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CONTENTS

Notable Case Law	...	1	Goa	...	1—16
Nominal Table	...	1— 3	Gujarat	...	1—32
Subject Index	...	3— 37	Jammu & Kashmir	...	1—16
List of Cases Overruled & Reversed etc.	...	37— 40	Kerala	...	1—32
Comparative Table	...	40— 41	Madhya Pradesh	...	1—16
Journal	...	1— 16	Madras	...	1—32
Supreme Court	...	1—128	Manipur	...	1—16
Allahabad	...	1— 48	Mysore	...	1—32
Andhra Pradesh	...	1— 32	Orissa	...	1—16
Assam & Nagaland	...	1— 16	Patna	...	1—32
Bombay	...	1— 32	Punjab and Haryana	...	1—32
Calcutta	...	1— 48	Rajasthan	...	1—32
Delhi	...	1— 32	Tripura	...	1—16

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REPORTERS

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NOTABLE CASE LAW

CRIMINAL PROCEDURE CODE

1. Can the High Court under Section 435 of Criminal P. C. revise an order tendering pardon under Section 337 or Section 338 of Criminal P. C. ? No AIR 1968 Delhi 21

INCOME-TAX

2. Is an income-tax assessment order a "property" within the meaning of Section 420, I. P. C. ? (Yes) AIR 1969 SC 40
3. Is an income-tax assessment order a "valuable security" within the meaning of Section 420, I. P. C. ? (Yes) AIR 1969 SC 40

LAND DEVELOPMENT AND REFORMS

4. Is "Varamdar" entitled to apply for fixation of fair rent under the Kerala Land Reforms Act, 1963 (1 of 1964) ? (Yes) AIR 1968 Ker 11 (FB)

STAMP ACT

5. "Document duly executed transferring interest required to be registered but not registered. Is it exempt from stamp duty ? (No) AIR 1968 Mad 1 (FB)

NOMINAL TABLE

- | | |
|--|----------------------|
| Abdul Mohi Siddiqui v. State Transport Appellate Authority, Gwalior and others, Respondents | Madh Pra 13 (C N 5) |
| Abdul Rauf, v. Shamshulhaq | All 35 (C N 6) |
| Aktiebolaget Jonkoping v. V. S. V. Palanichamy Nadar | Cal 43 (C N 9) |
| Amaresh Chandra v. N. K. Chanda | Tripura 13 (C N 4) |
| Amruta Purohitani v. Jogesh Chandra Hota | Orissa 5 (C N 3) |
| Anna Nagedram and Bommareddi Venkayya and Co., Duggirala v. Commissioner of Income-tax, Andhra Pradesh | Andh Pra 6 (C N 4) |
| Asarifi Mandal v. Mt. Parvati Devi | Pat 24 (C N 7) |
| Ashiq Miyan v. State of Madhya Pradesh | SC 4 (C N 2) |
| Balakrishna Menon v. Inspecting Ass. Commr. of Agricultural Income-tax | Ker 1 (C N 1) (FB) |
| Balbhadra Prasad, v. State of Madhya Pradesh | Madh Pra 15 (C N 6) |
| Bakru v. Badaruddin | J & K 1 (C N 1) (FB) |
| Bandi Naidu v. Pavuluri Ramanujiah | Andh Pra 22 (C N 11) |
| Bangshidhar Shewbhagwan and Co., v. Deputy Commissioner, Lakhimpur | Assam 7 (C N 3) |
| Belsand Sugar Co. Ltd. v. Thakur | Pat 8 (C N 3) |
| Girja Nandan Singh | Pat 8 (C N 3) |
| Bhupati Goswami v. C. R. Krishnamurthi | Assam 14 (C N 5) |
| Bijali Bala v. Charu Bala | Pat 21 (C N 6) |
| Boothalinga Agencies v. V. T. C. Pori-swami Nadar | SC 110 (C N 24) |
| Boramma v. Dharmappa | Mys 17 (C N 5) |
| Bore Gowda v. B. Nagaraju | Mys 8 (C N 3) |
| Brooke Bond India (Private), Ltd. v. Union of India | Cal 39 (C N 8) |
| Butail R. L. v. Union of India | Delhi-15 (C N 7) |
| Chaggar G. S. v. Union of India | SC 118 (C N 25) |
| Chief Controlling Revenue Authority, Madras v. Canara Industrial and Banking Syndicate Ltd. | Mad 1 (C N 1) (FB) |
| Chief Settlement Commissioner Punjab v. Ajit Singh Kalha: See | SC 23 (C N 11) |
| Chief Settlement Commissioner Punjab v. Om Prakash | SC 33 (C N 11) |
| (January) 1969 Indexes/1 | |
| Chintamani Saran Nath v. Tikait Pratap Chandra Nath | Pat 1 (C N 1) (FB) |
| Chooramani G. S. v. State of U. P. | All 43 (C N 8) |
| Chori Ouso v. Sasoon Helegua | Ker 11 (C N 4) |
| Chudaman Narayan v. State of Maharashtra | Bom 1 (C N 1) |
| Commissioner of Income-tax v. S. K. Bose | Cal 4 (C N 2) |
| Commissioner of Income-tax, Andh Pradesh v. Bharat Trading Co., Nizamabad | Andh Pra 3 (C N 2) |
| Commissioner of Income-tax, M. P. v. Badrilal Bholaram, Indore | Madh Pra 9 (C N 4) |
| Comunidade of Aquem v. State | Goa 1 (C N 1) |
| D. Cawasji and Co., Mysore v. State of Mysore | Mys 23 (C N 8) |
| Daitari Sahu v. Lokanath Baral | Orissa 6 (C N 4) |
| Dalpat Singh v. State of Rajasthan | SC 17 (C N 7) |
| Dassi Dhani Ram v. Dhani Ram | Punj 25 (C N 5) |
| Deo Singh v. State of Bihar: See | SC 53 (C N 16) |
| Dhanki Mahajan v. Rana Chandubha Vakhatsing | SC 69 (C N 19) |
| Dhulabhai v. State of Madhya Pradesh | SC 78 (C N 21) |
| Fedders Lloyd Corporation (P.), Ltd. v. B. A. Lakshminarayana Swami | Delhi 26 (C N 9) |
| Goa Dock Labour Union v. Union Territory of Goa | Goa 16 (C N 3) |
| Gopala Panikkar v. State of Kerala | Ker 29 (C N 9) |
| Gopalan Nair v. Thevi | Amma |
| Thankamma | Ker 23 (C N 7) |
| Govind Narayan v. Government of Goa, Daman and Diu | Goa 6 (C N 2) |
| Gulzarilal v. Bhagwati Prasad | Raj 11 (C N 3) |
| Hadibandhu Das v. District Magistrate, Cuttack | SC 43 (C N 14) |
| Hari Narain Choudhary v. Ramnehi Kuer | Pat 7 (C N 2) |
| Hiralal Hargovindas v. Popatlal Sankalchand | Guj 28 (C N 6) |
| Hiren Bose, In. re | Cal 1 (C N 1) (SB) |

Hyderabad Stock Exchange Ltd., Hyderabad v. Commissioner of Income- tax, Andhra Pradesh	Andh Pra 4 (C N 3)
Indian Pan Works, Delhi v. Chief Commissioner, Delhi	Delhi 1 (C N 1)
Indra Perfumery Co. v. Moti Lal Lalu Mal	Delhi 14 (C N 6)
Ishwarlal Girdharilal v. State of Mahara- shtra	SC 40 (C N 13)
Jai Lal v. Delhi Administration	SC 15 (C N 6)
Jang Bahadur Singh v. Baij Nath Tiwari	SC 30 (C N 10)
Jhanwarial v. State of Rajasthan	Raj 29 (C N 7)
Joshi L. B. Dr. v. Dr. T. B. Godbole	SC 128 (C N 27)
Jotish Chandra v. State of Bihar	SC 7 (C N 3)
Jwala Singh v. Laboo Ram	Pat 28 (C N 10)
Kalinga Tubes Ltd. v. Workmen	SC 90 (C N 22)
Kangiam Jadhob Singh v. Chongaltham Pishak Singh	Manipur 13 (C N 6)
Kanhu Charan Behera v. Jagabandhu Behera	Orissa 7 (C N 5)
Kerla Ankamma Devasthanam v. Mani- Konda Venkata Ratnama	Andh Pra 13 (C N 7)
Kesava Kurup Raghava Kurup v. Thomas Idicula	Ker 21 (C N 6)
Khundrakpam Yaima Singh v. Mayengbam Tomchou Singh	Manipur 1 (C N 1)
Kochar M. M. v. State	Delhi 21 (C N 8)
Kongkham Chandra Mani Singh v. Kongkham Sangai Singh	Manipur 12 (C N 5)
Krishna Pillai Raghavan Pillai v. Karthia- yani Amma Sarasamma	Ker 26 (C N 8)
Kulandaiswami Madurai v. Murgayya Madurar	Mad 14 (C N 4)
Kumaran K. C. v. Vallabhadas Vasanti	Ker 9 (C N 3)
Lajjaram v. Khubiram	Raj 9 (C N 2)
Lajwanti v. Lal Chand	SC 27 (C N 9)
Lakhyaswar Karmi v. Padmabati Karmi	Orissa 10 (C N 6)
Laxmidas Damodardas v. L. Chandrabhan	Guj 23 (C N 5)
Leitanthem Bidhu Singh v. Khangira- kpm Ibobi Singh	Manipur 3 (C N 2)
Loganathan v. Ponnuswami Naicker	Mad 15 (C N 5)
Loon Karan Seth v. Ivan E. John	SC 73 (C N 20)
Maganalal Chhotabhai v. Chandrakant	SC 37 (C N 12)
Mahommad Abdul Baqi Khan v. Rajas- than Board of Muslim Wakfs, Jaipur	Raj 1 (C N 1)
Manihar Singh v. Superintendent of Police	Assam 1 (C N 1)
Manmati v. Mohan	Madh Pra 7 (C N 3)
Maqbool Raza Ghaffar Hussain v. Joint Director of Consolidation, U. P. Lucknow	All 26 (C N 4) (FB)
Mastanaiah P. v. Delimitation Commis- sioner, New Delhi	Andh Pra 1 (C N 1)
Modi Co., v. Union of India	SC 9 (C N 4)
Municipal Council, Jaipur v. Laxmi Narain	Raj 16 (C N 4)
Municipal Council, Pandurna v. R. P. Dube	Madh Pra 1 (C N 1) (FB)
Musharraf Ahmed v. State	Delhi 12 (C N 5)
Muthyala Reddy v. State of Mysore	Mys 1 (C N 1)
Narayana Balthilaya v. Venkatesh Balthi- laya	Mys 6 (C N 2)
Nasib Singh v. Bajo Ram	J & K 9 (C N 4) (FB)
Neelakanta Iyer v. Ramakrishna Iyer	Ker 31 (C N 10)
Ngangom Iboton Singh v. Union Terri- tory of Manipur	Manipur 6 (C N 3)
Ngounipu Kabui v. Lungbujai Kabui	Manipur 8 (C N 4)
Niranjanlal Agarwalla v. Union of India	SC 23 (C N 8)
Orient Paper Mills Ltd., v. Union of India	SC 48 (C N 15)
Pakula Majhi v. Subhadra Bhotruni	Orissa 3 (C N 2)
Paturi Veeranna v. Pathuri Seethamma	Andh Pra 15 (C N 8)
Poonamalli Ramayya v. The State of Andhra Pradesh	Andh Pra 21 (C N 10)
Prabhu Halwai v. Fulchand Khandelwal	Pat 16 (C N 5)
Pran Gopal Saha v. District Magistrate and Collection (Tribal Welfare Sec- tion), Agtala	Tripura 10 (C N 3)
Prasana Kumar v. Sureswari	Orissa 12 (C N 7)
Puttamadamma v. Puttappa	Mys 20 (C N 6)
Rajgopal Naidu V. v. Muthulakshmi Ammal	Mad 5 (C N 2)
Rajgopal S. v. C. M. Armugam	SC 101 (C N 23)
Rajendra Mohan v. Nimai Chand	Tripura 15 (C N 5)
Rajendra Prasad Oil Mills, Kanpur v. Smt. Chunni Devi	All 1 (C N 1) (FB)
Rama Shankar Singh v. Principal, Dar- bhanga Medical College	Pat 11 (C N 4)
Ram Chander v. State of Punjab	Punj 4 (C N 2)
Ramchandra Govind v. State	Bom 20 (C N 4)
Ram Dass v. Chandu Lal	J & K 12 (C N 5)
Ramdayal v. Kishorilal Chaudhari	Raj 24 (C N 6)
Rameshwar Prasad v. Krishna Mohanath Raina	Madh Pra 4 (C N 2)
Ram Krishna v. Union of India	Cal 18 (C N 5)
Ramujagar Singh v. State of Bihar	See SC 53 (C N 16)
Rank Film Distributors of India Ltd., v. Registrar of Companies, West Bengal	Cal 32 (C N 7)
Rattan Lal v. State	J & K 5 (C N 2)
R. N. Oswal Hosiery and Mahabir Woollen Mills, Ludhiana v. Commissioner of In- come Tax, Punjab	Punj 8 (C N 3)
Sabuddin Sheikh v. J. S. Thakar	Guj 1 (C N 1) (FB)
Samanthapudi Surannamukhi v. Viru- pakshamma	Andh Pra 23 (C N 12)
Sanyasi Behera v. Onarasi	Orissa 16 (C N 9)
Sawaraj Pal v. Janak Raj	Punj 26 (C N 6)
Sevntilal v. State of Gujrat	Guj 14 (C N 2)
Shanti Devi v. Ramesh Chandra Roukar	Pat 27 (C N 9)
Sheikh Abdul Rehman v. Jagat Ram Aryan	J & K 16 (C N 6)
Shiv Singh v. State Transport Appellate Tribunal	All 14 (C N 3)
Shree Nursing Timber Works v. Amala Bala	Cal 12 (C N 4)

Shrii Laxmi Cotton Traders Pvt. Ltd., v. State of Haryana	Punj 12 (C N 4)	Tehil Singh v. Superintending Canal Offi- cer, Ferozepur	Punj 1 (C N 1)
Shyama Charan v. Commissioner, Rohel- khand Division	All 11 (C N 2)	Thampi D. S. v. Charles D'Cruz John D'Cruz	Ker 19 (C N 5)
Sivapada Senapati v. State	Cal 28 (C N 6)	Thomas v. Hotz Hotels Ltd.	Delhi 3 (C N 2)
Sivhamurthy Swami v. Agodi Songanno	Mys 12 (C N 4)	Triloki Nath v. State of Jammu and Kashmir	SC 1 (C N 1)
Springdales School, New Delhi v. Sati		Uma Dutt v. R. K. Sardana	Delhi 6 (C N 3)
Tahilramani, New Delhi	Delhi 7 (C N 4)	Union of India v. M/s. Khas Karanpura Colliery Co., Ltd.	SC 125 (C N 26)
Sribatsa Misra v. State of Orissa	Orissa 13 (C N 8)	Union of India v. Partap Singh See SC 33 (C N 11)	
State of Andhra Pradesh v. Digyadar- san	Andh Pra 9 (C N 5)	Union of India v. Ramakrishna Ramnath	Bom 7 (C N 2)
State of Bihar v. Daulat Kumari	Pat 25 (C N 8)	Union of India v. Sugrabai	Bom 13 (C N 3)
State of Bihar v. Kapil Singh	SC 53 (C N 16)	Union Territory of Tripura v. Madhusudan Guna	Tripura 1 (C N 1)
State of Jammu and Kashmir v. Lucky Glass Works	Cal 11 (C N 3)	United Industries v. Dalwadi and Co., Guj	Guj 18 (C N 3)
State of Kerala v. Mahadeva Iyer Venkita Subramania Iyer	Ker 8 (C N 2)	Uttereswari Rice Mill, Berhampur v. Sales Tax Officer, Intelligence Wing Vigilance, Berhampur	Orissa 1 (C N 1)
State of Mysore v. A. G. Ramaswami	Mys 22 (C N 7)	Vadera B. S. v. Union of India	SC 118 (C N 25)
State of Punjab v. Bhai Ardaman Singh	SC 13 (C N 5)	Vasanth G. v. State of Nagaland	Assam 3 (C N 2)
Subhash Chander v. Bodh Raj	J and K 8 (C N 3)	Veeraswami Mandiri v. K. Manicka Mudaliar	Mad 27 (C N 7)
Subramaniam C. v. Speaker of the Mad- ras, Legislative Assembly	Mad 10 (C N 3) (FB)	Venkata Satyanrayana v. Subbarao	Andh Pra 29 (C N 14)
Sudesh Kumar v. Mool Chand	Raj 22 (C N 5)	Venugopalaswamy Temple, Tenali v. Kukumarree Anjaneyulu	Andh Pra 18 (C N 9)
Sudhir Chandra v. Wealth-tax Officer, Calcutta	SC 59 (C N 17)	Venugopalaswami Varu Temple v. V. Visweswara Prasad	Andh Pra 24 (C N 13)
Sudhir Chandra Deb Nath v. State-Union Territory of Tripura	Tripura 7 (C N 2)	Vidya Datta v. Jagmandar Das	All 31 (C N 5)
Sunder Parmanand v. Caltex (India) Ltd., Bom	Bom 24 (C N 5)	Workmen of Dalmia Cement (Bharat) Ltd. v. State of Madras	Mad 21 (C N 6)
Suraj Kumari Smt. v. State of Bihar	Pat 30 (C N 11)	Yaduray Bansi v. Sunderbai	Guj 21 (C N 4)
Surti M. Dr. v. State of Gujrat	SC 63 (C N 18)	Yousuf Begam v. State of Andhra Pra- desh	Andh Pra 10 (C N 6)
Syed Habib Hussain v. Kamal Chand	Raj 31 (C N 8)	Zilla Parishad, Muzaffarnagar v. Jugal Kishore Ram Swarup	All 40 (C N 7) (FB)
Tapesch Chandra v. United Bank of India, Ltd.	Assam 10 (C N 4)		

SUBJECT INDEX

ANDHRA PRADESH GRAM PANCHAYAT ACT (2 of 1964)

See under Panchayats.

ANDHRA TENANCY ACT (18 of 1956)

See under Tenancy Laws.

ARBITRATION ACT (10 of 1940)

—Ss. 32, 34 — Suit for complete partition of Hindu joint family. — Existence of arbitration agreement between coparceners in respect of part of the property — Suit neither barred nor can be stayed Madh Pra 7 A (C N 3)

—S. 32 — Suit filed for partition and separate possession of joint family property — Mere mention of arbitration agreement and award in plaint does not bar the suit — Burden is on defendant to plead necessary facts in support of the bar set up by them Madh Pra 7 B (C N 3)

—S. 34 — Suit for complete partition of Hindu joint family — Existence of arbitration agreement between coparceners respecting part of property — Suit neither barred nor can be stayed — See Arbitration Act (10 of 1940), Section 32 Madh Pra 7 A (C N 3)

—S. 34 — Waiver — Plea that the Court has no jurisdiction in the matter should be taken before the written statement is filed — Such a plea taken in the written statement will be of no effect Pat 8 B (C N 3)

ASSAM AND NAGALAND HIGH COURT CIVIL RULES AND ORDERS (1967)

See under High Court Rules and Orders.

ASSAM POLICE MANUAL

—Part III, R. 66 — Disciplinary enquiry — Power to frame charge — Delegation — See Constitution of India, Art. 311 (2) Assam 1 A (C N 1)

BENGAL FINANCE (SALES TAX) ACT (6 of 1941)

See under Sales Tax.

BIHAR BUILDINGS (LEASE, RENT AND EVIC- TION) CONTROL ACT (3 of 1947)

See under Houses and Rents.

BIHAR LAND REFORMS ACT (30 of 1950)

See under Tenancy Laws.

BIHAR SUGAR FACTORIES CONTROL ACT (7 of 1937)

—Ss. 18 (2) and 19 (2) — Bihar Sugar Factories Control Rules, 1938, R. 42-A — Act and rules framed thereunder void after coming into force of Essential Commodities Act — Civil Court has jurisdiction to try suits touching a contract in the form prescribed under the Act. AIR 1959 Pat 398 and AIR 1959 Pat 403, Not foll. — (Civil P. C. (1908), S. 9) — (Essential Commodities Act (1955), S. 16 (1) (b)) — (Constitution of India, Arts. 254 (2), 372 and 366)

BIHAR SUGAR FACTORIES CONTROL ACT (contd.)

(10) and Entry 33 of List III of Schedule 7)

Pat 8 A (C N 3)
 —S. 19 (2) — Act and Rules framed under are void after coming into force of Essential Commodities Act, 1955 — See Bihar Sugar Factories Control Act (7 of 1937), S. 18 (2)

BIHAR SUGAR FACTORIES CONTROL RULES (1938)

—R. 42-A — Rules are void after coming into force of Essential Commodities Act 1955 — See Bihar Sugar Factories Control Act (7 of 1937), S. 18 (2)
 Pat 8 A (C N 3)

BOMBAY GENERAL CLAUSES ACT (1 of 1904)

—S. 15 — Bombay Police Act (22 of 1951); S. 56 — Power under Section 56 conferred on Sub-Divisional Magistrate by virtue of his office — It does not cease to be a special conferment of power. AIR 1943 Sind 107, Diss. from

Guj 1 A (C N 1) (FB)
 —S. 15 — Expression 'specially' in Section 56 of Bombay Act 22 of 1951 — Construction — See Bombay Police Act (22 of 1951), S. 56

Guj 1 B (C N 1) (FB)
 —S. 16 — Expression 'specially' in Section 56 of Bombay Act 22 of 1951 — Construction of — See Bombay Police Act (22 of 1951), S. 56

Guj 1 B (C N 1) (FB)
 —S. 18 — Expression 'specially' in Section 56 of Bombay Act 22 of 1951 — Construction of — See Bombay Police Act (22 of 1951), S. 56

BOMBAY POLICE ACT (22 of 1951)

—S. 56 — Power under, conferred on Sub-Divisional Magistrate by virtue of his office — Does not cease to be a special conferment of power — See Bombay General Clauses Act (1 of 1904), S. 15

Guj 1 A (C N 1) (FB)
 —S. 56 — Expression "specially" as used in section — Construction — Special conferment of power and general conferment of power — Distinction explained — In regard to Sub-Divisional Magistrate, power under Section 56 must be conferred upon that officer either by his name or by his office — Notification conferring general power held did not satisfy requirement of Section 56 — (Bombay General Clauses Act (1 of 1904), Ss. 15, 16, 18) — (Civil P. C. (1908), Pre. — Interpretation of Statutes — Statutes conferring power)

BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT (57 of 1947)

See under Houses and Rents.

BOMBAY SHOPS AND ESTABLISHMENTS ACT (79 of 1948)

See under Shops and Establishments.

CENTRAL CIVIL SERVICES (TEMPORARY SERVICE) RULES (1949)

See under Civil Services.

CENTRAL EXCISES AND SALT ACT (1 of 1944)

—S. 35 and First Sch., Item 17 (3) and (4) — Collector while hearing appeal acts quasi judicially — Directions issued by Central Board of Revenue which are not under Rule 238, cannot be binding on him for purposes of deciding the appeal — Determination whether 'M. G. Poster paper' was 'packing and wrapping paper' chargeable under Item 17 (4) or "Printing paper" chargeable under Item 17 (3) of First Schedule — Direction of Board, held, could not be binding on the Collector

SC 48 (C N 15)

CENTRAL EXCISES AND SALT ACT (contd.)

—First Sch., Item 17 (3) and (4) — Collector while hearing appeal acts quasi judicially. — Directions issued by Central Board of Revenue which are not under Rule 233, cannot be binding on him for purposes of deciding the appeal — Determination whether 'M. G. Poster paper' was 'packing and wrapping paper' chargeable under Item 17 (4) or "printing paper" chargeable under Item 17 (3) of First Schedule — Direction of Board, held, could not be binding on the Collector — See Central Excises and Salt Act (1944), S. 35

SC 48 (C N 15)

C. P. AND BERAR MUNICIPALITIES ACT (2 of 1922)

See under Municipalities.

CENTRAL SALES TAX ACT (74 of 1956)

See under Sales Tax.

CHHOTA NAGPUR TENANCY ACT (6 of 1908)

See under Tenancy Laws.

CIVIL PROCEDURE CODE (5 of 1908)

—Pre. — Interpretation of Statutes — Meaning of words — Preventive Detention Act (1950), S. 13 (2)

SC 43 B (C N 14)

—Pre. — Interpretation of Statutes — Statement of objects and reasons and parliamentary debates can be looked into for ascertaining the intention of legislature, the mischief which the statute was enacted to suppress and the prevailing conditions when it was enacted

All 43 A (C N 7)

—Pre. — Interpretation of Statutes — Meaning of words — Words take their colour and contents from their context which include other enacting provision, the preamble, the existing law and the mischief which the Act was designed to remove — See Tenancy Laws — U. P. Government Estates Thekedari Abolition Act (1958) (1 of 1959) S. 3

All 43 B (C N 8)

—Pre. — Interpretation of Statutes — Proviso — Positive independent provision

All 43 C (C N 8)

—Pre. — Interpretation of Statutes — Codification of law — Object of codification — See Hindu Adoptions and Maintenance Act (1956), Preamble

Andh Pra 15 A (C N 8)

—Pre. — Directory or mandatory provisions — Directory provision does not give discretion — See Criminal P. C. (1898), S. 165 (1)

Delhi 26 A (C N 9)

—Pre. — Interpretation of Statutes — Directory or mandatory provisions — Use of word "shall" — See Criminal P. C. (1898), S. 165 (5)

Delhi 26 C (C N 9)

—Pre. — Interpretation of Statutes — Retrospective operation — Statute affecting vested right — Express language fairly capable of either interpretation — Prospective operation should be given

Goa 6 C (C N 2)

—Pre. — Interpretation of Statutes — That construction of word has to be adopted which harmonises with the context and promotes the policy and the object which the Legislature had in view

Goa 6 D (C N 2)

—Pre. — Interpretation of Statutes — Statutes conferring power — See Bombay Police Act (22 of 1951), S. 56

Guj 1 B (C N 1) (FB)

—Pre. — Interpretation of Statutes — Internal aid — Aid of sub-section — Rule of construction

Guj 1 C (C N 1) (FB)

—Pre. and S. 9 — Provision regarding bar of jurisdiction — Rule as to — (Interpretation of Statutes — Bar of jurisdiction)

J and K 9 B (C N 4)

CIVIL P. C. (contd.)

—Pre. — Repealing provision — Presumption as to — (Evidence Act (1872), S. 114) — (General Clauses Act (1897), S. 6)

—Pre. — Precedents — Obiter dicta — Binding nature — Obiter dicta of Supreme Court are binding on High Courts — (Constitution of India, Art. 141) J and K 9 C (C N 4)

—Pre. — Interpretation of Statutes — Deeming provisions — Inclusive definition, scope of — See Tenancy Laws — Kerala Land Reforms Act, 1963 (1 of 1964), S. 31

—Pre. — Precedents — Interpretation — Has to be read as whole — (Precedents) — (Civil P. C. (1908), O. 20, R. 4)

—S. 2 (7-B) — Applicability of Section 80 to Jammu and Kashmir — Jammu and Kashmir is now a State — Notice under Section 80 necessary where a suit against it can be maintained in a place where Code applies — See Civil P. C. (1908), S. 80 (c) Cal 11 (C N 3)

—S. 7 — Rent Controller under Delhi Rent Control Act — Not conferred with all the powers of Civil Court under Civil Procedure Code — See Civil P. C. (1908), O. 23, R. 3

—S. 9 — Exclusion of jurisdiction of Civil Court — Case law summarised — Held on facts and circumstances of case that suit in question for declaration that provisions of law relating to assessment were ultra vires and for refund of tax illegally collected was not barred by Section 17 of M. B. Sales Tax Act (30 of 1950): First Appeals Nos. 68, 69, 71 and 70 of 1961, respectively D/- 5-1-1965 (M. P.), Reversed

—S. 9 — Bar of jurisdiction of Civil Courts — Not to be readily inferred — See Motor Vehicles Act (1939), S. 110-F Delhi 3 (C N 2)

—S. 9 — Jurisdiction cannot be conferred by acquiescence, where there is no initial jurisdiction — This is so even in regard to Tribunal — Distinction in this respect in cases of inferior and superior Courts, pointed out — Reference of industrial dispute by Government which is not appropriate Government — Award is prima facie without jurisdiction even when no objection is taken to its jurisdiction — Industrial Disputes Act (1947), Ss. 10, 15

—S. 9 — Industrial Tribunal can decide whether dispute relates to major port or whether the reference is by appropriate Government — No Tribunal can confer jurisdiction upon itself by misconstruing a section — See Industrial Disputes Act (1947), S. 10

—S. 9 — Dispossession of tenant by landlord — Remedies for tenant — Civil suit maintainable — See Tenancy Laws — J. and K. Tenancy Act (2 of 1923) (as amended by Act 12 of 1955), S. 85

—S. 9 — Bar of jurisdiction of Civil Court — Provision as to must be strictly construed — See Civil P. C. (1908), Preamble

—S. 9 — Madras Estates Abolition Act (26 of 1948), Section 56 — Jurisdiction of civil Court to decide question of title to any ryotwari land is not taken away by any of provisions of the Act and much less by Section 56

—S. 9 — Civil Court has jurisdiction to try suits touching a contract in the form prescribed under the Bihar Sugar Factories Control Act 1937

CIVIL P. C. (contd.)

— See Bihar Sugar Factories Control Act (1937), Section 18 (2) Pat 8 A (C N 1)

—S. 11 — Assessment of unregistered firm Dissolution — Appeal — Decision in appeal filed by one partners will not be binding as res judicata on others — See Income-tax Act (1922), Section 30 Cal 4 D (C N 2)

—S. 11, Expl. 6 — Identity of parties — Suit in which one person is authorised to represent others — Such others are parties to litigation — Decision is binding on all whom such person represented in the suit in a subsequent suit, unless former decision can be shown as vitiated under Section 44, Evidence Act — If however they were not in truth represented then fraud or collusion need not be proved — How far bona fide of former litigation can be presumed

—S. 11 — Section 31, Travancore Nayar Act does not say who can obtain a decree against a tarwad — Section 31 concerned with decrees binding on Tarwad — If and when such decree would operate as res judicata — See Travancore Nayar Act (2 of 1100 ME) Section 31

—S. 11 — Res judicata — Trial Court and appellate Court having concurrent jurisdiction to extend time — Adverse order passed by appellate Court — Trial Court cannot extend time

—S. 11 — Suit under — Judgment debtors are not necessary parties but made parties — Effect — See Civil P. C. (1908), Order 21, Rule 63

—S. 11 — Principle of res judicata — Applicability — Applies also between two stages of same litigation — Decision in earlier stage must be final

—Ss. 11, 47, O. 21, Rr. 22, 64 — Principles of constructive res judicata — Execution of mortgage decree — Property sought to be sold — Objections taken by judgment debtor in 1958 rejected by executing Court — Appeal and second appeal therefrom also dismissed — Fresh objection in 1960 — Plea of non-saleability of homestead land — Plea not taken in 1958 — Plea held barred by principles of constructive res judicata — Objection not taken on service of notice under Order 21, Rule 22, cannot be subsequently raised

—Ss. 13, 45 — Ex parte, decree passed by Court at Agra against, resident of Junagadh territory — Decree is nullity — Decree transferred to Junagadh Court in 1958 — Decree not executable — AIR 1951 Bom 125 (FB) and AIR 1951 Bom 190, Held, impliedly overruled by AIR 1962 SC 1737

—S. 36 — Not intended to apply to temporary injunctions — See Civil P. C. (1908), Order 39, Rule 1

—S. 45 — Judgment in personam pronounced in absentum by foreign Court against person not submitting to its jurisdiction — Is a nullity — See Civil P. C. (1908), Section 13

—S. 47 — Principles of constructive res judicata — Applicability to execution proceedings — See Civil P. C. (1908), Section 11

—S. 60 (e) — Right to sue for contribution of an insolvent — Not a right or property within this section, exempting it from being vested in the official liquidator — See Provincial Insolvency Act (1920), Section 28 (5)

Andh Pra 23 (C N 12)

CIVIL P. C. (contd.)

—Ss. 80 (c) and 2 (7-B) — Applicability of the Section — Jammu and Kashmir is now a State — Notice under Section 80 is necessary before a suit can be maintained against it at a place where the Code applies Cal 11 (C N 3)

—S. 94 — Injunction under — Breach thereof is punishable under Order 39, Rule 2 (3) — See Civil P. C. (1908), Order 39, Rule 1

Guj 28 (C N 6)

—S. 96 — Appeal against order under Section 19, Hindu Marriage Act, to Single Judge — Letters Patent appeal under Clause 10 not barred — See Hindu Marriage Act (1955), Section 28

Punj 25 A (C N 5)

—S. 100 — Negligence on the part of guardian in concluding suit — Question of law

Mys 8 B (C N 3)

—Ss. 100-101 — Concurrent findings of fact — No interference Ker 9 A (C N 3)

—Ss. 100-101, Order 6, Rule 17 — Suit for redemption and possession of mortgaged property — Amendment seeking to convert it into one for possession on basis of title — Cannot be allowed in second appeal Ker 19 (C N 5)

—Ss. 100-101 — Easements Act (1882), Section 56 — Question whether certain licence is transferable — Not a pure question of law — Cannot be permitted to be raised for the first time in second appeal Ker 23 A (C N 7)

—Ss. 100-101 — Proof of representative title — Absence of — Effect — See Succession Act (1925), Section 214 Pat 24 (C N 7)

—Ss. 100 and 101 — New plea — New plea purely of fact cannot be allowed to be raised for the first time in second appeal — Question whether a document was executed by the executants thereto — Genuineness not challenged in trial Court as well as first appellate Court — Question cannot allowed to be raised for the first time in second appeal Raj 11 A (C N 3)

—S. 104, O. 41, Rr. 14, 21, O. 27, Rr. 4, 5 — Service of notice on Government Pleader is valid service of notice on State Government — State Government not putting appearance — Case transferred — Omission to give notice of transfer — Held, not a sufficient cause for non-appearance — Application under Order 41, Rule 21 — Dismissal — Exercise of discretion, not perverse — Order not interfered with in appeal Pat 25 (C N 8)

—S. 105 (2) — Scope and effect of — High Court remanding case for decision of question of maintainability of claim for eviction — Lower Court passing decree for eviction — Second appeal before another Bench against decree — Bench held competent to decide maintainability of claim for eviction — Section 105 (2) held no bar Pat 16 B (C N 5)

—S. 107 — Power of attorney in favour of Bank to execute decree — Execution by Bank — Objections to maintainability of application by Bank and to jurisdiction of Court — Objections entertainable at appellate stage having been based on legal grounds: AIR 1964 All 441, Reversed — Power of attorney, whether revocable — Nature of assignment — Power of Bank to execute — See Contract Act (1872), Section 202

SC 73 (C N 20)

—S. 107 (d), O. 41, R. 27 — Additional evidence when may be admitted in appeal — Failure to adduce evidence in Court of first instance — No satisfactory explanation therefor — Cannot be admitted as additional evidence in appeal

Mys 6 B (C N 2)

—S. 112 — Industrial Disputes Act (1947), Section 25-FFF — Closure of undertaking — Closure cannot be limited or restricted only to financial,

CIVIL P. C. (contd.)

economic or other considerations of like nature — Essence of matter is factum of closure by whatever reasons motivated — Question regarding closure of undertaking not considered by Tribunal in a proper manner — See Industrial Disputes Act (1947), Section 25-FFF

SC 90 A (C N 22)

—S. 115, Order 20, Rules 12, 17 — Exercise of jurisdiction illegally or with material irregularity — Suit by landlord against tenant for possession, arrears of rent and mesne profits — In decree passed in such suit, Court giving direction that landlord do render account of overpayments made to him — Court acts illegally and with material irregularity — High Court has full power to revise this decree under Section 115 and give such direction in the matter as it thinks fit

SC 37 A (C N 12)

—S. 115, O. 37, R. 3 — Order granting leave to defend subject to condition of depositing certain sum as security towards plaintiff's claim — Order cannot be interfered with in revision

Guj 18 C (C N 3)

—S. 115, O. 21, R. 66 — Finding of fact — Finding as to service of notice to judgment-debtor — Finding is binding in revision

Mad 5 C (C N 2)

—S. 115, O. 33, R. 2 — Court not following provisions of O. 33, R. 2 — Court passed is revisable — 1958 (2) Mad LJ 93, Dissented

Orissa 10 A (C N 6)

—S. 115 (c) — Lower Court exercising jurisdiction illegally and with material irregularity — Statement of plaintiff excluded from evidence on ground that it was recorded after the record of evidence of witness — Exclusion wrong and thus committing error of procedure — Case held fell within ambit of sub-clause (c) and the judgment of lower court was liable to be interfered with

Raj 9 B (C N 2)

—S. 122 — There is no inconsistency between Section 122 and Art. 227 of the Constitution — See Constitution of India, Art. 227, Proviso

Guj 18 A (C N 3)

—Ss. 144, 151 — Abuse of process of Court — Restitution — Court has inherent power to grant — (Maxim — Actus Curiae Neminem Gravabit) J & K 8 (C N 3)

—S. 144 — Suit for recovery of property on deposit of certain amount — Amount deposited not withdrawn by defendant — Suit decreed — Decree executed pending appeal — Decree reversed in appeal — Application by defendant under Section 144 for possession and mesne profits — Plaintiff claiming that he should be given credit for interest on deposit in assessing his liability for mesne profits — Held, claim was not tenable. AIR 1954 All 119, Dissent. from; 1966 Ker LJ 844, Overruled

Ker 31 (C N 10)

—Ss. 145, 510-A, 539, 539-A and 539-AA — Oaths Act (1873), S. 4 — In order that affidavit should be valid evidence in proceeding under Section 145, it may be sworn before any Magistrate who is otherwise competent to administer oaths under Section 4 of Oaths Act and receive evidence — Words 'having authority to receive evidence' in Section 4 cannot be restricted to authority of Court to receive evidence in any particular case to which evidence relates but can be extended to receive evidence in any case

Manipur 3 (C N 2)

—S. 146 — Power of attorney in favour of Bank to execute decree — Execution by Bank — Objections to maintainability of application by Bank and to jurisdiction of Court — Objections entertainable at appellate stage hav-

CIVIL P. C. (contd.)

ing been based on legal grounds: AIR 1964 All 441, Reversed — Power of attorney, whether revocable — Nature of assignment — Power of Bank to execute — See Contract Act (1872), S. 202 SC 73 (C N 20)

—Ss. 148 and 152 and O. 20, R. 3 — Deposit of purchase money — Time specified by decree — Extension of time — Principles

Orissa 7 B (C N 5)

—S. 151 — Abuse of judicial process — Proceedings on application of litigating party — Inherent powers cannot be invoked — See Contempt of Courts Act (1952), S. 3

Delhi 6 (C N 3)

—S. 151 — Abuse of process of Court — Restitution — Court has inherent power to grant — See Civil P. C. (1908), S. 144

J and K 8 (C N 3)

—S. 152 — Deposit of purchase money — Time fixed by decree — Extension of — Principles — See Civil P. C. (1908), S. 148

Orissa 7 B (C N 5)

—O. 1, R. 10 — Right of insolvent to sue for contribution — Vests in the Official liquidator — Insolvent is incompetent to bring a suit on such right — Consequently question of adding the official liquidator as party does not arise — See Provincial Insolvency Act (1920), S. 28 (5)

Andh Pra 23 (C N 12)

—O. 1, R. 10 — Misdescription of parties — Sales tax case against Chief Commissioner of Delhi — After formation of Delhi State Lt. Governor taking place of Chief Commissioner during pendency of proceedings — Omission to move the Court for amendment so as to have the Lt. Governor substituted in place of Chief Commissioner — Held, indicative of want of care and attention

Delhi 1 B (C N 1)

—O. 1, R. 10 — Suit under — Judgment debtors are not necessary parties but made parties — Effect — See Civil P. C. (1908), O. 21, R. 63

Orissa 16 B (C N 9)

—O. 6, R. 2 — Pleadings — Pleadings on certain point vague but all facts necessary for determination of point were before court — Point was fully argued before High Court without any objection and was also decided by High Court — Objection cannot be taken to consideration of point in appeal by Supreme Court — See Constitution of India, Art. 133

SC 125 C (C N 26)

—O. 6, R. 2 — Plea of right of privacy — Use of word "bapardgi" in plaint is sufficient to sustain it — Where well-known custom exists, it is not necessary to set up existence of customary right in any great detail or with particular emphasis

Raj 31 A (C N 8)

—O. 6, R. 17 — Suit for redemption and possession of mortgaged property — Amendment seeking to convert it into one for possession on basis of title — Cannot be allowed in second appeal — See Civil P. C. (1908), Ss. 100, 101

Ker 19 (C N 5)

—O. 9, R. 13 — Application to set aside ex parte decree not one for review under Art. 182 (3), Limitation Act 1908 — It does not therefore give a fresh start of limitation — See Limitation Act (1908), Art. 182 (3)

Tripura 15 A (C N 5)

—O. 18, R. 2 (4) — (Rajasthan) — Statement of witness recorded before that of plaintiff —

CIVIL P. C. (contd.)

Presumption of permission of Court to do — When arises

Raj 9 A (C N 1)

—O. 20, R. 3 — Alteration of decree — Time specified by decree for deposit of purchase money — Extension of time — Principles — See Civil P. C. (1908), S. 148

Orissa 7 B (C N 5)

—O. 20, R. 4 — Interpretation of judgment — Judgment has to be read as a whole — See Civil Procedure Code (5 of 1908), Pre.

Mad 1 B (C N 1) (FB)

—O. 20, R. 12 — Exercise of jurisdiction illegally or with material irregularity — Suit by landlord against tenant for possession, arrears of rent and mesne profits — In decree passed in such suit, Court giving direction that landlord do render account of over-payments made to him — Court acts illegally and with material irregularity — High Court has full power to revise this decree under Section 115 and give such direction in the matter as it thinks fit — See Civil P. C. (1908), S. 115

SC 37 A (C N 12)

—O. 20, R. 17 — Exercise of jurisdiction illegally or with material irregularity — Suit by landlord against tenant for possession, arrears of rent and mesne profits — In decree passed in such suit, Court giving direction that landlord do render account of over-payments made to him — Court acts illegally and with material irregularity — High Court has full power to revise this decree under Section 115 and give such direction in the matter as it thinks fit — See Civil P. C. (1908), S. 115

SC 37 A (C N 12)

—O. 20, R. 18 (2) — Transfer made after preliminary decree — Such transfer should not be ignored at the time of allotment

Pat 7 (C N 2)

—O. 21, R. 1 (2) — Decree awarding interest on decretal amount until payment — Deposit of decretal amount in Court without notice to decree-holder — Interest does not cease to run from date of deposit. AIR 1939 Nag 191, Dis-sented from

Ker 8 (C N 2)

—O. 21, R. 10 — Execution petition filed within three years of decree — Execution petition is step in aid of execution and says limitation — Limitation Act (1908), Art. 182

Manipur 1 B (C N 1)

—O. 21, R. 16 — Power of attorney in favour of Bank to execute decree — Execution by Bank — Objections to maintainability of application by Bank and to jurisdiction of Court — Objections entertainable at appellate stage having been based on legal grounds: AIR 1964 All 441, Reversed — Power of attorney, whether revocable — Nature of assignment — Power of Bank to execute — See Contract Act (1872), Section 202

SC 73 (C N 20)

—O. 21, R. 32 — Not intended to apply to temporary injunctions — See Civil P. C. (1908), O. 39, R. 1

Guj 28 (C N 6)

—O. 21, R. 35 — Decree giving option to decree-holder for possession of land with or without improvements made by judgment-debtor — Decree-holder electing to possession without improvements — Executing Court cannot go behind decree and has to get the improvements removed

Manipur 1 A (C N 1)

—O. 21, R. 58 — Sale of disputed property by A, B and C in favour of D — E attached property in execution of his decree against A, B and C — D's objection under O. 21, R. 58 dismissed — D's suit under O. 21, R. 63 as well

CIVIL P. C. (contd.)

—s for declaration of his title — Sale by A, B, C in favour of F — E was also party in D's suit but his name was expunged as E's claim was satisfied — D's suit was decreed — Suit filed by F decreed against A, B and C but dismissed against D — In execution of money decree F attaching disputed property — A, B and C not having any subsisting interest in property — Objection by D under O. 21, R. 58 — D's objection must succeed — See Civil P. C. (1908), O. 21, R. 63 Orissa 16 A (C N 9)

—O. 21, Rr. 63, 58 — Sale of disputed property by A, B and C in favour of D — E attached property in execution of his decree against A, B and C — D's objection under O. 21, R. 58 dismissed — D's suit under O. 21, R. 63 as well as for declaration of his title — Sale by A, B, C in favour of F — E was also party in D's suit but his name was expunged as E's claim was satisfied — D's suit was decreed — Suit filed by F decreed against A, B and C but dismissed against D — In execution of money decree F attaching disputed property — A, B and C not having any subsisting interest in property — Objection by D under O. 21, R. 58 — D's objection must succeed Orissa 16 A (C N 9)

—O. 21, R. 63; O. 1, R. 10, S. 11 — Suit under — Judgment-debtors are not necessary parties but made parties — Effect Orissa 16 B (C N 9)

—O. 21, R. 64 — Execution of mortgage decree — Objections taken by J. D. in 1958 rejected by executing Court — Appeal and second appeal therefrom also dismissed — Fresh objections in 1960 — Plea of non-saleability of homestead land — Plea not taken in 1958 — Plea held barred by principles of constructive res judicata — See Civil P. C. (1908), S. 11 Pat 21 (C N 6)

—O. 21, Rr. 66 (as amended in Madras) and 69 — Judgment debtor not personally served with notice of sale proclamation nor given opportunity to substantiate inadequacy of value — Value given by decree-holder misleading — Held, considerable prejudice was caused to judgment-debtor and also was to be set aside Mad 5 B (C N 2)

—O. 21, R. 66 — Finding as to service of notice to J. D. — Is finding of fact — Binding in revision — See Civil P. C. (1908), Section 115 Mad 5 C (C N 2)

—O. 21, R. 66 (as amended in Madras) — Service of notice to judgment-debtor in suspicious circumstances and not beyond reasonable doubt — Judgment-debtor cannot be presumed to have, at particular point of time, all information about defective proclamation of sale Mad 5 D (C N 2)

—O. 21, R. 66 (as amended in Madras) — Duty of Court — It is to send out completed sale proclamation containing details as required in law and also to avail itself of all information from records in court Mad 5 E (C N 2)

—O. 21, R. 66 (as amended in Madras) — Irregularities in sale proclamation — Waiver — Estoppel — See Evidence Act (1 of 1872), Section 115 Mad 5 F (C N 2)

—O. 21, R. 66 (2) (e) (as amended in Madras) — Requirement mandatory — Sale proclamation not disclosing two vaultations i.e., both of decree-holder and that of judgment debtor — Proclamation suffers from irregularity not curable by acquiescence Mad 5 A (C N 2)

CIVIL P. C. (contd.)

—O. 21, R. 69 (as amended in Madras) — Setting aside of sale for prejudice to judgment debtor — See Civil P. C. (1908), O. 21, R. 66 Mad 5 B (C N 2)

—O. 21, R. 69 — Irregularities in sale proclamation — Waiver — Estoppel — See Evidence Act (1 of 1872), S. 115 Mad 5 F (C N 2)

—O. 21, R. 84—Rule is mandatory — 25 per cent deposit by auction purchaser should be made to officer conducting sale as soon as he is declared purchaser — Deposit made to executing Court and not to officer conducting sale — There is no sale before the executing Court which he has to confirm — Property has to be resold — High Court Rules and Orders — Assam and Nagaland High Court Civil Rules and Orders (1967), R. 185 Assam 10 (C N 4)

—O. 21, R. 22 — Objection not taken on service of notice under O. 21, R. 22 cannot be subsequently raised — See Civil P. C. (1908), S. 11 Pat 21 (C N 6)

—O. 23, R. 3 and O. 43, R. 1 (m), S. 7 and O. 50, R. 1 (a)— Applicability—Orders of Additional Rent Controller refusing to record compromise in application under S. 14 of Delhi Rent Control Act — Provisions of O. 23, R. 3, do not apply — Order, therefore, not appealable under O. 43, R. 1 (m) Delhi 7 (C N 4)

—O. 27, R. 4 — Service of notice on Government Pleader is valid service of notice on the State Government — See Civil P. C. (1908), Section 104 Pat 25 (C N 8)

—O. 27, R. 5 — Service of notice on Government Pleader is valid service of notice on the State Government — See Civil P. C. (1908), Section 104 Pat 25 (C N 8)

—O. 30, R. 10 — 'Person' — Expression covers a limited Company even though such Company is carrying on the business in name or style other than its own All 1 (C N 1) (FB)

—O. 32, R. 7 — Negligence in conducting suit by guardian — Avoidance of decree by minor — Grounds Mys 8 A (C N 3)

—O. 33, R. 2 — Non-compliance with provisions — Order passed is revisable — See Civil P. C. (1908), S. 115 Orissa 10 A (C N 6)

—O. 33, R. 2 — Plaintiff receiving some properties — In due course his title over them is extinguished — In application to sue in forma pauperis plaintiff ought to show the properties and aver that his title is no longer there — Without such averment the application is liable to be thrown out Orissa 10 C (C N 6)

—O. 37, R. 3 — Order granting leave to defend subject to condition of depositing certain sums as security — No interference in revision with the order — See Civil P. C. (1908), S. 115 Guj 18 C (C N 3)

—O. 37, R. 3 (2) — Order granting conditional leave to defend suit filed under summary procedure need not give reasons in support of order Guj 18 B (C N 3)

—O. 39, Rr. 1 and 2 (3); O. 21, R. 32, Ss. 36 and 94 — Injunction under O. 39, R. 1 — Breach thereof is punishable under O. 39, R. 2 (3) — Order 21, R. 32 and S. 36 not meant for empowering Court to punish party. AIR 1945 Nag 134 and AIR 1941 All 140, Diss. from Guj 28 (C N 6)

—O. 39, R. 2 (3) — Breach of temporary injunction — Punishable under R. 2 (3) — See Civil P. C. (1908), O. 39, R. 1 Guj 28 (C N 6)

—O. 41, R. 14 — Notice on Government Pleader is valid service of notice to the Government — Government not putting appearance

CIVIL P. C. (contd.)

- Transfer of case — Omission to give notice of transfer — Not sufficient cause for non-appearance — Application under O. 41, R. 21 dismissed — Exercise of discretion not perverse — Order not interfered with in appeal — See Civil P. C. (1908), S. 104 Pat 25 (C N 8)
- O. 41, R. 21 — Application under — Dismissal — Exercise of discretion not perverse — Order not interfered with in appeal — See Civil P. C. (1908), S. 104 Pat 25 (C N 8)
- O. 41, R. 27 — Scope — Appeal before Supreme Court — Request for direction to produce certain register — Even if register is produced, oral evidence to prove that register and to meet inferences following from that register necessary — Held that in the circumstances request or summoning of that register could not be allowed SC 101 A (C N 23)
- O. 41, R. 27 — Additional evidence when may be admitted in appeal — See Civil P. C. (1908), S. 107 (d) Mys 6 B (C N 2)
- O. 43, R. 1 (m) — Order of Additional Rent Controller refusing to record compromise in application under S. 14 of Delhi Rent Act — Not appealable under O. 43, R. 1 (m) — See Civil P. C. (1908), O. 23, R. 3 Delhi 7 (C N 4)
- O. 47, R. 1 — Application under O. 9, R. 13 — Not one for review — See Limitation Act (1908), Art. 182 (3) Tripura 15 A (C N 5)
- O. 50, R. 1 (a) — Applicability to proceedings under S. 14, Delhi Rent Control Act — See Civil P. C. (1908), O. 23, R. 3 Delhi 7 (C N 4)

CIVIL SERVICES

—CENTRAL CIVIL SERVICES (TEMPORARY SERVICE) RULES, 1949

- R. 2 (b) — Quasi permanency — See Central Civil Services (Temporary Service), Rules 1949, R. 3 Assam 3 B (C N 2)
- Rr. 3 and 2 (b)—Quasi-permanency—Incumbent petitioner holding a temporary post continuously for five years — Termination without any cause being shown against petitioner—Held, on facts that as the petitioner ought to be treated as quasi-permanent employee termination amounted to removal of service attracting Art. 311 of the Constitution. Assam 3 B (C N 2)

- R. 5 — Notice terminating service — Office file showing orders passed by appointing authority — Copy of the order served on the government servant signed by another and not mentioning that it was on behalf of the Appointing Authority — Held, Appointing Authority signing the original order on office file is enough compliance with R. 5 (a) Tripura 10 B (C N 3)

—ORISSA MINISTERIAL SERVICE RULES, 1963

- R. 9 — Promotion of Government Servant — Unambiguous order of promotion — Promotees governed only by the order — See Constitution of India, Art. 309 Orissa 13 (C N 8)

COAL BEARING AREAS (ACQUISITION AND DEVELOPMENT) ACT (20 of 1957)

- Ss. 4, 5, 7 — Notification under S. 4 (1) — Effect — Lessee to whom mining lease in the areas is granted has to halt his operations in notified area till action was taken under S. 7 or till period prescribed in that section came to an end — Writ petition challenging notification under S. 4 even if filed before notification under S. 7 was issued is not premature SC 125 B (C N 26)

COAL BEARING AREAS (ACQUISITION AND DEVELOPMENT) ACT (contd.)

- S. 5 — Notification under S. 4 (1) — Effect — Lessee to whom mining lease in the areas is granted has to halt his operations in notified area till action was taken under S. 7 or till period prescribed in that section came to an end — Writ petition challenging notification under S. 4 even if filed before notification under S. 7 was issued is not premature — See Coal Bearing Areas (Acquisition and Development) Act (1957), S. 4 SC 125 B (C N 26)
- S. 7 — Notification under S. 4 (1) — Effect — Lessee to whom mining lease in the areas is granted has to halt his operations in notified area till action was taken under Section 7 or till period prescribed in that section came to an end — Writ petition challenging notification under S. 4 even if filed before notification under S. 7 was issued is not premature — See Coal Bearing Areas (Acquisition and Development) Act (1957), S. 4 SC 125 B (C N 26)

COMPANIES ACT (1 of 1956)

- S. 17 (3) and (4) — Alteration in memorandum — Change of place of registered office from one State to another — Confirmation by Court — Loss of revenue to State — Whether relevant consideration. AIR 1957 Orissa 232 and AIR 1961 Orissa 62 and A. H. O. No. 1 of 1957 (Orissa), Dissent. from Cal 32 (C N 7)
- S. 147 — Limited company falls within the expression 'person' as used in O. 30, R. 10, Civil P. C. — See Civil P. C. (1908), O. 30, R. 10 All 1 (C N 1) (FB)

CONSTITUTION OF INDIA

- Preamble — Interpretation of Constitution — Clear and unambiguous expressions — They must be given their full and unrestricted meaning, unless hedged-in, by any limitations SC 118 B (C N 25)
- Preamble and Sch. 7, Lists I, II and III — Interpretation of Legislative Entries Mys 23 H (C N 8)
- Preamble, Arts. 14, 245 — Constitutionality of Statute is presumed — One who challenges it must discharge the burden Punj 12 E (C N 4)
- Arts. 13 and 14 — Executive instructions — Statutory provisions must prevail over executive instructions SC 33 B (C N 11)
- Art. 13 — Law as to privileges powers and immunity of Legislatures — Will be subject to Arts. 13 and 21 but not Art. 19 — See Constitution of India, Art. 194 (3) Mad 10 A (C N 3) (FB)
- Art. 14 — Executive instructions — Statutory provisions must prevail over executive instructions — See Constitution of India, Art. 13 SC 33 B (C N 11)
- Art. 14 — U. P. Act 1 of 1959 is completely protected by Art. 31-A from being affected by Arts. 14, 19 or 31 — See Tenancy Laws — U. P. Thekedari Abolition Act (1958) (1 of 1959) All 43 E (C N 8)
- Arts. 14, 301, 226 — Petitioner failing to carry out his obligation under licence issued under Imports (Control) Order (1955) — Government suspending only non-statutory business dealing with petitioner — Held, Art. 301 was not applicable nor Art. 14 infringed—Held further that Government had no right to induce another legal person not to enter into contractual relations with petitioner Cal 18 A (C N 5)
- Art. 14 — Rule 56 of Fundamental Rules is not against safeguard given under Article 14 — See Constitution of India, Art. 311 (2) Delhi 15 (C N 7)

CONSTITUTION OF INDIA (contd.)

—Art. 14 — Section 16 (2) of Mysore Act 5 of 1945 is not unconstitutional — See Municipalities — Mysore City of Bangalore Improvement Act (5 of 1945), S. 16 (2)

Mys 1 B (C N 1)

—Art. 14 — Different laws in different parts of State — Levy of Education Cess only in old Mysore area (excluding Bellary district) under Mysore Elementary Education Act, 1941 (as amended) does not violate Article 14 of the Constitution — Mysore Elementary Education Act (6 of 1941), Section 9

Mys 23 D (C N 8)

—Art. 14 — Medical Council of India, Regulations — Classification between B. Sc. (Honours) candidates and other B. Sc. candidates — Classification held violative of Article

Pat 11 A (C N 4)

—Art. 14 — Discrimination — Old Punjab State divided into Punjab, Haryana, etc. — Haryana State amending Punjab General Sales Tax Act (46 of 1948) by Punjab General Sales Tax (Haryana Amendment and Validation) Act, 14 of 1967 to operate retrospectively in its territory for period prior to formation of Haryana State — Other territories of old Punjab State not passing similar amendments — There is no violation of Article 14 so far Haryana State is concerned, as law in Haryana is uniform

Punj 12 C (C N 4)

—Art. 14 — Constitutionality of statute is presumed — See Constitution of India, Pre.

Punj 12 E (C N 4)

—Art. 16 (4) — Reservation of appointments for "backward classes" — Determination of backward classes cannot be on basis of community, caste, race or religion — State policy of distribution of posts community-wise is hit by Art. 16 (1) and (4)

SC 1 (C N 1)

—Art. 19 — U. P. Act 1 of 1959 is completely protected by Article 31-A from being affected by Articles 14, 19 or 31 — See Tenancy Laws — U. P. Thekedari Abolition Act (1958) (1 of 1959)

All 43 E (C N 8)

—Art. 19 — Freedom of press such freedom is subject to limitations under Art. 19 (2) — In the garb of criticism the press cannot commit contempt of Court — See Contempt of Courts Act (1952), S. 2

Cal 1 A (C N 1) (SB)

—Art. 19 — Law as to powers, privileges and immunity of Legislatures — Will be subject to Arts. 13 and 21 but not Art. 19 — See Constitution of India, Art. 194 (3)

Mad 10 A (C N 3) (FB)

—Art. 19 (1) (f) — Acquisition for public purpose — Notice calling for objections need not precede — Failure to give such notice before declaration of public purpose — No infringement of Article 19 (1) (f) — See Constitution of India, Article 31

Mys 1 A (C N 1)

—Art. 19 (1), (f), (5) — Easements Act (1882), Section 18, Illustration (b) — Constitutional validity

Raj 31 C (C N 8)

—Arts. 19 (1) (g), 301 — Essential Commodities Act (1955), S. 3 — Licensee under Imports (Control) Order (1955) carrying on iron and steel business apart from import business — Violation of terms of licence — Government cannot take any other measure apart from provisions of statute — Any action taken to deny licensee any rights or privileges with respect to iron and steel business is ultra vires

Cal 18 C (C N 5)

—Art. 20 — Law as to powers, privileges and immunity of Legislatures — Will be subject to

CONSTITUTION OF INDIA (contd.)

Articles 13 and 21 but not Article 19 — See Constitution of India, Art. 194 (3)

Mad 10 A (C N 3) (FB)

—Art. 20 (2) — Autrefois acquit — See Criminal P. C. (1898), Section 423

Cal 28 D (C N 6)

—Art. 21 — Law relating to powers, privileges and immunity of Legislatures — Will be subject to Articles 13 and 21 but not Article 19 — See Constitution of India, Art. 194 (3)

Mad 10 A (C N 3) (FB)

—Arts. 22 (4) and 22 (7) — Directions in articles are imperative — Preventive Detention Act (1950), Section 11 (1) — Detention order — Absence of confirming order of Government within 3 months from date of detention — Detention order must be struck down

Assam 14 C (C N 5)

—Art. 31 — U. P. Government Estates Thekedari Abolition Act 1958 applies not only to Thekedars but also to cultivating lessees on Government Estates — Notifications abolishing Estates without applying Reforms Act is an act of bad faith — Notification must be quashed — See Tenancy Laws — U. P. Government Estates Thekedari Abolition Act (1958) (1 of 1959), Section 3

All 43 B (C N 8)

—Art. 31 — U. P. Thekedari Abolition Act 1958 is completely protected by Article 31-A from being affected by Articles 14, 19 or 31 — See Tenancy Laws — U. P. Thekedari Abolition Act (1958) (1 of 1959)

All 43 E (C N 8)

—Arts. 31, 19 (1) (f) — Public purpose — Declaration of, by authority — Notice calling for objections need not precede — Failure to give such notice before declaration of public purpose — No infringement of Article 19 (1) (f)

Mys 1 A (C N 1)

—Art. 31-A, Proviso 2 — Abolition of leases on Government Estates by U. P. Act 1 of 1959 — Provisions are void under Article 31-A, Second Proviso, inasmuch as Act does not seek to provide compensation at market rate — See Tenancy Laws — U. P. Thekedari Abolition Act 1958 (1 of 1959), S. 3

All 43 D (C N 8)

—Art. 31-A — U. P. Thekedari Abolition Act 1958 is completely protected by this Article from being affected by Arts. 14, 19 and 31 — See Tenancy Laws — U. P. Thekedari Abolition Act (1958) (1 of 1959)

All 43 E (C N 8)

—Art. 58 — "Holds any office of profit" — Meaning of — See Constitution of Jammu and Kashmir, S. 69

J and K 12 A (C N 5)

—Art. 72 — Tender of pardon — Nature of act — See Criminal P. C. (1898), S. 401

Delhi 21 B (C N 8)

—Art. 77 — Provision is directory — Order not expressed in name of President — Government can, by independent evidence, show that order was in fact made by Government

Cal 18 B (C N 5)

—Art. 133 — Pleadings — Pleadings on certain point vague but all facts necessary for determination of point were before court — Point was fully argued before High Court without any objection and was also decided by High Court — Objection cannot be taken into consideration of point in appeal by Supreme Court

SC 125 C (C N 26)

—Art. 133 (1) (b) and (c) — High Court quashing order of suspension of R from office of Mahant of S Mutt and directing Government to restore to R possession of Mutt and its properties — Properties worth several lakhs of rupees — Petition for leave to appeal against order — Held, petition did not fall under Article 133 (1) (c) but under Article 133 (1) (b) and

CONSTITUTION OF INDIA (contd.)

it involved indirectly claim or question respecting property of mutt which was worth several lakhs of rupees — Andh Pra 9 (C N 2)
 — Art. 136 — Sec Penal Code (1860), S. 120-B — SC 4 A (C N 2)
 — Art. 136 — Industrial Disputes Act (1947), Section 25-FFF — Closure of undertaking — Closure cannot be limited or restricted only to financial, economic or other considerations of like nature — Essence of matter is Factum of closure by whatever reasons motivated — Question regarding closure of undertaking not considered by Tribunal in a proper manner — See Industrial Disputes Act (1947), S. 25-FFF — SC 90 A (C N 22)
 — Art. 141 — Obiter dicta of Supreme Court are binding on High Courts — See Civil P. C. (1908), Pre. — J and K 16 C (C N 6)
 — Art. 161 — Tender of pardon — Nature of act — See Criminal P. C. (1898), S. 401 — Delhi 21 A (C N 8)
 — Art. 191 — "Holds an office of profit" — Meaning of — See Constitution of Jammu and Kashmir, S. 69 — J and K 12 A (C N 5)
 — Arts. 191, 192 — Objections as to validity of nomination paper — Onus of proof — See Constitution of Jammu and Kashmir, S. 69 — J and K 12 B (C N 5)
 — Art. 191 — Contractual obligation to serve Government on a future date — No disqualification for being chosen as a member of Legislature — See Constitution of J and K S. 69 — J and K 12 C (C N 5)
 — Art. 191 — Subsequent disqualification cannot be taken into account for validity of nomination paper on date of scrutiny — See Constitution of J and K, S. 69 — J and K 12 D (C N 5)
 — Art. 191 — "Any services" — Meaning of — See Constitution of Jammu and Kashmir S. 69 — J and K 12 E (C N 5)
 — Arts. 194 (3), 19, 13, 20 and 21 — Powers, privileges and immunity of Legislature, law relating to — Such law will be subject to Articles 13 and 21 but not 19 — Only a final order imposing a disability on the subject is justiciable — Mad 10 A (C N 3) (FB)
 — Art. 194 (3) — Powers, privileges and immunities of Legislature — Absence of any law made by such legislature does not result in such privileges having lapsed by reason of inaction of Legislature — Mad 10 B (C N 3) (FB)
 — Art. 194 (3) — Powers, privileges and immunities of legislature — Form of law — The corpus is the law of Constitution itself — Mad 10 C (C N 3) (FB)
 — Art. 215 — Scandalizing the Court — See Contempt of Courts Act (1952), S. 2 — Cal 1 A (C N 1) (5B)
 — Art. 226 — Certiorari — Writ of — See Civil P. C. (1908), S. 9 — SC 78 (C N 21)
 — Art. 226 — Delay — Notification under Section 4 (1) of Coal Bearing Areas (Acquisition and Development) Act, 1957 — Writ petition challenging validity of notification filed within six months of date of notification — Held delay was not sufficient to refuse relief prayed for — SC 125 A (C N 26)
 — Art. 226 — See Coal Bearing Areas (Acquisition and Development) Act (1957), S. 4 — SC 125 B (C N 26)
 — Art. 226 — Motor Vehicles Act (1939), Section 48 — Rejection of two applications for permits by R. T. A. — Unsuccessful applicants filing two appeals therefrom — Tribunal remanding both appeals by common order — Joint writ petition by aggrieved applicants

CONSTITUTION OF INDIA (contd.)

against order in appeal is maintainable, W. P. No. 1827 of 1963, D/- 3-3-1966 (All) Reversed — All 14 A (C N 3)
 — Art. 226 — Use of discretionary power by executive could be validly exercised within the language of the law, as circumscribed by its purpose and policy — See Tenancy Laws — U. P. Government Estates Thekedari Abolition Act (1958) (1 of 1959), S. 3 — All 43 B (C N 8)
 — Art. 226 — Natural justice — Orders passed by Government not strictly called judicial or quasi-judicial — Even then before order in favour of party is set aside, he should be given chance to make his representation — Andh Pra 21 (C N 10)
 — Art. 226 — Quo warranto, writ of — Writ alleging that duly elected member was subsequently disqualified from holding office under Section 20, Andhra Pradesh Gram Panchayats Act (35 of 1959) — Proper remedy is to move under Section 22 — Writ of Quo Warranto is most inappropriate — Andh Pra 22 (C N 11)
 — Art. 226 — Mandamus — Writ of — Mandamus — Writ of — Writ can issue — Assam 7 B (C N 3)
 — Art. 226 — Who can apply — Registered partnership firm taking from Government certain land on lease for purpose of tea estate owned by it — Agreement entered through J, one of its partners — Order requisitioning land served on tea estate — Firm has locus standi to challenge order by writ petition — Assam 7 C (C N 3)
 — Art. 226 — Government can decide not to enter into business transactions with a particular person — It has however no right at common law to induce another legal person that he should not enter into business dealings with a third party — See Constitution of India, Article 14 — Cal 18 A (C N 5)
 — Art. 226 — In order to maintain application under Article, petitioner need not show that he has already suffered actual injury — Apprehension of injury or threat of injury is enough — Cal 18 D (C N 5)
 — Art. 226 — Petitioner acting as handling agents to Government under contract not governed by any statutory provision — Government can engage any person as its agent for such business — Action of Government infringing rights of petitioner under contract — Remedy is under law of contract and not under Art. 226 — Cal 18 E (C N 5)
 — Art. 226 — Quasi judicial order — Violation of natural justice — Effect — See Constitution of India, Art. 227 — Delhi 1 (C N 1)
 — Art. 226 — Court has discretion under Article 226 to order return of document seized in search irregular in law — See Criminal P. C. (1898), S. 165 (5) — Delhi 26 C (C N 9)
 — Art. 226 — Principle of natural justice — Applicability to administrative orders — Even administrative orders have to conform to principles of fair play and natural justice — Goa 6 A (C N 2)
 — Art. 226 — Material facts must be disclosed by petitioner — Goa 16 A (C N 3)
 — Art. 226 — Decision of jurisdictional facts by Tribunal can be challenged by writ — See Industrial Disputes Act (1947), S. 10 — Goa 16 C (C N 3)
 — Art. 226 — Questions meant to be decided by Tribunal — High Court would not, in petition under Article 226 use its jurisdiction — Questions of fact and mixed questions of law and fact, will not be entertained in writ pro-

CONSTITUTION OF INDIA (contd.)

ceeding — Industrial Disputes Act (1947), S. 10
Goa 16 D (C N 3)

—Art. 226 — Election of Sarpanch and Sahayak Sarpanch — Two parties — Some panchas of one party arrested by police just before commencement of meeting for election on false and flimsy grounds to prevent them from taking part in election and vote — It was found that other panchas at whose instance they were arrested, played fraud and made election simple farce and mockery — Held it was nothing but an abuse of democracy and democratic set up of Nyaya Panchayat and the so called election was a sham and colourable one which must be set aside — Constitution of India, Art. 226 — See Panchayats — U. P. Panchayat Raj Act (26 of 1947) (as extended to Manipur) S. 44

Manipur 13 B (C N 6)
—Art. 226 — Writ Petition — New point — Point regarding validity of election of Sarpanch and Sahayak Sarpanch after one month of appointment of Panchas of Nyaya Panchayat not raised in Writ Petition — Point raised in affidavit-in-rejoinder — Copies served on respondent's advocate—Held point raised in affidavit-in-rejoinder of which respondent had full notice could be urged — Panchayat — U. P. Panchayat Raj Rules (1947), R. 146 (1)

Manipur 13 D (C N 6)
—Arts. 226 and 329 — U. P. Panchayat Raj Act (26 of 1947) (as extended to Manipur), Sections 12 (c) and 44 — U. P. Panchayat Raj Rules (1947), Rr. 147, 79 — Election of Sarpanch and Sahayak Sarpanch — Remedy to aggrieved party available under Rules—On facts and circumstances writ petition held maintainable
Manipur 13 E (C N 6)

—Art. 226 — Medical Council Regulations — Constitutionality of circular under challenged — Relief
Pat 11 C (C N 4)

—Arts. 226 and 227 — Judicial or quasi-judicial order — Interference — Northern India Canal and Drainage Act (8 of 1873), S. 30-B (3) — Revision under — Superintending Canal Officer acts judicially and his order is open to scrutiny under Arts. 226 and 227 of Constitution — His order must be a speaking order — Order dismissing revision without giving any reasons is no order in eye of law
Punj 1 (C N 1)

—Art. 227 — Supervisory jurisdiction of High Court — Scope and exercise of — Case before Tenancy Tribunal — Tenancy Laws — Andhra Tenancy Act (18 of 1956), S. 13

Andh Pra 18 (C N 9)
—Arts. 227, 226 — Natural justice — Violation of — Quasi judicial order — Application for reference under S. 21 (1), Bengal Finance (Sales Tax) Act 1941, without court-fee stamp — Copy of order challenged not enclosed — Application entertained by over-sight but subsequently rejected ex parte — Principles of natural justice as to right of audi alteram partem violated — Case fit for interference by High Court under Art. 227
Delhi 1 A (C N 1)

—Arts. 227, Proviso, 372 — Civil P. C. (1908), S. 122 — There is no inconsistency between Proviso to Art. 227 and S. 122 — Art. 372 cannot be invoked for the purpose of coming to the conclusion that S. 122 Civil P. C. ceased to be in force on commencement of Constitution — Applicability of Art. 372 postulates that there is inconsistency between S. 122 Civil P. C. and proviso to Art. 227 of the Constitution—S. 122 Civil P. C. in its entirety continues in force after commencement of Constitution and no part of it is unconstitutional or ultra vires — Civil Revn.

CONSTITUTION OF INDIA (contd.)

Appln. No. 1116 of 1963, D/- 23-8-1967 (Guj), Overruled
Guj 18 A (C N 3)

—Art. 227 — Decision of Tribunal as to jurisdictional facts — Can be challenged by writ — See Industrial Disputes Act (1947), S. 10

Goa 16 C (C N 3)
—Art. 227 — Judicial or quasi-judicial order — Interference — See Constitution of India, Art. 226
Punj 1 (C N 1)

—Art. 239 (1) — Reference of industrial dispute by Administrator (Lt. Governor) — Validity — See Industrial Disputes Act (1947), S. 10
Goa 16 E (C N 3)

—Art. 240 (1) (d) — Reference of industrial dispute by Administrator (Lt. Governor) — Validity — See Industrial Disputes Act (1947), S. 10
Goa 16 E (C N 3)

—Art. 245 — Constitutionality of Statute is presumed — See Constitution of India, Pre.

Punj 12 E (C N 4)
—Art. 246, Sch. 7, List 1, Entry 86 and List II, Entry 49 — Levy of tax on capital value of non-agricultural lands and buildings — Parliament can legislate therefor under List 1, Entry 86—Imposition of Wealth-tax on non-agricultural lands and buildings under Wealth Tax Act (1957) is constitutional—Not conflicting with Entry 49 of List II. Observations made in AIR 1960 All 136 (FB) held were obiter and did not correctly interpret Entry 86 of List I

SC 59 B (C N 17)
—Art. 246 — Circumstances and Property Tax comes within Sch. 7, List II, Items 49 and 60 — Proviso is intra vires the State Legislature— See Municipalities — U. P. Town Areas Act (2 of 1914), S. 14 (1) (f)
All 40 B (C N 7) (FB)

—Art. 246 — State can enact law retrospectively covering period prior to its coming into existence — See Sales Tax — Punjab General Sales Tax (Haryana Amendment and Validation) Act (President's Act No. 14 of 1967), S. 6

Punj 12 A (C N 4)
—Art. 246 (4) — Reference of industrial dispute by Administrator (Lt. Governor) — Validity — See Industrial Disputes Act (1947), S. 10
Goa 16 E (C N 3)

—Art. 254 (2) — Bihar Sugar Factories Control Act 1937 became void on coming into force of the Essential Commodities Act 1955 — State Legislature's attempt to extend its life beyond 30-6-55 was of no effect, as it did not follow the procedure prescribed under Cl. (2) of Art. 254 — See Bihar Sugar Factories Control Act (7 of 1937), S. 18 (2)
Pat 8 A (C N 3)

—Art. 265 — Education cess on Beer and Toddy Shops rents — Leviability— See Mysore Excise Act (5 of 1901), S. 29

Mys 23 C (C N 8)
—Art. 265 — "Tax and Cess" — Term Cess is used when levy is for some special administrative expense
Mys 23 E (C N 8)

—Art. 265 — Payment of Tax under mistake of law — Refund — See Contract Act (1872), S. 72
Mys 23 K (C N 8)

—Art. 265, Schedule 7, List II, Entries 8, 46 to 63 — Power to tax cannot be deduced as an ancillary power from legislative entries
Mys 23 I (C N 8)

—Art. 265 and Sch. 7, List II, Entry 62 — Tax — Essentials — Shop rent under Mysore Excise Act is not a tax — It is not a tax on luxury — Mysore Excise Act (21 of 1966), S. 24
Mys 23 J (C N 8)

—Art. 277 — Tax imposed under a pre-constitution statute — Valid continuance after Constitution — Conditions essential — Education

CONSTITUTION OF INDIA (contd.)

cess levied under Mysore Elementary Education Act — Validity — Mysore Elementary Education Act (6 of 1941), S. 9 and Schedule (as amended in 1955) Mys 23 G (C N 8)

—Art. 299 (1) — Held Central Government had power to enter into such agreement and although it was not executed in form prescribed under Art. 299 (1) was all the same binding on all parties concerned — See Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 16 (1) Punj 4 (C N 2)

—Art. 300 — Suit against State for damages — Railways Act (1890), Section 72 (before its amendment in 1961) — Claim against State owned Railway — It does not behave the State to contest a good claim on the offchance of success on some unsubstantial technical plea SC 23 C (C N 8)

—Art. 301 — Petitioner failing to carry out his obligation under licence issued under Imports (Control) Order (1955) — Government suspending only non-statutory business dealings with petitioner — Held Article 301 was not applicable — See Constitution of India, Art. 14 Cal 18 A (C N 5)

—Art. 301 — Violation of terms of licence by a licensee under Imports (Control) Order (1955) — Government cannot take any measure apart from provisions of statute — Any action to be taken to deny licensee any rights or privileges in respect of other business in ultra vires — See Constitution of India, Art. 19 (1) (g) Cal 18 C (C N 5)

—Art. 301 — Goods imported from other States — Taxing of — Validity — See Sales Tax — Punjab General Sales Tax Act (46 of 1948) as amended by Haryana Amendment and Validation Act 14 of 1967, Sch. D Punj 12 G (C N 4)

—Art. 304 (a) — Goods imported from other States — Taxing of — Validity — See Sales Tax — Punjab General Sales Tax Act (46 of 1948) as amended by Haryana Amendment and Validation Act 14 of 1967, Sch. D Punj 12 G (C N 4)

—Art. 309. Proviso — Words 'any rules so made shall have effect,' subject to provisions of any such Act — Power to give retrospective operation to rules — Railway establishment Code, Rule 157 — Railway Board acting under Rule 157 can make rule having retrospective effect — AIR 1963 Mys 265 and AIR 1955 Mys 25, Overruled SC 118 A (C N 25)

—Art. 309 — Promotion of Government Servant — Unambiguous order of promotion — Promotees governed only by the order Orissa 13 (C N 8)

—Art. 311 — Misconduct by employee — Parallel enquiry by domestic tribunal and Court — Interference with due course of justice in pending proceedings — Domestic inquiry into misconduct of employee during pendency of a parallel inquiry before Court in the absence of stay order — No contempt — See Contempt of Courts Act (1952), S. 1 SC 30 (C N 10)

—Art. 311 — Disciplinary action — Evidence to be supplied with charge — Not an inflexible rule All 11 A (C N 2)

—Art. 311 — Disciplinary action — Show cause notice — Report of Enquiring Officer not sent with it — Effect All 11 B (C N 2)

—Art. 311 — Disciplinary action — Show cause notice — One week's time given for reply — Effect All 11 C (C N 2)

—Art. 311 — Dismissal of public servant — Appeal—No rule that personal hearing should be

CONSTITUTION OF INDIA (contd.)

given, though it is better to give such hearing All 11 D (C N 2)

—Art. 311 — Departmental enquiry — Doctrine of bias — Principles Assam 1 B (C N 1)

—Art. 311 — Removal from service — Termination of service by an authority subordinate to appointing authority — Assistant Teacher appointed by Chief Secretary to State — Termination of Service after 5 years by Deputy Director of Education, an authority subordinate to Chief Secretary — Termination, held, amounted to removal since the incumbent was no longer in a position to serve Assam 3 A (C N 2)

—Art. 311 — Departmental enquiry — Doctrine of bias — See Central Civil Services (Temporary Service), Rules 1949, R. 3 Assam 3 B (C N 2)

—Art. 311 (1), (2) — Order must be by way of punishment, to bring case under either clause Tripara 10 A (C N 3)

—Art. 311 (2) — Assam Police Manual Part 3, Rule 66 — Disciplinary enquiry—Power to frame charge cannot be delegated by disciplinary authority in absence of statutory provisions Assam 1 A (C N 1)

—Arts. 311 (2), 14 — Fundamental Rules, R. 56 — Age of superannuation raised to 58 — Compulsory retirement under Rule 56 (j) beforehand is not invalid — Rule 56 is not against safeguard given under Article 14 — Compulsory retirement does not amount to removal or dismissal — What is "public interest" explained Delhi 15 (C N 7)

—Art. 329 — Allotment of reserved seats after compliance with Section 9 — Decision of Commission cannot be challenged in Court of law, unless arbitrary — See Delimitation Commission Act (1962), Section 9 Andh Pra 1 (C N 1)

—Art. 329 — Election of Sarpanch and Sahayyat Sarpanch — Remedy to aggrieved party available under Rules — On facts and circumstances writ petition held maintainable — See Constitution of India, Article 226 Manipur 13 E (C N 6)

—Art. 356 — Ordinance — Nature of — See J and K Constitution Act (14 of 1996), Sec. 5 J and K 5 (C N 2)

—Art. 358 — Emergency — Ordinance issued during — Nature of — See J and K Constitution Act (14 of 1996), Section 5 J and K 5 (C N 2)

—Art. 360 — Ordinance — Nature of — See J and K Constitution Act (14 of 1996), S. 5 J and K 5 (C N 2)

—Art. 364 (2) (a) — Industrial dispute regarding major port of Marmagao — Reference by Administrator is legal even if does not relate to major port — See Industrial Disputes Act (1947), S. 10 Goa 16 E (C N 3)

—Art. 366 (10) — Reference of dispute by Administrator (Lt. Governor) — Legality — See Industrial Disputes Act (1947), Section 10 Goa 16 E (C N 3)

—Art. 366 (10) — Bihar Sugar Factories Control Act 1937 was an existing law within the Article till Essential Commodities Act 1955 was passed and enforced — See Bihar Sugar Factories Control Act (7 of 1937), Section 18 (2) Pat 8 A (C N 3)

—Art. 372 — Applicability — There is no inconsistency between Article 227 and Section 122, C. P. C. — See Constitution of India, Article 227, Proviso Guj 18 A (C N 3)

—Art. 372 — Ordinance — Nature of — See J and K Constitution Act (14 of 1996), S. 5 J and K 5 (C N 2)

CONSTITUTION OF INDIA (contd.)

—Art. 372 — Bihar Sugar Factories Control Act 1937 was an existing law within Article, 366 (10) and continued to be in force under Article 372 till the Essential Commodities Act was passed by Parliament in exercise of powers conferred by Schedule VII, List 3, Entry 33 to the Constitution — See Bihar Sugar Factories Control Act (7 of 1937), Section 18 (2) Pat 8 A (C N 3)

—Sch. 7, List I — Interpretation of entries in the list — See Constitution of India, Preamble Mys 23 H (C N 8)

—Sch. 7, List 1, Item 82 — Income-tax and circumstances and property tax are fundamentally distinct — Latter tax not covered by item 82 — 1961 All LJ 743 and 1955 All LJ 630 and AIR 1957 All 433, Overruled All 40 A (C N 7) (FB)

—Sch. 7, List 1, Entry 86 — Levy of tax on capital value of non-agricultural lands and buildings — Parliament can legislate therefore under List 1, Entry 86 — Imposition of Wealth-tax on non-agricultural lands and buildings under Wealth Tax Act (1957) is constitutional — Not conflicting with Entry 49 of List II — Observation made in AIR 1960 All 136 held were obiter and did not correctly interpret Entry 86 of List I — See Constitution of India, Article 246

SC 59 B (C N 17)

—Sch. 7, List II — Interpretation of entries in the List — See Constitution of India, Preamble Mys 23 H (C N 8)

—Sch. VII, List II, Entry 8 — Power to tax — Cannot be deduced as ancillary power from legislative entries — See Constitution of India, Art. 265 Mys 23 I (C N 8)

—Sch. VII, List II, Entries 46 to 63 — Power to tax — Cannot be deduced as an ancillary power from legislative entries — See Constitution of India, Article 265 Mys 23 I (C N 8)

—Sch. 7, List II, Entry 49 — Levy of tax on capital value of non-agricultural lands and buildings — Parliament can legislate therefore under List I, Entry 86 — Imposition of Wealth-tax on non-agricultural lands and buildings under Wealth Tax Act (1957) is constitutional — Not conflicting with entry 49 of List II — Observation made in AIR 1960 All 136 held were obiter and did not correctly interpret Entry 86 of List I — See Constitution of India, Article 246

SC 59 B (C N 17)

—Sch. 7, List II, Item 49 — Circumstances and property tax — Covered by the item—See Municipalities — U. P. Town Areas Act (2 of 1914), S. 14 (1) (f) All 40 B (C N 7) (FB)

—Sch. 7, List II, Item 60 — Circumstances and property tax — Comes within the item — See Municipalities — U. P. Town Areas Act (2 of 1914), S. 14 (1) (f) All 40 B (C N 7) (FB)

—Sch. VII, List II, Entry 62—Shop rent under Mysore Excise Act is not a tax — See Constitution of India, Article 265 Mys 23 J (C N 8)

—Sch. 7, List III — Interpretation of entries in the list — See Constitution of India, Preamble Mys 23 H (C N 8)

—Sch. 7, List III, Entry 33 — See Bihar Sugar Factories Control Act (7 of 1937), Section 18 (2) Pat 8 A (C N 3)

CONSTITUTION OF JAMMU AND KASHMIR, 1956

—S. 69 — Jammu and Kashmir Representation of the People Act (4 of 1957), Section 44 — "Holds any office of profit" — Meaning of — Mere issue of letter of appointment — Not enough — (Words and Phrases — "Holds") — (Constitution of India, Articles 191, 58) J and K 12 A (C N 5)

—S. 69 — Jammu and Kashmir Representation of the People Act (4 of 1957), Section 44 — Ob-

CONSTITUTION OF J. AND K. (contd.)

jection to validity of nomination paper — Onus to prove disqualification or defect is on party who raises objection — Returning officer cannot ask the candidate to whose nomination objection has been raised to prove that he is qualified — (Evidence Act (1872), Sections 101, 104 — (Constitution of India, Articles 191-192)

J and K 12 B (C N 5)

—S. 69 — Jammu and Kashmir Representation of the People Act (4 of 1957), Section 44 — Jammu and Kashmir Representation of People Rules — Contractual obligation to serve under Government on a future date — No disqualification for being chosen as a member of Legislature — (Constitution of India, Art. 191)

J and K 12 C (C N 5)

—S. 69 — Jammu and Kashmir Representation of the People Act (4 of 1957), Section 44 — Subsequent disqualification cannot be taken into account for validity of nomination paper on the date of scrutiny — (Constitution of India, Article 191) J and K 12 D (C N 5)

—S. 69 — Jammu and Kashmir Representation of the People Act (4 of 1957), Section 24 (d) — "Any services" — Meaning of — (Words and Phrases — "Any services")

J and K 12 E (C N 5)

—S. 69 — Jammu and Kashmir Representation of the People Act (4 of 1957), Section 44 — Improper rejection of nomination papers — Presumption — (Evidence Act (1872), Section 114) J and K 12 F (C N 5)

CONSTITUTION (SCHEDULED CASTES) ORDER (1950)

—Para. 3 — Professing Hindu Religion — Meaning of — Appellant who was converted to Christianity openly marrying Hindu wife — Marriage, though not celebrated according to strict Hindu rites prevalent among Adi Dravidas, not being also in Christian form — Subsequently in 1961 appellant getting his service cards corrected so as to show him as an Adi Dravida Hindu instead of Christian — Appellant contesting general elections in 1962 as member of Adi Dravida Hindu Caste — Appellant also giving out caste of his children as Adi Dravida Hindus — Held, these various steps taken by appellant clearly amounted to public declaration of his professing Hindu faith SC 101 B (C N 23)

CONTEMPT OF COURTS ACT (32 of 1952)

—S. 1 — Interference with due course of justice in pending proceedings — Domestic inquiry into misconduct of employee during pendency of parallel inquiry before Court in the absence of stay order — No contempt — Criminal Misc. Contempt Case No. 7 of 1965, D/- 3-8-1965 (Allahabad), Reversed — (Intermediate Education Act (U. P. Act 11 of 1921), Section 16 G and Regulations. 31 to 45) — (Constitution of India, Article 311 — Misconduct by employee — Parallel inquiries by domestic tribunal and Court)

SC 30 (C N 10)

—Ss. 2 and 3 — Scandalizing the Court — Right of press to criticise — (Constitution of India, Articles 19, 215) — (Penal Code (1860), Section 228) — (Criminal P. C. (1898), S. 480) Cal 1 A (C N 1) (SB)

—S. 3 — In the garb of criticism the press cannot commit contempt of Court — See Contempt of Courts Act (1952), Section 2

Cal 1 A (C N 1) (SB)

—S. 3 — Apology — Principles — See Contempt of Courts Act (1952), Section 4

Cal 1 B (C N 1) (SB)

CONTEMPT OF COURTS ACT (contd.)

—S. 3 — Jurisdiction of High Court — Process when can be resorted to — Proceedings on application of litigating party — Inherent powers not to be invoked — Duty of High Court — (Civil P. C. (1908), Section 151)

Delhi 6 (C N 3)

—Ss. 4 and 3 — Apology — Principles — It only minimises the gravity of the offence and does not wholly absolve the contemner of his guilt

Cal 1 B (C N 1) (SB)

CONTRACT ACT (9 of 1872)

—S. 10 — Central Government Notification D/- 29-3-1958 — Specific delivery contract — Construction — Transferable or non-transferable — Absence of a specific clause in the agreement prohibiting transfer is not conclusive — Intention of the parties gathered from the contract as a whole and the surrounding circumstances is decisive — Contract placed by Central Purchase Organization Government of India, in Form D. G. S. and D 68 — Held non-transferable specific delivery contract — See Forward Contract (Regulation) Act (1952), Section 2 (f)

SC 9 B (C N 4)

—S. 23 — Principle behind section — Public policy — Test — Dropping of prosecution must be at least part of consideration for pro-note

Mad 15 A (C N 5)

—S. 42 — Joint usufructuary mortgage debt — Each mortgagor is liable for entire debt — There is no provision for splitting up the debt — See Debt Laws — Saurashtra Agricultural Debtors Relief Act (23 of 1954), Section 2 (5)

SC 69 A (C N 19)

—S. 56 — Doctrine of frustration of contract — Comes within purview of Section 56 — But provisions of section cannot apply to case of 'self-induced frustration' — On facts held contract to sale imported goods became impossible or unlawful after coming into force of Imports (Control) Order, 1955, and so void under Section 56 of Contract Act and this was not a case of self induced frustration: Appeal No. 367 of 1958, D/- 16-3-1962 (Mad), **Reversed**

SC 110 B (C N 24)

—S. 72 — Payment of tax under mistake of law — Party so paying entitled to recover — Payment of education cess on Toddy Shop rent, Beer shop rent and Arrack shop rent under Mysore Excise Act declared void — Parties are entitled to — Mysore Excise Act (21 of 1966), Section 24 — Constitution of India, Article 265

Mys 23 K (C N 8)

—S. 202 — T. P. Act (1882), Sections 6 and 130 — Civil P. C. (1908), Order 21, Rule 16 and Sections 107 and 146 — Power of attorney in favour of Bank to execute decree — Execution by Bank — Objections to maintainability of application by Bank and to jurisdiction of Court — Objections entertainable at appellate stage having been based on legal grounds: AIR 1964 All 441 **Reversed** — Power of attorney, whether revocable — Nature of assignment — Power of bank to execute

SC 73 (C N 20)

CRIMINAL LAW AMENDMENT ACT (46 of 1952)

—S. 7 (1) — Special Judge — Jurisdiction of, is exclusive only as to trial of an offence — See Criminal P. C. (1898), Section 165 (5)

Delhi 26 D (C N 9)

—S. 8 — Section does not confer exclusive jurisdiction on Special Judge in regards to taking cognizance of a case — See Criminal P. C. (1898), Section 165 (5)

Delhi 26 D (C N 9)

CRIMINAL LAW AMENDMENT ORDINANCE (38 of 1944)

—S. 3 — Charge of defalcation of Government fund — Attachment of property under — Property if procured out of fund — Question is immaterial — Property must be that of accused

Pat 30 A (C N 11)

—S. 5 (2) — Words "some interest in property attached" under — Should mean independent right of objector — Onus is on objector to establish such right failing which his claim under Section 5 is vitiated — (Evidence Act (1872), Sections 101 to 104)

Pat 30 B (C N 11)

CRIMINAL PROCEDURE CODE (5 of 1898)

—Ss. 4 (1) (h), 155 (2), 200, 202, 203, 204, 4 (1) (e) — Complaint about a non-cognizable offence against persons the complainant cannot trace — Magistrate is bound to cause an enquiry to be made by the Police before he can dismiss the complaint under Section 203 — Otherwise the complainant will be rendered helpless since in such cases the police cannot act without being authorised by a Magistrate — (Trade and Merchandise Marks Act (1958), Sections 78 and 79)

Guj 14 B (C N 2)

—Ss. 20 and 202 — A city Magistrate can exercise jurisdiction in a case within the city — Allotment of areas in the city to different City Magistrate is merely for sake of administrative convenience — This does not bar making or having inquiry or investigation made by a Police Officer under Section 202 of the Code

Guj 14 A (C N 2)

—S. 107 — Proceedings under — Whether 'prosecution' for maintainability of suit for damages — See Tort — Malicious Prosecution

Andh Pra 29 A (C N 14)

—S. 107 — Procedure — Summoning parties to ascertain facts and circumstances is illegal

Manipur 12 A (C N 5)

—S. 107 — Proceedings — No danger of breach of peace — Magistrate can drop proceedings — Possession of land given by Court — Party given possession entitled to protection — Magistrate needing proof of confirmation of possession should call for it and should not drop proceedings

Manipur 12 B (C N 5)

—S. 117 (3) — Interim order for security — Order should not be mechanically passed by merely relying on police report

Delhi 12 (C N 5)

—S. 155 (2) — Complaint about a non-cognizable offence against persons the complainant cannot trace — Magistrate bound to cause an inquiry to be made by the Police before he can dismiss complaint under Section 203 — See Criminal P. C. (1898), Section 4 (1) (h)

Guj 14 B (C N 2)

—S. 165 (1) — Object and scope of — Provisions are directory and not mandatory — But this does not give police officer discretion to fulfil or not to fulfil its requirement — Requirements have to be fulfilled substantially — Held, that there was substantial compliance with the requirements — That the documents for which search was made were "said to be" in possession of petitioner at his factory premises, is reason for belief that the documents may be found in the places mentioned — (Civil P. C. (1908), Preamble — Directory or mandatory provisions — Directory provision does not give discretion)

Delhi 26 A (C N 9)

—S. 165 (1) — The police officer is required to record only the grounds for his belief that the thing may be found in any place and the thing for which search is to be made — Place where search has to be made need not be mentioned

Delhi 26 B (C N 9)

CRIMINAL P. C. (contd.)

—S. 165 (5) — Provision is directory even though word used is "shall" — But this does not give discretion to police officer — Record under sub-section (3) sent after completion of search — Search is irregular in law — Effect of irregular search pointed out — Court has discretion under Article 226 of the Constitution not to order return of document seized — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Directory or mandatory provisions — Use of word "shall") — (Constitution of India, Art. 226) Delhi 26 C (C N 9)

—Ss. 165 (5), 190 — Record under Section 165 (1) sent to magistrate having jurisdiction to take cognizance and not to Special Judge having exclusive jurisdiction to try offence, though Special Judge could also take cognizance — There is compliance with Section 165 (5) — (Criminal Law Amendment Act (1952), Sections 7 (1) and 8) Delhi 26 D (C N 9)

—S. 190 — Taking cognizance — Jurisdiction to Special Judge is not exclusive — See Criminal P. C. (1898), Section 165 (5) Delhi 26 D (C N 9)

—S. 190 (1) (b) — First information against seven named and twelve unnamed persons — Police, after investigation, filing charge sheet only against four and mentioning other three named persons as prosecution witnesses — Magistrate on perusal of records and after hearing arguments directing the latter to be arrayed as accused and issuing summonses against them — Held, that the order did not amount to interference with police investigation — The order was squarely within Clause (b) of Section 190 (1) and could not be impugned as being without jurisdiction Ker 29 A (C N 9)

—S. 193 (3) — Superior Appellate Court — See Criminal P. C. (1898), Section 476 Orissa 6 (C N 4)

—S. 200 — Complaint of non-cognizable offence against persons not traceable — Magistrate bound to cause an inquiry before dismissing complaint under Section 203 — See Criminal P. C. (1898), Section 4 (1) (h) Guj 14 B (C N 2)

—S. 202 — Inquiry or investigation by a Police Officer — Power of City Magistrate to order — See Criminal P. C. (1898), Section 20 Guj 14 A (C N 2)

—S. 202 — Complaint about non-cognizable offence against persons not traceable — Magistrate bound to cause an inquiry to be made before dismissing it under Section 203 — See Criminal P. C. (1898), Section 4 (1) (h) Guj 14 B (C N 2)

—Ss. 202 and 439 — Postponing issue of process — Reasons for not recorded — Order is erroneous and liable to be set aside Tripura 13 (C N 4)

—S. 203 — Complaint about non-cognizable offence against persons not traceable — Magistrate bound to cause enquiry to be made by Police before dismissing the complaint — See Criminal P. C. (1898), Section 4 (1) (h) Guj 14 B (C N 2)

—S. 204 — Complaint about a non-cognizable offence against persons not traceable — Magistrate bound to cause an inquiry by Police before dismissing the complaint under Section 203 — See Criminal P. C. (1898), Section 4 (1) (h) Guj 14 B (C N 2)

—S. 222 — Conviction for criminal breach of trust — Subsequent prosecution for different sums during the period covered earlier — Subsequent trial not barred — See Criminal P. C. (1898), Section 403 Bom 1 A (C N 1)

CRIMINAL P. C. (contd.)

—S. 234 — Conviction for criminal breach of trust — Subsequent prosecution for different sums during the period covered earlier — Subsequent trial not barred — See Criminal P. C. (1898), Section 403 Bom 1 A (C N 1)

—Ss. 251-A, 252 — Opium Act (1878), Sections 20-G, 9 (a) — Offence under Section 9 (a) — Offence investigated in accordance with provisions of Act by Police Sub Inspector — Report made by Sub-Police Officer under Section 20-G — Trial held by Magistrate under Section 251-A, Criminal P. C. — Held, there was no illegality in the trial — AIR 1963 Madh Pra 337, Overruled SC 4 B (C N 2)

—S. 252 — See Criminal P. C. (1898), Section 251-A SC 4 B (C N 2)

—Ss. 256 (1) and 540 — Examination of remaining witnesses — "Any remaining witnesses" — Meaning — Examination of new witnesses not mentioned in complaint petition — Admissibility Manipur 8 (C N 4)

—Ss. 337, 338, 339 and 435 — Revision order tendering pardon either under Section 337 or Section 338 is not revisable by High Court under Section 435 — Provision under Section 337 (1-A) does not convert order into a judicial act Delhi 21 A (C N 8)

—S. 337 — Tender of pardon — Nature of act — See Criminal P. C. (1898), Section 401 Delhi 21 B (C N 8)

—S. 337 — Exercise of power under — No revision under Section 435 lies — See Criminal P. C. (1898), Section 338 Delhi 21 E (C N 8)

—Ss. 337 (1) and 338 — State at which pardon can be tendered — High Court ordering that the accomplice be committed and tried along with other accused — Tender of pardon to accomplice during Sessions trial, held, could not be said to nullify High Court's orders — No limit is placed on the stage of the trial after which a tender of pardon may not be made Delhi 21 C (C N 8)

—Ss. 337 (1) and 338 — Evidence of an accomplice — Credibility of Delhi 21 D (C N 8)

—S. 338 — Order under in revision — Not revisable by High Court under Section 435 — See Criminal P. C. (1898), Section 337 Delhi 21 A (C N 8)

—S. 338 — Tender of pardon — Nature of act — See Criminal P. C. (1898), Section 401 Delhi 21 B (C N 8)

—S. 338 — Stage at which pardon can be tendered — See Criminal P. C. (1898), Section 337 (1) Delhi 21 C (C N 8)

—S. 338 — Delay in tendering pardon — Evidence of an accomplice — Credibility — See Criminal P. C. (1898), Section 337 (1) Delhi 21 D (C N 8)

—Ss. 338, 337 and 435 — Scope — Exercise of power under Section 338 — No revision under Section 435 lies Delhi 21 E (C N 8)

—S. 339 — Revision order tendering pardon either under Section 337 or Section 338 not revisable by High Court under Section 435 — See Criminal P. C. (1898), Section 337 Delhi 21 A (C N 8)

—S. 339 (2) — Proceeding against the accomplice Delhi 21 F (C N 8)

—S. 367 — Appreciation of evidence — Murder — Child witness — Evidentiary value — Corroboration — Criminal Appeal No. 545 of 1962, D/9-2-1965 (Pat), Partly Reversed SC 53 (C N 16)

—Ss. 401, 402, 337, 338 — Scope and object of the sections — Tender of pardon — Nature of

CRIMIANL P. C. (contd.)

the act — (Constitution of India, Articles 72 and 161) Delhi 21 B (C N 8)

—S. 402 — Scope and object — See Criminal P. C. (1898), Section 401 Delhi 21 B (C N 8)

—Ss. 403, 561-A, 222 and 234 — Conviction for criminal breach of trust — Subsequent prosecution for different sums during the period covered earlier — Subsequent trial not barred — AIR 1917 Mad 524, Dissented Bom 1 A (C N 1)

—S. 403 — Acquittal on charge under Sections 302/45, I. P. C. — No appeal against acquittal — Appeal by accused against their conviction under other charges — Appellate Court cannot convict under Sections 302/34 I. P. C. but can convict under Sections 304/34, I. P. C. — See Criminal P. C. (1898), Section 423 Cal 28 D (C N 6)

—S. 417 (3) — Acquittal appeal by Municipal Council, against acquittal of accused in a complaint under Section 20 of Food Adulteration Act by its Chairman, is maintainable — See Municipalities — Rajasthan Municipalities Act (38 of 1959), Section 67 (d) Raj 16 A (C N 4)

—Ss. 423, 403 — Autrefois acquit — Acquittal on charge under Section 302/34, Penal Code — No appeal against acquittal — Accused convicted under other charges filing appeal — Appellate Court cannot convict under Sections 302/34 but can convict under Sections 304/34, Penal Code Cal 28 D (C N 6)

—S. 435 — Revision order tendering pardon either under Section 337 or Section 338 — Not revisable by High Court under this section — See Criminal P. C. (1898), Section 337 Delhi 21 A (C N 8)

—S. 435 — Exercise of power under Section 338 — No revision under the section lies — See Criminal P. C. (1898), Section 338 Delhi 21 E (C N 8)

—S. 439 — High Court, in revision, cannot disturb concurrent finding of fact Bom 20 A (C N 4)

—S. 439 — Postponing issue of process — Reasons not recorded — Order is erroneous and liable to be set aside — See Criminal P. C. (1898), Section 202 Tripura 13 (C N 4)

—Ss. 476, 476-A, 476-B and 193 (3) — Application under Section 476-A rejected by Magistrate — Appeal against order lies under Section 476-B — Section 195 (3) indicates superior appellate Court as Court of session Orissa 6 (C N 4)

—S. 476-A — Application under, rejected by Magistrate — Appeal against order lies under Section 476-B — See Criminal P. C. (1898), Section 476 Orissa 6 (C N 4)

—S. 476-B — Order rejecting application under Section 476-A — Appeal lies against it under the section — See Criminal P. C. (1898), Section 476 Orissa 6 (C N 4)

—S. 480 — Scandalizing the Court — See Contempt of Courts Act (1952), Section 2 Cal 1 A (C N 1) (SB)

—S. 488 — Maintenance order in favour of wife — Order not ipso facto extinguished by subsequent decree obtained by the husband for restitution of conjugal rights — See Criminal P. C. (1898), Section 489 (2) Raj 29 (C N 7)

—Ss. 489 (2) and 488 — Maintenance order in favour of wife — Husband subsequently obtaining decree for restitution of conjugal rights — Right to maintenance not ipso facto extinguished by decree Raj 29 (C N 7)

CRIMIANL P. C. (contd.)

—S. 497 — Grant of bail Principles — See Criminal P. C. (1898), Section 498 Manipur 6 (C N 3)

—Ss. 498 and 497 — Grant of bail — Principles — (Penal Code (1860), Sections 302, 304 and 307) Manipur 6 (C N 3)

—S. 510-A — Applies to all formal affidavits filed in any inquiry or trial or other proceeding under the Code — See Criminal P. C. (1898), Section 145 Manipur 3 (C N 2)

—S. 539 — Affidavits — Manner of swearing or affirming — Section applies only to affidavits filed in the High Court — See Criminal P. C. (1898), Section 145 Manipur 3 (C N 2)

—S. 539-A — Affidavits to be used under the section — May be sworn or affirmed either in manner prescribed under Section 539 or before any Magistrate — See Criminal P. C. (1898), Section 145 Manipur 3 (C N 2)

—S. 539-AA — Section governs filing of affidavits in Courts other than the High Court — See Criminal P. C. (1898), Section 145 Manipur 3 (C N 2)

—S. 540 — "Any remaining witnesses" — Meaning — See Criminal P. C. (1898), Section 256 (1) Manipur 8 (C N 4)

—S. 540 — Limits of discretionary power — Application by prosecution to issue summons to additional witnesses — That the evidence sought to be proved was for just decision not disclosed in the application — Court is justified in rejecting application to exercise powers under section on such application as it will amount only to filling up the gap in the prosecution case Mys 22 (C N 7)

—S. 561-A — Conviction for criminal breach of trust — Subsequent prosecution for different sums during the period covered earlier — Subsequent trial not barred — See Criminal P. C. (1898), Section 403 Bom 1 A (C N 1)

—S. 561-A — Scope — Power can be exercised to quash proceedings Bom 1 B (C N 1)

CY PRES

—Doctrine of — Applicability to wakf — See Mussalman Wakf Validation Act (1913), Section 3 All 35 C (C N 6)

DEBT LAWS

—SAURASHTRA AGRICULTURAL DEBTORS RELIEF ACT (23 of 1954)

—Ss. 2 (5), 2 (6) (i), 7 — Joint usufructuary-mortgage debt — Each mortgagor is liable for entire debt — There is no provision for splitting up the debt — T. P. Act (1882), Section 60 — Contract Act (1872), Section 42 — C. R. Application No. 477 of 1960, D/- 12-2-1963 (Guj), Reversed SC 69 A (C N 19)

—S. 7 — Joint usufructuary mortgage debt — Each mortgagor is liable for entire debt — There is no provision for splitting up the debt — See Debt Laws — Saurashtra Agricultural Debtors Relief Act (23 of 1954), S. 2 (5) SC 69 A (C N 19)

DEED

—Construction — Central Government Notification D/- 29-3-1958 — Specific delivery contract — Construction — Transferable or non-transferable — Absence of a specific clause in the agreement prohibiting transfer is not conclusive — Intention of the parties gathered from the contract as a whole and the surrounding circumstances is decisive — Contract placed by Central Purchase Organization, Government of India, in Form D. G. S. and D 68 — Held non-transferable specific

DEED (contd.)

delivery contract — See Forward Contract (Regulation) Act (1952), S. 2 (f)

SC 9 B (C N 4)

DEFENCE OF INDIA ACT (51 of 1962)

—Ss. 29 and 40 — Delegation of powers by Central Government — To whom can be made — Imposition of conditions on delegate not obligatory — All powers of Central Government may be delegated — Notification delegating powers under S. 29 to specified authorities subordinate to State Government held valid Assam 7 A (C N 3)
—S. 40 — Delegation of powers of Central government — To whom can be made — See Defence of India Act (1962), S. 29

Assam 7 A (C N 3)

DELHI RENT CONTROL ACT (59 of 1958)

See under Houses and Rents.

DELHI RENT CONTROL RULES (1958)

See under Houses and Rents.

DELIMITATION COMMISSION ACT (61 of 1962)

—Ss. 9 and 10 — Allotment of reserved seats after compliance with Section 9 — Decision of Commission cannot be challenged in Court of law, unless arbitrary — (Constitution of India, Art. 329)

Andh Pra 1 (C N 1)

—S. 10 — Allotment of reserved seats in compliance with S. 9 — Decision of Commission cannot be challenged in a Court of law — See Delimitation Commission Act (1962), S. 9

Andh Pra 1 (C N 1)

DISPLACED PERSONS (COMPENSATION AND REHABILITATION) ACT (44 of 1954)

—S. 16 (1) — Displaced Persons (Compensation and Rehabilitation) Rules, R. 34 (d) — Financial arrangement between Central Government and State Government whereunder property in compensation pool was transferred to State Government — State Government paying stipulated price — Held, Central Government had power to enter into such agreement and although it was not executed in form prescribed under Art. 299 (1) of the Constitution was all the same binding on parties concerned — Further held that though Settlement Commissioner as delegate of Central Government could not after the said transaction pass any order under R. 92 (4) yet the rules promulgated by State Government itself justified the order passed by Settlement Commissioner as delegate of State Government — Civil Writ No. 2417 of 1965, D/- 9-8-1966, Reversed

Punj 4 (C N 2)

DISPLACED PERSONS (COMPENSATION AND REHABILITATION) RULES

—R. 34 (d) — Financial arrangement between Central Government and State Government whereunder property in compensation pool was transferred to State Government — Validity — See Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 16 (1)

Punj 4 (C N 2)

DIVORCE ACT (4 of 1869)

—S. 36 — Maintenance pendente lite — Quantum — See Hindu Marriage Act (1955), S. 24

Orissa 12 (C N 7)

EASEMENTS ACT (5 of 1882)

—S. 2 (b) — Right of privacy — Nature — Proof — See Easements Act (1882), S. 18, Illustration (b)

Raj 31 B (C N 8)

—Ss. 4, 13 and 15 — Sub-soil rights — Right to extract minerals is a valuable right — Any subsidiary right leading to the enjoyment of the minerals and their extraction is also a valuable right — Right to extract minerals acquired under

EASEMENTS ACT (contd.)

Portuguese Government Decree of 3-11-1905 is vested right

Goa 6 E (C N 2)

—S. 13 — Sub-soil rights — Right to extract minerals is a valuable right — See Easements Act (1882), S. 4

Goa 6 E (C N 2)

—S. 15 — Right to extract minerals is a valuable right — Any subsidiary right leading to enjoyment of the minerals and their extraction is also a valuable right — See Easements Act (1882), S. 4

Goa 6 E (C N 2)

—S. 15 — Right to take water along artificial course — Absence of contract — Acquisition of right by prescription must be proved

Mys 6 A (C N 2)

—S. 18, Illustration (b), S. 2 (b) — Right of privacy — Nature of — Proof — Held, customary rights of privacy existed in Jaipur. AIR 1929 All 676, Dissent from. AIR 1963 All 340 Held obiter and Dissent from. Raj 31 B (C N 8)

—S. 18 Illus. (b) — Right of privacy — Constitutional validity of — See Constitution of India Art. 19 (1) (f), (5)

Raj 31 C (C N 8)

—S. 56 — Question whether certain licence is transferable — Not a pure question of law — See Civil P. C. (1908), Ss. 100-101

Ker 23 A (C N 7)

—Section 60 — Licensee executing work of permanent character — Licence not surrendered or abandoned — Licence cannot be revoked

Ker 23 B (C N 7)

EAST PUNJAB FACTORIES (CONTROL OF DISMANTLING) ACT (20 of 1948)

—S. 3 — Scope and applicability — Provision does not bar execution of a decree for eviction — L. P. A. No. 405 of 1958, D/- 3-10-1961 (Punj), Reversed but on a different ground.

SC 27 (C N 9)

EAST PUNJAB REFUGEES (REGISTRATION OF LAND CLAIMS) ACT (12 of 1948)

—S. 2 (e) and (d) — 'Displaced person' and 'Refugee' — Person who has died before the disturbance took place and has never migrated to India, is not either a displaced person or a refugee — No allotment can be made in his favour even though his name appears in revenue records — Para 17 of Tarlok Singh's Land Resettlement Manual is no statutory authority

SC 33 A (C N 11)

EAST PUNJAB URBAN RENT RESTRICTION ACT (3 of 1949)

See under Houses and Rents.

EDUCATION**—INTERMEDIATE EDUCATION ACT (U. P. ACT 2 of 1921)**

—S. 16-G — Interference with due course of justice in pending proceedings — Domestic inquiry into misconduct of employee during pendency of a parallel inquiry before Court in the absence of stay order — No contempt — See Contempt of Courts Act (1952), S. 1

SC 30 (C N 10)

—Regulations 34 to 45 — Interference with due course of justice in pending proceedings — Domestic inquiry into misconduct of employee during pendency of a parallel inquiry before Court in the absence of stay order — No contempt — See Contempt of Courts Act (1952), S. 1

SC 30 (C N 10)

—MYSORE ELEMENTARY EDUCATION ACT (6 of 1941)

—S. 9 — Levy of education cess on toddy shop rent and tree tax in Bellary District is without authority of law since the Act has not been subsequently extended to Bellary district — Even the

EDUCATION — MYSORE ELEMENTARY

EDUCATION ACT (contd.)

Notification of sale of excise privileges does not provide for such payment Mys 23 A (C N 8)

—S. 9 — No education cess on Arrack or beer shop rent can be levied Mys 23 B (C N 8)

—S. 9 and Schedule — Education cess on Beer and Toddy shop rent — Neither leviable under R. 23 nor under any notification under S. 9 and Sch. — See Mysore Excise Act (5 of 1901), S. 29 Mys 23 C (C N 8)

—S. 9 — Levy of Education cess only in old Mysore area (excluding Bellary district) — Does not violate Art. 14 of the Constitution — See Constitution of India, Art. 14 Mys 23 D (C N 8)

—S. 9 and Schedule (as amended in 1955) — Shop rent in respect of Toddy shop, Arrack Shop and Beer Shop not an excise duty — See Mysore Excise Act (21 of 1966), S. 24 Mys 23 F (C N 8)

—S. 9 and Schedule (as amended in 1955) — Essential conditions for continuance of tax imposed under pre-Constitution statute — See Constitution of India, Art. 277 Mys 23 G (C N 8)

EQUITY

—Cy pres Doctrine — Applicability to Wakf — See Mussalman Wakf Validating Act (1913), S. 3 All 35 C (C N 6)

ESSENTIAL COMMODITIES ACT (10 of 1955)

—S. 3 — Licencee under Imports (Control) Order (1955) carrying on iron and steel business apart from import business — Violation of term of licence — Government cannot take any other measure apart from the provisions of statute — See Constitution of India, Art. 19 (1) (g) Cal 18 C (C N 5)

—S. 16 (1) (b) — See Bihar Sugar Factories Control Act (7 of 1937), S. 18 (2) Pat 8 A (C N 3)

EVIDENCE ACT (1 of 1872)

—S. 3 — Right of privacy — Nature of — Proof — See Easements Act (1882), S. 18, Illustration (b) Raj 31 B (C N 8)

—S. 13 — Right of privacy — Nature — Proof — See Easements Act (1882), S. 18, Illustration (b) Raj 31 B (C N 8)

—S. 18 — Information obtained from counsel across the bar — Counsel can state that he is unable to supply information for want of material — If counsel chooses to give information as to facts, it amounts to admission so far as it goes against interest of party — Information so obtained must form part of record in so far as it contains statements as to facts Bom 24 A (C N 5)

—S. 44 — Identity of parties — Suit in which one person is authorised to represent others — Such others are parties to the litigation — Decision is binding on all whom such person represented in a suit in subsequent suit, unless former decision can be shown as vitiated under S. 44 — See Civil P. C. (1908), S. 11 Expl. 6 Ker 26 A (C N 8)

—S. 57 — Right of privacy — Nature of — Proof of custom — See Easements Act (1882), S. 18, Illustration (b) Raj 31 B (C N 8)

—Ss. 90, 114 — Will more than fortyfive years old — Will rational in character having made in favour of trust and dependent widows well provided for — Presumption is that testator was of sound mind at time of execution — Proof of handwriting of attesting witnesses sufficient to prove soundness of mind of executor Madh Pra 4 B (C N 2)

—S. 90 — Ministerial act of physically signing the document left to other persons — Question of

EVIDENCE ACT (contd.)

— Presumption is to be decided on facts

Raj 11 B (C N 3)
—Ss. 101 to 104 — Applicability — Conditions essential — Plea of insanity — State of mind before and after commission of act relevant — Held on evidence that defence of insanity was not made out — See Penal Code (1860), S. 84

SC 15 (C N 6)
—Ss. 101 to 104 — See Hindu Law — Conversion SC 101 C (C N 23)

—Ss. 101-104 — Income-tax officer can either assess income of association of persons or of individuals constituting it — Re-opening of assessment — Burden of proof that the option was not consciously used is on Income-tax Officer — See Income-tax Act (1922), S. 3

Andh Pra 3 (C N 2)
—Ss. 101-104 — Proprietorship of trade mark — Burden of establishing proprietorship of trade mark lies on applicant — It is for applicant to satisfy court as to his user Bom 24 C (C N 5)

—Ss. 101-104 — Onus of proving that a trade mark is not calculated to deceive or cause confusion is on applicant — See Trade and Merchandise Marks Act (1958), S. 11 (a) Bom 24 D (C N 5)

—Ss. 101-104 — Objection as to validity of nomination paper — Onus to prove disqualification or defect is on party who raises the objection — See Constitution of Jammu and Kashmir S. 69 J and K 12 B (C N 5)

—Ss. 101-104 — Gift of immovable property — Acceptance is essential — Onus to prove acceptance — See Transfer of Property Act (1882), S. 122 Ker 21 A (C N 6)

—Ss. 101-104 — Suit for partition of joint family property — Mere mention of arbitration agreement and award does not bar the suit — Burden to plead necessary facts in support of bar set up is on the defendant — See Arbitration Act (10 of 1940), S. 32 Madh Pra 7 B (C N 3)

—Ss. 101-104 — Onus to prove exception provided in S. 42 (1) (a) of the Provincial Insolvency Act is on the insolvent — See Provincial Insolvency Act (1920), S. 42 (1) (a)

Pat 28 (C N 10)
—Ss. 101-104 — Attachment of property under Criminal Law Amendment Ordinance 1944 — Objection to — Onus is on the objector to establish his independent right to the property attached, failing which his claim under S. 5 of the Ordinance is vitiated — See Criminal Law Amendment Ordinance (1944), S. 5 (2) Pat 30 B (C N 11)
—S. 105 — Total denial of offence — Plea by accused — It is open to them to raise alternative plea of right of private defence, if the same can be proved on the strength of prosecution evidence itself — See Penal Code (1860), S. 96 Bom 20 B (C N 4)

—S. 112 — Suit for partition by mother on behalf of minor son — Evidence to show that the mother had deserted the defendant 25-30 years back and the minor was born subsequently — Defendant in cross-examination admitting that the plaintiff was his wife — Non-framing of fresh issue about non-access does not result in wrong decision of the case Mys 8 C (C N 3)

—S. 112 — Applicability — Provisions are as much applicable to the offspring of a marriage between Hindus as it is to children of spouses professing other faiths Mys 17 A (C N 5)

—S. 112 — Nature of onus under — Mere assertion as to non-access not sufficient — Child born during pendency of suit for maintenance — Earlier proceeding by wife for restitution amic-

EVIDENCE ACT (contd.)

ably settled — No evidence as to relation between spouses during period the child could have been begotten produced by husband — Right of maintenance held not forfeited on ground of unchastity — Pendency of suit could not prove non-access — Hindu Adoptions and Maintenance Act (1956), S. 18 (3) Mys 17 B (C N 5)

—S. 114 — Presumption as to repeal of a provision — See Civil P. C. (1908), Preamble J and K 9 C (C N 4) (FB)

—S. 114 — Improper rejection of nomination paper — Presumption — See Constitution of Jammu and Kashmir, S. 69 J and K 12 F (C N 5)

—S. 114 — Presumption of retrospective continuity Ker 21 B (C N 6)

—S. 114 — How far bona fide of former litigations can be presumed — See Civil P. C. (1908), S. 11, Expl. 6 Ker 26 A (C N 8)

—S. 114 — Will more than fortyfive years old — Presumption as to soundness of testator's mind at time of execution — Proof of handwriting of attesting witnesses sufficient to prove soundness of mind of executor — See Evidence Act (1872), S. 90 Madh Pra 4 B (C N 2)

—S. 114 — Defective service of notice to J. D. — J. D. cannot be presumed to have information about defective proclamation of sale — See Civil P. C. (1908), O. 21, R. 66 (as amended in Madras) Mad 5 D (C N 2)

—S. 114, Ill. (b) — See Evidence Act (1872), S. 133 SC 17 A (C N 7)

—S. 114 (b) — See Evidence Act (1872), S. 133 SC 17 B (C N 7)

—S. 115 — Estoppel against statute — Admission of erroneous opinion on question of law by party's counsel in lower Court — Not binding on that party while seeking relief in appeal. Case law discussed All 14 C (C N 3)

—S. 115 — Estoppel — Assessment of unregistered firm — Dissolution — Each ex-partner is an assessee — Decision in appeal by one will not be binding as 'estoppel' on others — Income-tax Act (1922), S. 30 Cal 4 D (C N 2)

—S. 115 — Civil P. C. (1908), O. 21, R. 66 (as amended in Madras) and 69 — Waiver of irregularities in sale proclamation — Judgment-debtor having no knowledge of irregularity in sale proclamation applying for adjournment of sale — Only deliberate intention on his part to waive his right to object to irregularity in proclamation could constitute waiver, as estoppel must be certain to every intent and not to be taken by argument or inference Mad 5 F (C N 2)

—S. 115 — Interpretation of document is question of law and there can be no estoppel in such matters Raj 22 B (C N 5)

—Ss. 133 and 114, Illus. (b) — Accomplice, who is — Trial of offences under Prevention of Corruption Act — Persons giving illegal gratification under coercion and fear of being harassed are not accomplices — Their evidence is not required to be corroborated — (Prevention of Corruption Act (1947), Ss. 5 (1) and 5 (2)) — (Penal Code (1860), S. 161) SC 17 A (C N 7)

—Ss. 133 and 114, Illus. (b) — Trap witnesses — Evidence — Corroboration — Trial of offences under Prevention of Corruption Act — Though trap witnesses are interested witnesses, as a matter of law, their evidence cannot be rejected for want of corroboration. AIR 1958 SC 500, Rel. on. (Prevention of Corruption Act (1947), Ss. 5 (1) and 5 (2)) — (Penal Code (1860), S. 161). SC 17 B (C N 7)

—S. 142 — Scope — Principles governing grant of permission to cross-examine one's own witness

EVIDENCE ACT (contd.)

— Circumstances under which leading questions may be allowed — See Evidence Act (1872), S. 154 Mys 12 (C N 4)

—Ss. 154 and 142 — Scope — Principles governing grant of permission to cross-examine one's own witness — Circumstances under which leading questions may be allowed Mys 12 (C N 4)

FATAL ACCIDENTS ACT (13 of 1855)

—S. 1-A — Tort — Negligence — Duties of doctor towards his patient SC 128 (C N 27)

FORWARD CONTRACTS (REGULATION) ACT (74 of 1952)

—S. 2 (f) — Specific delivery contract — Construction — Transferable or non-transferable — Absence of a specific clause in the agreement prohibiting transfer is not conclusive — Intention of the parties gathered from the contract as a whole and the surrounding circumstances is decisive — Contract placed by Central Purchase Organization, Government of India, in Form D. G. S. and D. 68 — Held non-transferable specific delivery contract — (Contract Act (1872), S. 10) — (Deed — Construction) SC 9 B (C N 4)

—Ss. 15 (1), 17, 18 (1) — Government can by a notification declare all forward contracts illegal except those which are non-transferable specific delivery contracts SC 9 A (C N 4)

—S. 17 — Government can by a notification declare all forward contracts illegal except those which are non-transferable specific delivery Contracts — See Forward Contract (Regulation) Act (1952), S. 15 (1) SC 9 A (C N 4)

—S. 18 (1) — Government can by a notification declare all forward contracts illegal except those which are non-transferable specific delivery Contracts — See Forward Contract (Regulation) Act (1952), S. 15 (1) SC 9 A (C N 4)

FUNDAMENTAL RULES

—R. 56 — Rule is not against safeguard given under Art. 14 of the Constitution — See Constitution of India, Art. 311 (3) Delhi 15 (C N 7)

GENERAL CLAUSES ACT (10 of 1897)

—S. 3 (8) (b) — In relation to state or Central Government appropriate Government is Administrator — See Industrial Disputes Act (1947), S. 10 Goa 16 E (C N 3)

—S. 3 (42) — Expression 'Person' — Expression covers limited company, even when carrying on the business in name or style other than its own — See Civil P. C. (1908), O. 30, R. 10 All 1 (C N 1) (FB)

—S. 3 (60) (c) — In relation to State or Central Government appropriate Government is Administrator — See Industrial Disputes Act (1947), S. 10 Goa 16 E (C N 3)

—S. 6 — Repeal — Presumption as to — See Civil P. C. (1908), Preamble J and K 9 C (C N 4) (FB)

—S. 17 — See Public Safety — Preventive Detention Act (1950), S. 9 Assam 14 B (C N 5)

—S. 18 — See Public Safety — Preventive Detention Act (1950), S. 9 Assam 14 B (C N 5)

—S. 21 — See Public Safety — Preventive Detention Act (1950), S. 9 Assam 14 B (C N 5)

GOA, DAMAN AND DIU (LAWS) REGULATION (1962)

—Cl. 3 (i) — Reference of industrial dispute by Administrator (Lt. Governor) — Validity — See Industrial Disputes Act (1947), S. 10 Goa 16 E (C N 3)

—Cl. 5 (1) — Reference of industrial dispute by Administrator (Lt. Governor) — Validity — See Industrial Disputes Act (1947), S. 10 Goa 16 E (C N 3)

**GOA, DAMAN AND DIU
(LAWS) REGULATION (contd.)**

—Cl. 6 (1) (b) — Reference of industrial dispute by Administrator (Lt. Governor) — Validity
— See Industrial Disputes Act (1947), S. 10
Goa 16 E (C N 3)

GOVERNMENT GRANTS ACT (15 of 1895)

—S. 3 (as amended by U. P. Amendment Act 1960) — Section as amended make U. P. Imposition of Ceiling on Land Holdings Act applicable to leases, on Government Estates, granted by the Government — See Tenancy Laws — U. P. Thekedari Abolition Act, 1958 (1 of 1959), S. 3
All 43 D (C N 8)

**GOVERNMENT OF UNION TERRITORIES ACT
(20 of 1963)**

—S. 46 (2) (3) — Reference of industrial dispute by Administrator (Lt. Governor) — Validity
— See Industrial Disputes Act (1947), S. 10
Goa 16 E (C N 3)

HIGH COURT RULES AND ORDERS

**—ASSAM AND NAGALAND HIGH COURT,
CIVIL RULES AND ORDERS (1967)**

—R. 185 — Deposit by auction purchaser should be made to officer conducting sale as soon as he is declared purchaser — Court has no jurisdiction to extend the time for paying deposit — See Civil P. C. (1908), O. 21, R. 84
Assam 10 (C N 4)

**HINDU ADOPTIONS AND MAINTENANCE
ACT (78 of 1956)**

—Preamble and S. 4 — Act codifies law relating to maintenance — Object of codification — Act has overriding effect against any text, rule etc., of Hindu Law
Andh Pra 15 A (C N 8)

—S. 4 — Act overrides any text, rule etc. of Hindu Law relating to maintenance — See Hindu Adoptions and Maintenance Act (1956), Preamble
Andh Pra 15 A (C N 8)

—S. 18 (3) — Child born during pendency of suit for maintenance — Mere assertion as to non-access not sufficient — Right of maintenance held not forfeited on ground of unchastity — See Evidence Act (1872), S. 112
Mys 17 B (C N 5)

—Ss. 22 and 25 — Applicability — Surrender of estate by widow in favour of reversioners prior to Act — Agreement by reversioners to pay maintenance with condition against enhancement — Section 22 not being retrospective held did not apply — Suit under S. 25 for enhancement of maintenance not maintainable — Widow's only claim could be on basis of agreement
Andh Pra 15 B (C N 8)

—S. 25 — Applicability — Surrender of estate by widow in favour of reversioners prior to Act — Agreement by reversioners to pay maintenance with condition against enhancement — Suit for enhancement of maintenance under the section not maintainable — See Hindu Adoptions and Maintenance Act (1956), S. 22
Andh Pra 15 B (C N 8)

HINDU LAW

—Alienation by father — Setting aside of — Suit by after-born son — Starting point for limitation — See Limitation Act (1908), S. 6
Andh Pra 24 A (C N 13)

—Alienation — Validity — Sole trustee of temple collecting amounts due to temple from others — Misappropriation of such amounts by him — Such a debt would not be an avyavaharika debt and the sale to satisfy such a debt would not suffer from any infirmity — (Hindu Law — Debts

HINDU LAW (contd.)

— Avyavaharika debt). — (Point conceded, Andh Pra 24 B (C N 13))
—Caste System — See Hindu Law — Conversion
SC 101 C (C N 23)
—Conversion — See Constitution (Scheduled Castes) Order (1950), Para 3
SC 101 B (C N 23)

—Conversion — Effect on caste — Hindu belonging to Adi Dravida Caste converted to Christianity — He ceases to belong to Adi Dravida Caste — Burden lies on him to prove that on re-conversion he again became member of Adi Dravida Caste
SC 101 C (C N 23)

—Conversion — Ordinarily, membership of caste under Hindu religion is acquired by birth — (Quaere) whether membership of caste can be acquired by conversion to Hinduism or after re-conversion to Hinduism: Case law, ref.
SC 101 D (C N 23)

—Debts — Avyavaharika debt — See Hindu law — Alienation
Andh Pra 24 B (C N 13)

—Father — Avyavaharika debt — Liability of son to repay his father's debt — Son not liable for Avyavaharika debt — Meaning of Avyavaharika debt — Liability to be examined as on date when incurred — Origin of debt legal — Subsequent dishonesty does not absolve the son
Mad 15 B (C N 5)

—Inheritance — Oriya family belonging to Koraput not renouncing personal law when Koraput became part of State of Orissa in 1936 — Members of such family must be governed by law of inheritance as it prevailed in Madras before 1936
Orissa 3 A (C N 2)

—Joint Family Property partition — See Arbitration Act (10 of 1940), S. 32
Madh Pra 7 A (C N 3)

—Mitakshara — Inheritance — Madras School — Deceased leaving behind only father's brother's daughter and no male heir — She is entitled to succeed as a Bandhu
Orissa 3 B (C N 2)

—Widow — Surrender of estate prior to Act of 1956 — Effect — See Hindu Adoptions and Maintenance Act (1956), S. 22
Andh Pra 15 B (C N 8)

HINDU MARRIAGE ACT (25 of 1955)

—S. 3 (b) — Courts deciding petitions under the Act — Appeal against orders of Court — Lies to Court to which appeals from decrees and orders passed in civil suits lie — See Hindu Marriage Act (1955), S. 28
Punj 25 A (C N 5)

—S. 9 — Application for restitution of conjugal rights by husband after ten years from withdrawal by wife from his society — Maintainability — See Hindu Marriage Act (1955), S. 23 (1) (d)
Pat 27 A (C N 9)

—S. 9 — Decree of restitution of conjugal rights — Not executed by husband for 2 years — Wife can apply for divorce — See Hindu Marriage Act (1955), S. 13 (1) (ix)
Pat 27 B (C N 9)

—S. 9 — Application for restitution of conjugal rights by husband — Court must give serious consideration to evidence of wife and her parents and cannot refuse to do so on ground of their being interested witnesses
Pat 27 C (C N 9)

—Ss. 13 (1) (ix) and 9 — Decree for restitution of conjugal rights in favour of husband — Failure by husband to take steps to give effect to it for more than 2 years — Wife is entitled to ask for divorce and decree for restitution of conjugal rights becomes ineffective when she does so
Pat 27 B (C N 9)

HINDU MARRIAGE ACT (contd.)

—S. 13 — 'Living in adultery' — Adultery is a serious charge and has to be proved beyond reasonable doubt — Punj 25 B (C N 5)

—S. 19 — Order under — Appeal against to Single Judge of High Court — Further appeal under Cl. 10 of Letters Patent is maintainable — See Hindu Marriage Act (1955), S. 28 — Punj 25 A (C N 5)

—S. 21 — Appeal against orders made on petitions under the Act — Forum — See Hindu Marriage Act (1955), S. 28 — Punj 25 A (C N 5)

—S. 23 (1) (b) — Relief on ground of cruelty — Cruelty must not have been condoned by petitioner before filing petition — Last acts of cruelty not established — Petitioner cannot fall back on previous instances of similar character — Guj 21 A (C N 4)

—Ss. 23 (1) (d) and 9 — Application for restitution of conjugal rights by husband after ten years from withdrawal by wife from his society — No satisfactory explanation given for such inordinate delay — Decree for restitution of conjugal rights in favour of husband not sustainable — Pat 27 A (C N 9)

—S. 23 (1) (b) — Cruelty — Proof — Testimony of party — Corroboration whether and how far necessary — Guj 21 B (C N 4)

—S. 24 — Maintenance pendente lite — Court expenses — Act does not lay down scale — Divorce Act (1869), S. 36 lays down limit of one fifth of husband's net income — Conduct of wife is a factor to be considered — Court expenses to be granted should be reasonable — Orissa 12 (C N 7)

—Ss. 28, 3 (b), 19 and 21 — Order on petition under S. 19 — Appeal against, to single Judge of High Court — Further appeal under Cl. 10 Letters Patent is also maintainable and not barred by Act — Punj 25 A (C N 5)

HINDU SUCCESSION ACT (30 of 1956)

—S. 7 (3) — Death of Sthanamadar — Liability for income-tax under Kerala Agricultural Income-tax Act in respect of income of such Sthanamadar — Limitation of — See Kerala Agricultural Income-tax Act (17 of 1950), S. 24(2) — Ker 1 A (C N 1) (FB)

HOUSES AND RENTS

—BIHAR BUILDINGS (LEASE, RENT AND EVICTION) CONTROL ACT (3 of 1947)

—S. 11 (1) (d) — Maintainability of claim for eviction — Second appeal after remand before another Bench — Competency of the Bench to decide maintainability of the claim for eviction — See Civil P. C. (1908), S. 105 (2) — Pat 16 B (C N 5)

—S. 11 (1) (d) — Action for eviction under — Non-service of notice under S. 106, T. P. Act — Action is premature — Pat 16 C (C N 5)

—BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT (57 of 1947)

—Ss. 12 (1) and 12 (3) (b) — Suit by landlord against eviction of tenant — Tenant in arrears of rent — During pendency of suit tenant not paying standard rent, nor was he ready or willing to pay — Instead, he claimed that he was not liable to pay any amount — Tenant, held could not claim protection from eviction — SC 37 C (C N 12)

—S. 20 — Scope. — SC 37 B (C N 12)

HOUSES AND RENTS (contd.)

—DELHI RENT CONTROL ACT (59 of 1958)

—S. 14 — Orders of Additional Rent Controller refusing to record compromise in proceeding under the section — Not appealable order under O. 43, R. 1 (m) C. P. C. — See Civil P. C. (1908), O. 23, R. 3 — Delhi 7 (C N 4)

—S. 14 — Application for eviction for non-payment of rent — Maintainability — See T. P. Act (1882), S. 106 — Delhi 14 (C N 6)

—S. 15 (1) — See T. P. Act (1882), S. 106 — Delhi 14 (C N 6)

—S. 36 — Rent Controller under the Act has not been conferred with all the powers of a Civil Court under C. P. C. — He has been conferred with only those powers as enumerated in this section — Recording of a compromise in proceedings under S. 14 is not one of them — See Civil P. C. (1908), O. 23, R. 3 — Delhi 7 (C N 4)

—S. 37 — Though Rent Controller has not been conferred with all the power of a Civil Court under the Civil Procedure Code, he has to follow the practice and procedure of a Small Cause Court as prescribed in Civil Procedure Code — See Civil P. C. (1908), O. 23, R. 3 — Delhi 7 (C N 4)

—S. 38 — Practice and procedure — To be followed by the Rent Controller — See Civil P. C. (1908), O. 23, R. 3 — Delhi 7 (C N 4)

—DELHI RENT CONTROL RULES, 1958

—R. 23 — Rule does not make provisions of Civil Procedure Code to proceedings before Rent Controller — See Civil P. C. (1908), O. 23, R. 3 — Delhi 7 (C N 4)

—EAST PUNJAB URBAN RENT RESTRICTION ACT (3 of 1949)

—S. 13 (1) and (2) — T. P. Act (1882), S. 106 — Notice of eviction — Monthly tenancy in Punjab — Fifteen days' notice is necessary but it need not terminate with end of month of tenancy: AIR 1933 Lah 134, Dissent. from — Punj 26 (C N 6)

—WEST BENGAL PREMISES TENANCY ACT (12 of 1956)

—Ss. 17, 21 — Deposit of rent with Rent Controller, without previous tender is not valid payment — Tender by cheque when valid — T. P. Act (1882), S. 108 (1) — Cal 12 A (C N 4)

—S. 17 — 'Default' — Expression does not refer to any blameworthy conduct on the part of tenant — It merely refers to the fact of non-payment of rent for any particular period — Cal 12 C (C N 4)

—S. 17 (1) — Tender in cash is not by itself good payment unless followed by valid deposit before Rent Controller — See Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), S. 21 — Cal 12 B (C N 4)

—S. 21 — Deposit of rent with Rent Controller, without previous tender is not valid payment — Tender by cheque when valid — See Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), S. 17 — Cal 12 A (C N 4)

—Ss. 21, 22 and 17 (1) — Refusal of landlord to accept cheque — Protection under Act when available to tenant — Cal 12 B (C N 4)

—S. 22 — Refusal of landlord to accept cheque — Protection under Act when available to tenant — See Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), S. 21 — Cal 12 B (C N 4)

SUBJECT INDEX, A. I. R. 1969 JANUARY

IMPORTS AND EXPORTS (CONTROL) ACT (18 of 1947)

—S. 5 (before its amendment in 1960) — Breach of condition of licence — It is not tantamount to breach of statutory order within meaning of Section 5 — Section as it stood cannot be construed with aid of Amending Act (Act 4 of 1960)

SC 110 A (C N 24)

IMPORTS (CONTROL) ORDER (1955)

—Cl. 8 — Violation of terms of licence—Action by Government permissible — See Constitution of India, Art. 19 (1) (g)

Cal 18 C (C N 5)

—Cl. 10 — Violation of terms of licence — Action against by Government permissible — See Constitution of India, Art. 19 (1) (g)

Cal 18 C (C N 5)

INCOME TAX ACT (11 of 1922)

—S. 2 (2) — Dissolution of firm — Each partner at the time of dissolution liable to tax jointly and severally — See Income-tax Act (1922), S. 44

Cal 4 B (C N 2)

—Ss. 3 and 34 — Scope — Income-tax Officer can either assess income of association of persons or of individuals constituting it — Burden of proving that option was not consciously exercised is on Income-tax Officer

Andh Pra 3 (C N 2)

—S. 4 (3) (i) — Exemption under — Held that Hyderabad Stock Exchange Ltd. was entitled to exemption

Andh Pra 4 (C N 3)

—S. 16 (3) (a) (ii) — Minor — Admission to benefits of partnership — Income accruing to minor and interest earned by him as also interest on profits credited to minor are assessable in the total income of the guardian — When such income is neither direct nor indirect result of admission to benefits of partnership, then it is not assessable

Madh Pra 9 A (C N 4)

—S. 23 — Unregistered firm — Dissolution — Assessment of tax — Each ex-partner is an assessee — See Income-tax Act (1922), S. 30

Cal 4 D (C N 2)

—S. 23 (5) — Assessment of unregistered firms — Second proviso to S. 30 not applicable — See Income-tax Act (1922), S. 30, Proviso 2

Cal 4 A (C N 2)

—Ss. 26, 44 (Prior to amendment in 1958) — Constitution of firm, change in — Five persons A-1 to A-5 constituting firm doing transport business — A-1 to A-4 selling their share to B-1 to B-4 — On same day A-5 selling his share to B-1 to B-4 by separate deed — B-1 to B-4 continuing transport business for some time — In both transactions only assets transferred without any mention of liability — Held that the transfer was of business as a whole that the firm was only reconstituted and that there was only change in ownership of firm and no discontinuance of business — Assessment of firm for period when A-1 to A-5 were partners taken up after B-1 to B-4 had become partners — Held A-1 to A-5 were not liable to assessment under S. 44 as it stood prior to its amendment in 1958

Cal 4 E (C N 2)

—Ss. 30, Proviso 2, 23 (5) — Second proviso not applicable to assessment of unregistered firms — Where second proviso applies explained

Cal 4 A (C N 2)

—Ss. 30, 23 — Res judicata — Estoppel — Appeal — Unregistered firm — Dissolution — Assessment of tax — Each ex partner is an assessee — Decision, in appeal filed by one will not be binding as 'res judicata' or 'estoppel' on others

Cal 4 D (C N 2)

—Ss. 30 (1), 30 (2) — Income-tax Rules (1922), R. 21 — Appeal, right of — Right arises only after

INCOME-TAX ACT (contd.)

notice of demand is served — Sub-section (2) provides limitation — Dissolved unregistered firm — Demand notice served on each ex-partner — Each ex-partner gets right of appeal

Cal 4 C (C N 2)

—S. 34 — Scope — See Income-tax Act (1922), S. 3

Andh Pra 3 (C N 2)

—S. 34 — Notice to reopen assessment — Contents — It need not specify whether it is under Section 34 (1) (a) or (b)

Andh Pra 6 B (C N 4)

—S. 34 (1) (a), (b) — Scope and applicability — Income-tax Officer considering cash-credits, accepting them and allowing interest — Subsequent discovery that those cash-credits were false and were not genuine — Held provision of S. 34 (1) (a) could be invoked as it was non-disclosure fully or truly of all material facts necessary for assessment

Andh Pra 6 A (C N 4)

—Ss. 44, 2 (2) — Firm, dissolution of — Each partner at the time of dissolution liable to tax jointly and severally — Each partner becomes an assessee under S. 2 (2)

Cal 4 B (C N 2)

—S. 44 (Prior to amendment in 1958) — Constitution of firm, change in — Assessment of firm for period when former partners were there taken up after reconstitution of firm — Held former partners were not liable to assessment under S. 44 prior to amendment — See Income-tax Act (1922), S. 26

Cal 4 E (C N 2)

—S. 44 — A dissolved firm is liable to be assessed

Cal 4 F (C N 2)

—S. 66 (1) — Two firms having same partners and identical shares — If the businesses are separate they can be assessed as different units, (1946) 14 ITR 272 (Bom), Diss. from

Punj 8 (C N 3)

INCOME TAX RULES (1922)

—R. 21 — Appeal, right of — Arises only after notice of demand is served — See Income-tax Act (1922), S. 30 (1)

Cal 4 C (C N 2)

INDUSTRIAL DISPUTES ACT (14 of 1947)

—S. 2 (a) (i) — In relation to State or Central Government appropriate Government is Administrator — See Industrial Disputes Act (1947), S. 10

Goa 16 E (C N 3)

—Section 2 (k) — Dispute raised by Union — Mere fact that subsequently, the worker concerned requested reconsideration will not make the dispute any the less an industrial dispute

Mad 21 A (C N 6)

—S. 10 — Reference of Industrial dispute by Government which is not appropriate Government — Award is prima facie without jurisdiction even when no objection to its jurisdiction is taken — See Civil P. C. (1908), S. 9

Goa 16 B (C N 3)

—S. 10 — Decision of jurisdictional facts—Tribunal can decide whether dispute relates to major port and whether reference is by appropriate Government — Decision can be challenged by writ, AIR 1954 Bhopal 17, Dissented from — Civil P. C. (1908), S. 9 — Constitution of India, Arts. 226, 227

Goa 16 C (C N 3)

—S. 10 — Questions meant to be decided by Tribunal — High Court would not in petition under Art. 226 use its jurisdiction — See Constitution of India, Art. 226

Goa 16 D (C N 3)

—Ss. 10, 2 (a) (i) — Industrial dispute regarding major port Marmugao — Reference by appropriate Government — Reference by Administrator (Lt. Governor) is legal even if dispute does not relate to major port — In relation to State or Central Government appropriate Government is Adminis-

INDUSTRIAL DISPUTES ACT (contd.)

trator — Constitution of India, Arts. 364 (2) (a), 366 (10), 246 (4), 239 (1), 240 (1) (d) — Indian Ports Act (1908), S. 3 (8) — Goa, Daman and Diu (Laws) Regulation (1962), Cls. 3 (i), 5 (1), 6 (1) (b) — Industrial Disputes (Central) Rules (1957), R. 2 (f) — Government of Union Territories Act (1963), S. 46 (2) (3) — General Clauses Act (1897), Ss. 3 (8) (b), 3 (6) (c)

Goa 16 E (C N 3)
—Ss. 10 (1), 12 (5) — Order passed under S. 10 (1) read with S. 12 (5) — Power of Court to interfere — Mad 21 B (C N 6)

—Ss. 10 (1), 12 (5) — Refusal to make reference in the first instance — Subsequent order of reference — If competent

Mad 21 C (C N 6)
—S. 12 (5) — Order under — Power of Court to interfere — See Industrial Disputes Act (1947), S. 10 (1) — Mad 21 B (C N 6)

—S. 12 (5) — Reference of dispute once refused — Competency — See Industrial Disputes Act (1947), S. 10 (1)

Mad 21 C (C N 6)
—S. 15 — Jurisdiction cannot be conferred by acquiescence, where there is no initial jurisdiction — This is so even in regard to Tribunal — See Civil P. C. (1908), S. 9

Goa 16 B (C N 3)
—S. 25-FFF — Closure of undertaking — Closure cannot be limited or restricted only to financial, economic or other considerations of like nature — Essence of matter is factum of closure by whatever reasons motivated — Question regarding closure of undertaking not considered by Tribunal in a proper manner — Revision of Tribunal set aside by Supreme Court: Industrial Dispute Case No. 1 of 1967, D/- 5-12-1967, (Orissa), Reversed
SC 90 A (C N 22)

—S. 25-FFF — "On account of unavoidable circumstances" — Laying down of two pre-conditions in proviso to section is significant and must be given due effect — Held, closure of undertaking was not due to unavoidable circumstances beyond control of Management

SC 90 B (C N 22)

INDUSTRIAL DISPUTES (CENTRAL) RULES (1957)

—R. 2 (f) — Reference of industrial dispute by the Administrator (Lt. Governor) — Validity — See Industrial Disputes Act (1947), S. 10

Goa 16 E (C N 3)

INTERMEDIATE EDUCATION ACT (U. P. ACT 2 of 1921)

See under Education

INTERPRETATION OF STATUTES

—Bar of Jurisdiction of Civil Court — Cannot be spelled out by a process of implied reasoning — See Civil P. C. (1908), Preamble

J and K 9 B (C N 4) (FB)

—Codification of law — Object — See Hindu Adoptions and Maintenance Act (1956), Preamble

Andh Pra 15 A (C N 8)

JAIPUR EASEMENTS ACT (6 of 1943)

—S. 18 — Held that customary rights of privacy existed in Jaipur — See Easements Act (1882), S. 18, Illustration (b)

Raj 31 B (C N 8)

JAMMU AND KASHMIR CONSTITUTION ACT (14 of 1996)

—Ss. 5 and 38 — Jammu and Kashmir Essential Supplies (Temporary Powers) Ordinance, 2003 — Difference between Ordinance issued under S. 5 and one issued under S. 38 — Former has a force of law and no Court can challenge its leg-

J. & K. CONSTITUTION ACT (contd.)

lity — The latter, however, will be a law for 6 months — Essential Supplies (Temporary Powers) Ordinance, having been issued under S. 5 has force of law — Prosecution under it is not barred

J and K 5 (C N 2)

—S. 38 — Difference between Ordinance issued under S. 5 and one under S. 38 — Former has a force of law and no Court can challenge its legality — Latter however will be law for six months — See J and K Constitution Act (14 of 1996), S. 5

J and K 5 (C N 2)

JAMMU AND KASHMIR EVACUEES' (ADMINISTRATION OF PROPERTY) ACT (6 of 2006)

—S. 8 — Area of jurisdiction of Custodian General in revision — Same as appellate jurisdiction — See Jammu and Kashmir Evacuees' (Administration of Property) Act (6 of 2006), S. 30 (1) (b) (c)

J and K 1 A (C N 1) (FB)

—S. 14 — Revisional jurisdiction of Custodian General — Scope — See Jammu and Kashmir Evacuees' (Administration of Property) Act (6 of 2006), S. 30 (1) (b) (c)

J and K 1 A (C N 1) (FB)

—S. 25 — Revisional jurisdiction of Custodian general — Nature of — See Jammu and Kashmir Evacuees' (Administration of Property) Act (6 of 2006), S. 30 (1) (b) (c)

J and K 1 A (C N 1) (FB)

—S. 30 (c) — Word "the" occurring in Cl. (c) does not oust High Court's jurisdiction to hear appeal from Custodian-General's order

J and K 1 B (C N 1) (FB)

—Ss. 30 (1) (b) and (c), 8, 14 and 25 — Area of jurisdiction exercised by Custodian-General in revision — For all practical purposes same as appellate jurisdiction

J and K 1 A (C N 1) (FB)

JAMMU AND KASHMIR REPRESENTATION OF THE PEOPLE ACT (4 of 1957)

—S. 24 (d) — "Any services" — Meaning of — See Constitution of Jammu and Kashmir, S. 69

J and K 12 E (C N 5)

—S. 44 — "Holds an office of profit" — Meaning of — See Constitution of Jammu and Kashmir S. 69

J and K 12 A (C N 5)

—S. 44 — Objection to validity of nomination paper — Onus to prove disqualification on party raising the objection — See Constitution of Jammu and Kashmir, S. 69

J and K 12 B (C N 5)

—S. 44 — Contractual obligation to serve under Government on a future date — Is no disqualification for being a member of Legislature — See Constitution of Jammu and Kashmir, S. 69

J and K 12 C (C N 5)

—S. 44 — Subsequent disqualification cannot be taken into account for validity of nomination paper on date of scrutiny — See Constitution of Jammu and Kashmir, S. 69

J and K 12 D (C N 5)

—S. 44 — Improper rejection of nomination papers — Presumption — See Constitution of Jammu and Kashmir, S. 69

J and K 12 F (C N 5)

—S. 44 (4), Proviso — Nomination paper filed by a candidate — Father's name wrongly printed in electoral roll — Wrong mention held was an error which under the Proviso should be ignored

J and K 16 A (C N 6)

—S. 47 — "On the date fixed for scrutiny" — Meaning of — "Date" means the whole of day — See J and K State Constitution (1956), S. 51

J and K 16 D (C N 6)

J. & K. REPRESENTATION OF THE PEOPLE ACT (contd.)

—S. 47 — Subscription on oath — Essential qualification — Duty of candidate — See J and K State Constitution (1956), S. 51
J and K 16 E (C N 6)

—S. 89 — Trial of election petition — Documents not produced before Returning Officer can be produced and new grounds can be taken at the trial — Returning Officer decides only the validity or otherwise of the nomination paper in a summary manner
J and K 16 B (C N 6)

JAMMU AND KASHMIR STATE CONSTITUTION (1956)

—S. 51 — Jammu and Kashmir Representation of the People Act (4 of 1957), S. 47 — "On the date fixed for scrutiny" — Meaning of — "Date" means the whole of the day. AIR 1968 Mys 18 and AIR 1966 Madh Pra 255, Diss.

—S. 51 — Subscription of oath — Essential qualification — Duty of candidate — Rejection of a nomination paper for non-administering of oath not improper — (Jammu and Kashmir Representation of the People Act (4 of 1957), S. 47)
J and K 16 E (C N 6)

J AND K TENANCY ACT (2 of 1923)

See under Tenancy Laws.

KERALA AGRICULTURAL INCOME-TAX ACT (17 of 1950)

—S. 2 (m) — 'Person' — Meaning.
Ker 1 C (C N 1) (FB)

—S. 3 — Death of Sthanamdar — Liability for income-tax under the Act in respect of income derived by such Sthanamdar — See Kerala Agricultural Income-tax Act (17 of 1950), S. 24 (2)
Ker 1 A (C N 1) (FB)

—S. 17 — See Kerala Agricultural Income-tax Act (17 of 1950), S. 24 (2)
Ker 1 A (C N 1) (FB)

—S. 18 — See Kerala Agricultural Income-tax Act (17 of 1950), S. 24 (2)
Ker 1 A (C N 1) (FB)

—S. 23 — Income of persons on whom property has devolved after death of Sthanamdar — Liability for income-tax under the Act is limited to his legal representatives — See Kerala Agricultural Income-tax Act (17 of 1950), S. 24 (2)
Ker 1 A (C N 1) (FB)

—Ss. 24 (2), 23, 3, 17 and 18 — Income of persons on whom property has devolved after death of Sthanamdar — Hindu Succession Act (1956), S. 7
Ker 1 A (C N 1) (FB)

KERALA LAND REFORMS ACT 1963 (1 of 1964)

See under Tenancy Laws.

LAND ACQUISITION ACT (1 of 1894)

—S. 4 — Procedure for serving notice under Mysore Act 5 of 1945 — Not identical with procedure prescribed under Land Acquisition Act 1894 — See Municipalities — Mysore City of Bangalore Improvement Act (1945), S. 16 (2)
Mys 1 B (C N 1)

—S. 6 — Procedure for serving notice under Mysore Act 5 of 1945 — Not identical with one prescribed under Land Acquisition Act, 1894 — See Municipalities — Mysore City of Bangalore Improvement Act (1945), S. 16 (2)
Mys 1 B (C N 1)

—Ss. 9 (3), 18 — Failure to serve notice under — Effect — Award neither illegal nor void — Party entitled to seek reference to Civil Court
Andh Pra 10 (C N 6)

—S. 18 — Failure to serve notice under S. 9 (3) — Award neither illegal nor void — See Land

LAND ACQUISITION ACT. (contd.)

Acquisition Act (1 of 1894), S. 9 (3)

—S. 23 — Valuation of property acquired — See Portuguese Law No. 2030 D/- 22-6-1948, S. 14
Goa 1 A (C N 1)

—S. 23 — Potentialities of property can be taken into account while determining just compensation — See Portuguese Law No. 2030, D/- 22-6-1948, S. 10
Goa 1 B (C N 1)

LETTERS PATENT (PUNJ)

—Cl. 10 — Appeal to Single Judge against an order under S. 19 Hindu Marriage Act, 1955 — Further Letters Patent Appeal maintainable — See Hindu Marriage Act (1955), S. 28
Punj 25 A (C N 5)

—Cl. 10 — Finding of fact — Binding in letters patent appeal unless strong grounds are made out for interference
Punj 25 C (C N 5)

LIMITATION ACT (9 of 1908)

—S. 3 — Scope — Section 3 casts a duty on Court to dismiss any matter which is barred by limitation, even though no plea is taken by defendants with regard to limitation
Tripura 15 C (C N 5)

—S. 6 and Art. 126 — Setting aside of alienation of ancestral property — Suit by after-born son and his brother who was in existence but minor at the time of alienation — No fresh cause of action for after-born son — Benefit of Section 6 available to existing son is available to him also — (Hindu Law — Alienation by father — Setting aside of — Suit by afterborn son — Starting point for limitation)
Andh Pra 24 A (C N 13)

—S. 14 — Applicability — Suit for compensation against Bengal and Assam Railway Administration situated beyond Original Side jurisdiction of Calcutta High Court — Cause of action arising at Sealdah, a place on the border line of the territorial limits of jurisdiction of Calcutta High Court on Original Side — Plaintiff suing for relief wrongly in Calcutta High Court on Original Side — Proceeding commenced and prosecuted bona fide — Plaintiff held entitled to the benefit of the provision under Section 14
SC 23 B (C N 8)

—S. 28 — Redemption suit respecting mortgage in erstwhile Tehri Garhwal State — Right to file suit barred before the merger of State with Uttar Pradesh — Right not revived by application of Indian Limitation Act — Principles of Section 28 held applied, even when Tehri Garhwal Act did not contain similar provision — See Limitation Act (1908), Article 148
All 31 (C N 5)

—S. 144 — Applicability — Suit by trustee to set aside alienation of trust property by earlier trustee — Article would apply — See Limitation Act (1908), Article 134-B

—Arts. 49 and 120 — Wrongful seizure of goods — Suit against Government for compensation — Article 49 and not Article 120 applies
Tripura 1 (C N 1)

—Art. 120 — Suit for compensation against Government for wrongful seizure of goods — Article applies — See Limitation Act (1908), Article 49
Tripura 1 (C N 1)

—Art. 126 — Setting aside alienation of ancestral property — Suit by after-born son — Starting point — See Limitation Act (1908), Section 6
Andh Pra 24 A (C N 13)

—Art. 132 — Suit for decree for sale of mortgage property — Limitation when commences to run — See T. P. Act (1882), Section 68 (1) (d)
Mys 20 C (C N 6)

LIMITATION ACT (1908) (contd.)

—Arts. 134, 148 — Suit for redemption — A and B mortgaging joint property to 'C' — D, a creditor of B in execution of a decree against B putting the property for sale, purchasing it and paying off charge of C — D who purchased the entire property openly selling it to others who also to the knowledge of 'A', openly enjoying the property in full rights — Suit by A for redemption of his share is governed by Article 134 and not by Article 148

Mad 27 B (C N 7)

—Arts. 134-B and 144 — Hereditary trustee of temple property alienating it as his own — Removal of such trustee and appointment of another trustee by Endowment Department — Suit by such another trustee to set aside alienation — Article 134-B and not Article 144 is applicable — Even if Article 144 would apply starting point for adverse possession would be the date of removal of previous trustee

Andh Pra 13 A (C N 7)

—Arts. 142-144 — Trustee of temple property alienating it as his own — Suit by successor trustee to set aside alienation — Former trustee cannot claim adverse possession against temple — Alienation by him was breach of duty on his part to safeguard properties and interests of temple and he could not make claim hostile to the interests and title of the temple

Andh Pra 13 B (C N 7)

—Art. 144 — Suit for setting aside an alienation of temple property as his own by former trustee — Former trustee cannot claim adverse possession against temple — See Limitation Act (1908), Article 142

Andh Pra 13 B (C N 7)

—Art. 148, S. 28 — Mortgage in erstwhile Tehri Garhwal State payable in 8 years — Stipulation that for first four years mortgagors not to redeem — Time runs from expiry of four years and suit for redemption could be filed within 11 years from this date under Article 117 of Tehri Garhwal Limitation Act — Right to file suit barred before merger of State in State of Uttar Pradesh — Right not revived by application of Indian Limitation Act — Principles of Section 28 held applied, even when the Tehri Garhwal Act did not contain similar provision — Principle that mortgage will remain always a mortgage held had no application — T. P. Act (1882), Section 60

All 31 (C N 5)

—Art. 148 — Suit for redemption — Applicability of Article — See Limitation Act (1908), Article 134

Mad 27 B (C N 7)

—Art. 182 — Execution petition filed within three years of decree — Execution petition is step in aid of execution and saves limitation — See Civil P. C. (1908), Order 21, Rule 10

Manipur 1 B (C N 1)

—Art. 182 (2) — 'Where there has been an appeal' — Suit for possession decreed ex parte against all defendants on 17-8-1353 T. E. — On application by defendant N to set aside ex parte decree against him, suit decreed against N on contest and ex parte against other defendants on 22-1-1359 T. E. — Appeal against decree D/- 22-1-1359 T. E. — Time taken in prosecuting appeal against decree, D/- 22-1-1359, T. E. cannot be deducted in computing period of limitation for purpose of execution of ex parte decree D/- 17-8-1353 T. E.

Tripura 15 B (C N 5)

—Art. 182 (3) — 'Review of judgment' — Application to set aside ex parte decree under Order 9, Rule 13 of Civil P. C., 1908, is not one for review within Article 182 (3) and hence order thereon does not give fresh start of limitation —

LIMITATION ACT (1908) (contd.)

(Civil P. C. (1908), Order 9, Rule 13 and O. 47, Rule 1) Tripura 15 A (C N 5)

LIMITATION ACT (36 of 1963)

—S. 3 — See Limitation Act (9 of 1908), Section 3 Tripura 15 C (C N 5)

—S. 21 — Applicability — See Provincial Insolvency Act (1920), Section 28 (5)

Andh Pra 23 (C N 12)

—Art. 136 — See Limitation Act (9 of 1908), Article 182 (2) Tripura 15 B (C N 5)

MADHYA BHARAT SALES TAX ACT (30 of 1950)

See under Sales Tax.

MADHYA PRADESH MUNICIPALITIES ACT (37 of 1961)

See under Municipalities.

MADHYA PRADESH PUBLIC TRUSTS ACT (30 of 1951)

—S. 32 — Bar under — Principal office of trust outside State — Suit by Trust not barred under Section 32 for want of registration

Madh Pra 4 A (C N 2)

MADRAS ESTATES (ABOLITION AND CONVERSION INTO RYOTWARI) ACT (26 of 1948)

See under Tenancy Laws.

MADRAS MARUMAKKATHAYAM ACT (22 of 1933)

—S. 3 (a) (c) — See Travancore Nayar Act (2 of 1100 ME), Section 31 Ker 26 B (C N 8)

—S. 32 — See Travancore Nayar Act (2 of 1100 ME), Section 31 Ker 26 B (C N 8)

MAHOMMEDAN LAW

—Wakf — Applicability of doctrine of Cy pres — See Mussalman Wakf Validating Act (1913), Section 3 All 35 C (C N 6)

—Wakf — Change brought about in it by Mussalman Wakf Validating Act 1913 — See Mussalman Wakf Validating Act (1913), Section 1 All 35 B (C N 6)

MARUMAKKATHAYAM LAW

—Estate of Sthanamdar in Sthanam property prior to Hindu Succession Act — Nature of

Ker 1 B (C N 1) (FB)

—Tarwad — Representation — See Travancore Nayar Act (2 of 1100 ME), Section 31

Ker 26 B (C N 8)

MAXIM

—Actus Curiae neminem gravabit — Section 151, Civil P. C. is based on the principle of the maxim — See Civil P. C. (1908), Section 144 J & K 8 (C N 3)

MEDICAL COUNCIL ACT (102 of 1956)

—S. 19-A (as amended in 1964) — Draft regulation — Sanction by Central Government — Advisory value Pat 11 B (C N 4)

MINERAL CONCESSION RULES, 1960

—Ch. IV — Provisions of Rules are prospective — See Mines and Minerals (Regulation and Development) Act (1957), Section 4 (1), proviso Goa 6 B (C N 2)

MINES AND MINERALS (REGULATION AND DEVELOPMENT) ACT (67 of 1957)

—Ss. 4 (1), Proviso and 9 — Scope — Provisions of Section 4 (1) and rules are prospective while that of Section 9 are retrospective — Proviso to Section 4 (1) preserves and respects vested rights — Rights to extract china clay granted under Portuguese Government Decrees of 15 and 1906, respectively known as "P g. ..."

MINES & MINERALS (REGULATION & DEVELOPMENT) ACT (contd.)

sobre a lavra de pedreiras nas Provincias ultramarinas" and "Regulamento das minas" before 1-10-1968. when the Act was brought into force in Goa, Daman and Diu, held were vested rights and were not affected

Goa 6 B (C N 2)

—S. 9 — Provisions of the section are retrospective — See Mines and Minerals (Regulation and Development) Act (1957), Section 4 (1), proviso

Goa 6 B (C N 2)

MOTOR VEHICLES ACT (4 of 1939)

—Ss. 47 (3), 48 — Decision to increase number of permits and grant of same by R. T. A. in one and the same meeting — Two acts constitute two distinct and dissociated stages — Procedure not illegal — W. P. No. 1827 of 1963, D/- 3-3-1966 (All), Reversed

All 14 B (C N 3)

—S. 47 (3) — Extension of route amounting to new permit — Not permissible — See Motor Vehicles Act (1939), Section 57 (8)

Madh Pra 13 (C N 5)

—S. 48 — Tribunal remanding appeals, by two unsuccessful applicants, by common order — Joint writ petition against the order is maintainable — See Constitution of India, Article 226

All 14 A (C N 3)

—S. 48 — Fixation of number of permits to be granted and grant of permits in one and the same meeting — Procedure not illegal — See Motor Vehicles Act (1939), S. 47 (3)

All 14 B (C N 3)

—Ss. 57 (8) and 47 (3) — Extension of route — Grant of, amounting to new permit — Not permissible

Madh Pra 13 (C N 5)

—S. 110-F — Bar of Civil Court's jurisdiction — Change of forum brought in by the provision operates retrospectively — AIR 1964 MP 133, Diss — (Civil P. C. (1908), Preamble, Section 9)

Delhi 3 (C N 2)

MUNICIPALITIES**C. P. AND BERAR MUNICIPALITIES ACT (2 of 1922)**

—S. 66 (1) (e) — Expression "brought within the limits of the municipalities" — It means conveyed from another place and come to rest within municipal limits

Madh Pra 1 A (C N 1) (FB)

M. P. MUNICIPALITIES ACT (37 of 1961)

—S. 3 (18) — Notice to parties interested to be heard in support of review — See Municipalities

—M. P. Municipalities Act (37 of 1961), Section 332

Madh Pra 15 C (C N 6)

—S. 4 — Notice to parties interested to be heard in support of order under review — Notice to all citizens residing in Municipal area not necessary — See Municipalities — M. P. Municipalities Act (37 of 1961), Section 332

Madh Pra 15 C (C N 6)

—S. 5 — "Parties interested to appear and be heard" — Notice to all citizens residing in Municipal area not necessary — See Municipalities — M. P. Municipalities Act (37 of 1961), Section 332

Madh Pra 15 C (C N 6)

—S. 328 — Power of review — Scope — See Municipalities — M. P. Municipalities Act (37 of 1961), Section 332

Madh Pra 15 A (C N 6)

—S. 328 — Scope — Regular formal enquiry into allegations on which it is proposed to dissolve or supersede council, is not contemplated — Such enquiry is not also barred by section

Madh Pra 15 D (C N 6)

—Ss. 328 (1) and 328 (6) — Order of dissolution of council — Consequences mentioned in Section 328 (6) follow — See Municipalities —

MUNICIPALITIES — M. P. MUNICIPALITY ACT (contd.)

M. P. Municipalities Act (37 of 1961), Section 332

Madh Pra 15 B (C N 6)

—Ss. 332 and 328 — Power of review — Scope — Order dissolving municipal council — Order can be reviewed

Madh Pra 15 A (C N 6)

—Ss. 332, 328 (1) and 328 (6) — Power of review — Scope — Order of dissolution — Consequences mentioned in Section 328 (6) follow — Order restoring council can still be made in exercise of power of review

Madh Pra 15 B (C N 6)

—Ss. 332, 3 (18), 4 and 5 — Powers of review — Notice to parties interested to be heard in support of order under review — Notice to all citizens residing in Municipal area not necessary — Councillors found to be not interested in supporting order of dissolution — Order setting aside order of dissolution not vitiated for want of notice to them

Madh Pra 15 C (C N 6)

—S. 332 — Power of review — Scope — Government can review its order if it is not reasonable, proper or legal — Power is to be exercised sparingly and in extraordinary circumstances

Madh Pra 15 E (C N 6)

MYSORE CITY OF BANGALORE IMPROVEMENT ACT (5 of 1945)

—S. 16 (2) — Procedure under for serving notice — Not identical with procedure prescribed under Land Acquisition Act (1894) — No discrimination between persons governed by Section 16 (2) — Section 16 (2) is not unconstitutional — Constitution of India, Article 14

Mys 1 B (C N 1)

OCTROI IMPOSITION RULES FRAMED BY MUNICIPAL COUNCIL, PANDHURNA (1958)

—Item No. 87 (Class VIII) of Schedule — Expression "carriages and all sorts of conveyances" — Expression includes motor bus

Madh Pra 1 B (C N 1) (FB)

RAJASTHAN MUNICIPALITIES ACT (38 of 1959)

—Ss. 67 (d), 78 — Prevention of Food Adulteration Act (1954), Section 20 — Powers of Municipal Chairman under Section 67 (d) — Includes power to institute complaint for prosecution of accused under Section 20 of Food Adulteration Act — Specific delegation under Section 78 is not necessary — Appeal by Municipal Council on account of accused is valid

Raj 16 A (C N 4)

—S. 78 — Powers of Municipal Chairman under Section 67 (d) — Includes power to file complaint under Section 20 of Food Adulteration Act — Specific delegation under Section 78 not necessary — See Municipalities — Rajasthan Municipalities Act (38 of 1959), Section 67 (d)

Raj 16 A (C N 4)

U. P. TOWN AREAS ACT (2 of 1914)

—S. 14 (1) (f) — Validity — Circumstances and property tax comes within Sch. 7, List II, Items 49 and 60 of the Constitution — Provision is intra vires State Legislature — (Constitution of India, Article 246 and Sch. 7, List II, Item 49 and 60)

All 40 B (C N 7) (FB)

MUSSALMAN WAKF VALIDATING ACT (6 of 1913)

—Ss. 1 and 5 — Retrospective operation given by Act of 1930 — Effect — (Mussalman Wakf Validating Act (1930), Section 2)

All 35 A (C N 6)

MUSSALMAN WAKF VALIDATING ACT (contd.)

—Ss. 1, 3, 4 — Change brought about by Act in Muhammadan law as to wakf indicated

All 35 B (C N 6)

—S. 2 — Retrospective operation given to Mussalman Wakf Validating Act 1913 — Effect — See Mussalman Wakf Validating Act (1913), Section 1

All 35 A (C N 6)

—S. 3 — Change brought about by Act in Muhammadan Law of Wakf indicated — See Mussalman Wakf Validating Act (1913), Section 1

All 35 B (C N 6)

—Ss. 3 and 4 — Wakf for the maintenance of wakif and his family — Ultimate benefit reserved for religious or charitable purpose (upkeep of Madarsa) — Intermediate beneficiary outside class of persons contemplated by Section 3 (a) — Wakf is not thereby rendered invalid at its inception — Only effect is to cut out invalid disposition — Benefit of wakf is accelerated and goes to ultimate charitable purpose — Doctrine of Cy pres — Scope and applicability

All 35 C (C N 6)

—S. 4 — Muhammadan Law as to wakf — Change brought about in it by the Act of 1913 indicated — See Mussalman Wakf Validating Act (1913), Section 1

All 35 B (C N 6)

—S. 4 — Wakf for the maintenance of wakif and his family — Ultimate benefit reserved for religious or charitable purpose — Intermediate beneficiary outside class of persons contemplated by Section 3 (a) — Wakf is not rendered invalid at its inception — See Mussalman Wakf Validating Act (1913), Section 3

All 35 C (C N 6)

—S. 5 — Retrospective operation given by Act of 1930 — Effect — See Mussalman Wakf Validating Act (1913), Section 1

All 35 A (C N 6)

MYSORE CITY OF BANGALORE IMPROVEMENT ACT (5 of 1945)

See under Municipalities.

MYSORE ELEMENTARY EDUCATION ACT (6 of 1941)

See under Education.

MYSORE EXCISE ACT (5 of 1901)

—S. 29 — Rules regulating sale of excise privileges, Rule 23 — Levy of education cess on Beer shop rent, toddy shop rent, tree tax and tree rent — Such cess is neither leviable under Rule 23 nor under any notification — Mysore Elementary Education Act (6 of 1941), Section 9 and Schedule — Constitution of India, Article 265

Mys 23 C (C N 8)

MYSORE EXCISE ACT (21 of 1966)

—S. 24 — Excise Duty — Shop rent on Toddy shop, Arrack shop and Beer shop is not a duty of excise — Levy of Education cess is however valid since it is not confined to duties of excise only — Mysore Elementary Education Act (6 of 1941), Section 9 and Schedule (as amended in 1955) — (1966) 1 Mys LJ 554, Held, reversed in AIR 1967 SC 1512

Mys 23 F (C N 8)

—S. 24 — Shop rent under the Act is not a tax — See Constitution of India, Article 265

Mys 23 J (C N 8)

—S. 24 — Payment of education cess on Toddy shop, Arrack shop, Beer shop under the Act — Cess declared void — Parties are entitled to refund — See Contract Act (1872), Section 72

Mys 23 K (C N 8)

NATURAL JUSTICE

—Quasi judicial order — Rule of audi alteram partem violated — Case fit for interference under Article 227 of the Constitution — See Constitution of India, Article 227

Delhi 1 (C N 1)

NORTHERN INDIA CANAL AND DRAINAGE

ACT (8 of 1873)

—S. 30-B (3) — Revision under — Superintending Canal Officer acts judicially and his order is open to scrutiny under Articles 226, 227 of the Constitution — See Constitution of India, Article 226

Punjab 1 (C N 1)

OATHS ACT (10 of 1873)

—S. 4 — In order that affidavit should be valid evidence in proceeding under Section 145, Criminal P. C., it may be sworn in before any Magistrate who is otherwise competent to administer oath under Section 4 and receive evidence — See Criminal P. C. (1898), Section 145

Manipur 3 (C N 2)

OCTROI IMPOSITION RULES FRAMED BY MUNICIPAL COUNCIL PANDHURNA (1958)

See under Municipalities.

OPIUM ACT (1 of 1878)

—S. 9 (a) — See Penal Code (1860), Section 120-B

SC 4 A (C N 2)

—S. 3 (a) — See Criminal P. C. (1898), Section 251-A

SC 4 B (C N 2)

—S. 20-G — See Criminal P. C. (1898), Section 251-A

SC 4 B (C N 2)

ORISSA MINISTERIAL SERVICE RULES 1963

See under Civil Services.

ORISSA SALES TAX ACT (14 of 1947)

See under Sales Tax.

PANCHAYATS**—ANDHRA PRADESH GRAM PANCHAYAT ACT (2 of 1964)**

—S. 20 — Duly elected member — Does not cease to be a member merely because some one alleges that he has incurred a disqualification — See Constitution of India, Article 226

Andh Pra 22 (C N 11)

—S. 22 — Elected member — Writ alleging that he was subsequently disqualified from holding office under Section 20 — Proper remedy is to move under Section 22 — Writ of quo warranto is most inappropriate — See Constitution of India, Article 226

Andh Pra 22 (C N 11)

—U. P. PANCHAYAT RAJ ACT (26 of 1947)

—S. 12 (c) (as extended to Manipur) — Election of Sarpanch and Sahayak Sarpanch — Remedy to aggrieved party available under Rules — On facts and circumstances writ petition held maintainable — See Constitution of India, Article 226

Manipur 13 E (C N 6)

—S. 44 (as extended to Manipur) — U. P. Panchayat Raj Rules (1947), Rule 146 (1) — Word "shall" used in R. 146 (1), interpretation of "shall" is mandatory and in context of Section 44 of the Act it means "must" — Proviso to Section 44 lays down penal consequences if Sarpanch and Sahayak Sarpanch are not elected within prescribed period, in which case the prescribed authority "may" appoint Sarpanch or Sahayak Sarpanch — Hence, election of Sarpanch and Sahayak Sarpanch held beyond period of one month from date of appointment of Panchas is illegal and contrary to provisions of Section 44 and Rule 146 (1)

Manipur 13 A (C N 6)

—S. 44 — U. P. Panchayat Raj Rules (1947), Rule 146 (2) — Election of Sarpanch and Sahayak Sarpanch — Two Parties — Some Panchas of one party arrested by police just before commencement of meeting for election on false and flimsy grounds to prevent them from taking part in election and vote — It was found that

PANCHAYATS — U. P. PANCHAYAT RAJ ACT (contd.)

other panchas at whose instance they were arrested, played fraud and made election a simple farce and mockery — Held, it was nothing but an abuse of democracy and democratic set up of Nyaya Panchayat and the so-called election was a sham and a colourable one which must be set aside — Constitution of India, Article 226

Manipur 13 B (C N 6)

—S. 44 (as extended to Manipur) — U. P. Panchayat Rules (1947), Rule 146 (4) — Election of Sarpanch and Sahayak Sarpanch — Quorum — Total number of members 15 — Three members arrested just before commencement of meeting for election — Five members on rejection of their application to adjourn meeting due to illegal arrest, leaving meeting without signing list of voters present — Election conducted subsequently held contravened provisions of sub-rule (4) of Rule 146 as there were only 7 members while the quorum required for meeting was 'eight' the strength of Nyaya Panchayat being 15: Case law discussed

Manipur 13 C (C N 6)

—S. 44 (as extended to Manipur) — Election of Sarpanch and Sahayak Sarpanch — Remedy to aggrieved party available under Rules — On facts and circumstances writ petition held maintainable — See Constitution of India, Article 226

Manipur 13 E (C N 6)

—U. P. PANCHAYAT RAJ RULES (1947)

—R. 79 — Election of Sarpanch and Sahayak Sarpanch — Remedy to aggrieved party available under Rules — On facts and circumstances writ petition held maintainable — See Constitution of India, Article 226

Manipur 13 E (C N 6)

—R. 146 (1) — Word "shall" is mandatory and in context of Section 44 of the Act it means "must" — Proviso to Section 44 lays down penal consequences if Sarpanch and Sahayak Sarpanch are not elected within prescribed period, in which case the prescribed authority "may" appoint Sarpanch or Sahayak Sarpanch held, beyond period of one month from date of appointment of Panchas is illegal and contrary to provisions of Section 44 and Rule 146 (1) — See Panchayats — U. P. Panchayat Raj Act (26 of 1947) (as extended to Manipur), Section 44

Manipur 13 A (C N 6)

—R. 146 (1) — Writ petition — New point — Point regarding validity of election of Sarpanch and Sahayak Sarpanch after one month of appointment of Panchas of Nyaya Panchayat not raised in writ petition — Point raised in affidavit in rejoinder — Copies served on respondents advocates — Held, point raised in affidavit-in-rejoinder of which respondent had full notice could be urged — See Constitution of India, Article 226

Manipur 13 D (C N 6)

—R. 146 (2) — Election of Sarpanch and Sahayak Sarpanch — Two parties — Some Panchas of one party arrested by police just before commencement of meeting for election on false and flimsy grounds to prevent them from taking part in election and vote — It was found that other panchas at whose instance they were arrested, played fraud, made election a simple farce and mockery — Held, it was nothing but an abuse of democracy and democratic set up of Nyaya Panchayat and the so-called election was a sham and a colourable one which must be set aside — Constitution of India, Article 226 — See Panchayats — U. P. Panchayat Raj Act (26 of 1947) (as extended to Manipur), Section 44

Manipur 13 B (C N 6)

—R. 146 (4) — Election of Sarpanch and Sahayak Sarpanch — Quorum — Total number of mem-

PANCHAYATS — U. P. PANCHAYAT RAJ RULES (contd.)

bers 15 — Three members arrested just before commencement of meeting for election — Five members on rejection of their application to adjourn meeting due to illegal arrest, leaving meeting without signing list of Voters present — Election conducted subsequently held contravened provisions of sub-rule (4) of Rule 146 as there were only 7 members while the quorum required for meeting was 'eight' the strength of Nyaya Panchayat being 15 — See U. P. Panchayat Raj Act (26 of 1947) (as extended to Manipur), S. 44

Manipur 13 C (C N 6)

—R. 147 — Election of Sarpanch and Sahayak Sarpanch — Remedy to aggrieved party available under Rules — On facts and circumstances writ petition held maintainable — See Constitution of India, Article 226

Manipur 13 E (C N 6)

PARTNERSHIP ACT (9 of 1932)

—S. 13 — Capital contribution and advance, distinction between — Partner can withdraw capital by agreement with other partners — Withdrawal of capital contribution does not make it an advance merely because there is not compulsion in partnership deed to contribute towards capital — Withdrawal of capital does not mean want of obligation to contribute to capital

Madh Pra 9 B (C N 4)

PENAL CODE (45 of 1860)

—S. 29 — See Penal Code (1860), Section 420 SC 40 B (C N 13)

—S. 30 — See Penal Code (1860), Section 420 SC 40 B (C N 13)

—Ss. 34, 149 — Common object and common intention are different — However both deal with groups of persons who share one offence — Charge under S. 149 is no impediment — No conviction under S. 34

Cal 28 C (C N 6)

—S. 34 — Acquittal on charge under S. 302/34 I. P. C. — No bar to conviction under S. 304/34 I. P. C. by Appellate Court — See Criminal P. C. (1898), S. 423

Cal 28 D (C N 6)

—S. 34 — See Penal Code (1860), S. 395

Ker 29 B (C N 9)

—Section 84 and Chapter IV, General — Applicability—Conditions essential — Plea of insanity — State of mind before and after commission of act relevant — Held on evidence that defence of insanity was not made out

SC 15 A (C N 6)

—Ss. 96, 97 — Prosecution under Ss. 324/34, I. P. C. — Plea of total denial of the offence, taken up by accused in their statements — It is open for them to raise alternative plea of right of private defence, if the same can be proved on strength of prosecution evidence itself

Bom 20 B (C N 4)

—S. 97 — Right of private defence — Whether plea can be raised by accused who plead total denial of the offence — See Penal Code (1860), S. 96

Bom 20 B (C N 4)

—Ss. 97, 99, 425, 441 — Right of private defence of property — Offender asserting bona fide claim of his right — Offender, neither liable for mischief under S. 425, nor for criminal trespass under S. 441 — There is no right of private defence of property against such an offender

Bom 20 C (C N 4)

—S. 97 — Right of private defence — When extends to causing death explained — See Penal Code (1860), S. 100

Cal 28 A (C N 6)

—S. 99 — Right of private defence of property — Availability — See Penal Code (1860), S. 97

Bom 20 C (C N 4)

PENAL CODE (contd.)

—S. 99 — Right of private defence — Extent
— See Penal Code (1860), S. 100

Cal 28 A (C N 6)

—Ss. 100, 97, 99 — Private defence right of — Persons in possession of land have a right to defend the land from those who obstruct ploughing it — They have a right to defend themselves when they attempt to remove obstruction — When such right extends to causing death explained

Cal 28 A (C N 6)

—S. 114: Illus. (b) — Accomplice — Illustrative case — Accused No. 2 extorting moneys from villagers abusing his official status — Accused No. 1 a subordinate of A-2 aiding A-1 and being present at the time A-2 received moneys — A-1 held guilty under S. 5 (2) of Prevention of Corruption Act read with S. 114 of Penal Code — (Prevention of Corruption Act (1947), S. 5 (2))

SC 17 F (C N 7)

—Section 120-B — Opium Act (1878), Section 9 (a) — Prosecution of accused A, his two sons B and C and his nephew D under Section 120-B, I. P. C. and Section 9 (a) of the Act — Recovery of large quantity of opium from house of accused — Question whether accused persons were in conscious possession of opium recovered from their house — Plea of their living separately and that they were not present at time of recovery considered in detail and decided against accused — Chance of any outsider having thrown opium in court yard of house eliminated — Current findings of trial court and appellate court accepted by High Court in revision — There was no legal error or infirmity committed by any of the courts — Findings not interfered in appeal by special leave — Constitution of India, Article 136

SC 4 A (C N 2)

—Ss. 147, 149 — Unlawful assembly — Accused owning and possessing land wanting to plough it — Other party obstructing — Melee ensuing — Accused who had a right to defend their land and persons cannot be said to form unlawful assembly and S. 149 can have no application for any other offence committed by them

Cal 28 B (C N 6)

—S. 149 — Unlawful assembly — When can be said to have been formed — See Penal Code (1860), S. 147

Cal 28 B (C N 6)

—S. 149 — Charge under S. 149 is no bar to conviction under S. 34 — See Penal Code (1860), S. 34

Cal 28 C (C N 6)

—S. 161 — See Evidence Act (1872), S. 133

SC 17 A (C N 7)

—S. 161 — See Evidence Act (1872), S. 133

SC 17 B (C N 7)

—S. 161 — Ingredients of the offence — Motive of the particular kind mentioned in the section is necessary. Cri. Appeal No. 656 of 1963, D/- 14-12-1964 (Raj), Reversed

SC 17 C (C N 7)

—S. 161 — See Prevention of Corruption Act (2 of 1947), S. 5 (1) (a)

SC 17 D (C N 7)

—Sections 199 and 200 — Essential ingredients — For conviction under Section 199 false statement in a declaration must be proved to be touching any point material to object for which declaration is made — For conviction under Section 200 declaration should be used or attempted to be used corruptly — Appellant swearing affidavit giving date of birth of his minor son on basis of school record knowing that it was wrong — Giving of wrong date not touching any material point in appeal and appellant standing to gain no advantage therefrom — Declaration not shown to be used corruptly — Filing of complaint by court under Sections 199 and 200 against appellant is

PENAL CODE (contd.)

not justified. Cr. App. No. 4 of 1967, D/- 10-11-1967 (Pat), Reversed

SC 7 (C N 3)

—S. 200 — Essential ingredients — For conviction under S. 199 false statement is a declaration must be proved to be touching any point material to object for which declaration is made — For conviction under S. 200 declaration should be used or attempted to be used corruptly — Appellant swearing affidavit giving date of birth of his minor son on basis of school record knowing that it was wrong — Giving of wrong date not touching any material point to appeal and appellant standing to gain no advantage therefrom — Declaration not shown to be used corruptly — Filing of complaint by court under Ss. 199 and 200 against appellant is not justified — See Penal Code (1860), S. 199

SC 7 (C N 3)

—S. 228 — Scandalizing the Court — See Contempt of Courts Act (1952), S. 2

Cal 1 A (C N 1) (SB)

—S. 302 — Acquittal on charge under S. 302/34 I. P. C. — In appeal against conviction under other charges, Appellate Court cannot convict the accused under S. 302/34 — See Criminal P. C. (1898), S. 423

Cal 28 D (C N 6)

—S. 302 — Charge under — Grant of bail — Principles — See Criminal P. C. (1898), S. 498

Manipur 6 (C N 3)

—S. 304 — Earlier acquittal under S. 302/34 I. P. C. — Conviction under Sec. 304/34 I. P. C. by Appellate Court not hit by acquittal — See Criminal P. C. (1898), S. 423

Cal 28 D (C N 6)

—S. 304 — Charge under — Grant of bail — Principles — See Criminal P. C. (1898), S. 498

Manipur 6 (C N 3)

—S. 307 — Charge under — Grant of bail — Principles — See Criminal P. C. (1898), S. 498

Manipur 6 (C N 3)

—S. 379 — See Penal Code (1860), S. 395

Ker 29 B (C N 9)

—Ss. 395, 379, 34 — One group of persons detaining complainant carrying some Articles — Other group removing the articles — All can be charged with offence committed with common intention

Ker 29 B (C N 9)

—S. 409 — Conviction for criminal breach of trust — Subsequent prosecution for different sums during the period covered earlier — Subsequent trial not barred — See Criminal P. C. (1898), S. 403

Bom 1 A (C N 1)

—Ss. 420 and 22 — 'Property' does not necessarily mean a thing which must have a market value — Income-tax assessment order is a 'property'

SC 40 A (C N 13)

—Ss. 420, 29 and 30 — Valuable security — Income-tax assessment order is a valuable security

SC 40 B (C N 13)

—S. 425 — Offender not liable for mischief under the section — No right of private defence if propriety against such an offender — See Penal Code (1860), S. 97

Bom 20 C (C N 4)

—S. 441 — Offender not liable for trespass under — No right of private defence against such an offender — See Penal Code (1860), S. 97

Bom 20 C (C N 4)

—Chapter IV, General — Applicability — Conditions essential — Plea of insanity — State of mind before and after commission of act relevant — Held on evidence that defence of insanity was not made out — See Penal Code (1860), S. 84

SC 15 (C N 6)

PEPSU TENANCY AND LANDS ACT (3 of 1953)
See under Tenancy Laws

PORTUGUESE DECREE NO. 37758 D/- 22-2-1960

—S. 13 — Valuation of acquired property — Real value cannot be determined by taking into consideration its purpose as landed property — See Portuguese Law No. 2030 D/- 22-6-1948, S. 14
Goa 1 A (C N 1)

—S. 33 para unico — Valuation of property acquired — Reliance on S. 33 para unico is improper — See Portuguese Law No. 2030 D/- 22-6-1948, S. 14
Goa 1 A (C N 1)

PORTUGUESE GOVERNMENT DECREE OF 20-9-1906

—Regulamento das minas, Art. 3 — Expression "owner of the soil" — Meaning — Expression ought not to be narrowly construed — A lessee obtaining a lease of 2000 years is a qualified owner of the soil and his consent is effective.
Goa 6 F (C N 2)

PORTUGUESE GOVERNMENT DECREE OF 3-11-1905

—Regulamento sobre a lavra de pedreiras nas Províncias ultramarinas, Article 1 — China clay is covered by Article 1
Goa 6 G (C N 2)

PORTUGUESE LAW NO. 2030, D/- 22-6-1948

—S. 10 — Valuation of property — Just compensation — Value of property has to be determined in accordance with Section 10. See Portuguese Law No. 2030, D/- 22-6-1948, Section 14
Goa 1 A (C N 1)

—S. 10 — 'Just compensation' — Determination — Potentialities of property can be taken into account — Section 607 of Portuguese Civil Procedure Code does not apply
Goa 1 B (C N 1)

—S. 11 — Valuation of property acquired — Real value cannot be determined by taking into consideration its purpose as landed property — See Portuguese Law No. 2030, D/- 22-6-1948, Section 14
Goa 1 A (C N 1)

—Ss. 14, 10 and 11 and Portuguese Decree No. 37758, D/- 22-2-1950, Sections 13 and 33 para unico — Valuation of property — Just compensation — Acquired property not meant either for town planning or for opening routes of communication — Real value of the property has to be determined in accordance with Section 10 — Reliance on Section 33 para unico is improper — Real value cannot be determined by taking into consideration its purpose as landed property
Goa 1 A (C N 1)

PORTS ACT (15 of 1908)

—S. 3 (8) — Reference of industrial dispute regarding major port by (Lt. Governor) Administrator — Validity — See Industrial Disputes Act (1947), Section 10
Goa 16 E (C N 3)

PRECEDENTS

—A single Judge of a High Court is ordinarily bound to accept as correct judgments of courts of co-ordinate jurisdiction or Division Benches and Full Benches of his Court. Civ. Rev. Appln. No. 477 of 1960, D/- 12-2-1963 (Guj) Reversed
SC 69 B (C N 19)

PREVENTION OF CORRUPTION ACT (2 of 1947)

—S. 5 (1) and 5 (2) — See Evidence Act (1872), Section 133
SC 17 A (C N 7)

—S. 5 (1) and 5 (2) — See Evidence Act (1872), Section 133
SC 17 B (C N 7)

—S. 5 (1) (a) — Offence not falling under Section 161 of Penal Code cannot come within this provision — (Penal Code (1860), Section 161)
SC 17 D (C N 7)

PREVENTION OF FOOD ADULTERATION ACT (37 of 1954)

—Ss. 5 (1), 5 (1) (d) and 5 (2) — Ingredients — Acts complained of need not be in the discharge of official duties
SC 17 E (C N 7)

—S. 5 (2) — See Penal Code (1860), S. 114 Illus (b)
SC 17 F (C N 7)

—S. 7 — Person contravening Section 16 need not necessarily be a licensed vendor — See Prevention of Food Adulteration Act (1954), S. 16
Raj 16 B (C N 4)

—Ss. 10, 11, 16 — Negligence of Food Inspector to note what is written on milk container — Prosecution of accused on strength of his oral statement — Non-compliance with Section 11 — Conviction under Section 16 is illegal
Raj 16 C (C N 4)

—S. 11 — Non-compliance with Section 11 — Conviction under Section 16 is illegal — See Prevention of Food Adulteration Act (1954), S. 10
Raj 16 C (C N 4)

—Ss. 16, 7 — Person contravening Section 16 need not necessarily be a licensed vendor
Raj 16 B (C N 4)

—S. 16 — Non-compliance with Section 11 — Conviction under Section 16 is illegal — See Prevention of Food Adulteration Act (1954), Section 10
Raj 16 C (C N 4)

—S. 16 — Conviction under — Sale of adulterated food article must be proved
Raj 16 D (C N 4)

—S. 20 — Chairman of Municipal Committee — Has power to institute a complaint for prosecution of accused under the section — See Municipalities — Rajasthan Municipalities Act (38 of 1959), Section 67 (d)
Raj 16 A (C N 4)

PREVENTIVE DETENTION ACT (4 of 1950)

See under Public Safety

PROVINCIAL INSOLVENCY ACT (5 of 1920)

—S. 28 (5) — Insolvent's right to sue for contribution — Vests in Official Liquidator as not exempted under Section 60 (e) of Civil P. C. (1908) — Suit on such right by insolvent not maintainable
Andh Pra 23 (C N 12)

—S. 42 (1) (a) — Applicability — Insolvent, in petition for order of absolute discharge taking exception provided in Section 42 (1) (a) — Onus to prove exception is on him — Absence of objection to the averment in petition — Does not make Section 42 (1) (a) inapplicable — (Evidence Act (1872), Sections 101 to 104)
Pat 28 (C N 10)

PROVINCIAL SMALL CAUSE COURTS ACT (9 of 1887)

—S. 15 (1) — Suit for possession of immovable property — Excepted from the cognizance of a Small Cause Court — See Civil P. C. (1908), Order 23, Rule 3
Delhi 7 (C N 4)

—S. 17 (1) — Proceedings before Rent Controller — Practice and procedure to be followed — See Civil P. C. (1908), Order 23, Rule 3
Delhi 7 (C N 4)

—Sch. 2, Art. 14 — Suit for possession of immovable property or an interest therein — Not cognizable by Small Cause Courts — See Civil P. C. (1908), Order 23, Rule 3
Delhi 7 (C N 4)

PUBLIC SAFETY

—PREVENTIVE DETENTION ACT (4 of 1950)

—S. 3 — Detention orders served on person while in jail custody — For that reason alone orders are not invalid
Assam 14 A (C N 5)

—S. 3 — Grounds of detention must be specific and clear — Duties of detaining authority pointed out
Assam 14 D (C N 5)

PUBLIC SAFETY — PREVENTIVE DETENTION ACT (contd.)

—Ss. 3 (1)-(a) (ii), 7 (1) — Grounds in support of order in English language served on detenu running into fourteen typed pages and referred to his activities over thirteen years beside referring to large number of court proceedings concerning him and his associates — Mere oral explanation by the Authorities of such complicated order without supplying him translation in script and language which he understood — It amounts to denial of right of being communicated the grounds and of being afforded the opportunity of making representation against the order — Order made by District Magistrate, not having been followed up by service within five days, as provided by Section 7 (1), of communication to him of grounds must be deemed to have become invalid — Subsequent detention held to be unauthorised — Constitution of India, Articles 22 (5) and 226 SC 43 A (C N 14)

—S. 3 (1) (a) (ii) — See Preventive Detention Act (1950), Section 13 (2)

SC 43 B (C N 14)

—S. 7 (1) — See Public Safety — Preventive Detention Act (1950), Section 3 (1) (a) (ii)

SC 43 A (C N 14)

—S. 8 — Detention order — Consideration of case by Board different than one constituted at the time of service of detention order — Propriety — See Public Safety — Preventive Detention Act (1950), Section 9

Assam 14 B (C N 5)

—Ss. 9, 8 — At the time of service of detention order, only Board in existence as that constituted under Assam Government notification dated 15-2-1968 — This Board was functioning on 2-4-1968 when case was placed by State Government before Board — Case considered by different Board reconstituted under Assam Government notification dated 1-5-1968 — Held there could be no valid objection to latter Board considering the case pending before earlier Board — General Clauses Act (1897), Sections 17, 18, 21

Assam 14 B (C N 5)

—S. 11 (1) — Detention Order — Absence of confirming order of Government within 3 months from date of detention — Detention order must be struck down — See Constitution of India, Article 22 (4)

Assam 14 C (C N 5)

—Ss. 13 (2), 3 (1) (a) (ii) — Scope of S. 13 (2) — Expression "revocation" in Section 13 (2) is not capable of restricted interpretation — Order under Section 3 (1) (a) (ii) revoked — Fresh order under Section 13 (2) based not on fresh facts — Order is not justified under Section 13 (2) — (Civil P. C. (1908), Pre. — Interpretation of Statutes — Meaning of words) — (Words and Phrases — "Revocation")

SC 43 B (C N 14)

PUNJAB COURTS ACT (6 of 1918)

—S. 39 — Letters patent appeal under Cl. 10, against order in petition under Section 19, Hindu Marriage Act — Maintainable — See Hindu Marriage Act (1955), Section 28

Punj 25 A (C N 5)

PUNJAB GENERAL SALES TAX ACT (46 of 1948) (HARYANA AMENDMENT AND VALIDATION) ACT (PRESIDENT'S ACT NO. 14 of 1967)

See under Sales Tax.

PUNJAB REORGANISATION ACT (31 of 1966)

—Ss. 88, 89 — Section 88 deals with territorial extent while Section 89 deals with power of adap-

PUNJAB REORGANIZATION ACT (contd.)

tation — No provision in the Act forbids passing of laws retrospectively

Punj 12 B (C N 4)

—S. 89 — Deals with power of declaration — No provision in the Act forbids passing of laws retrospectively — See Punjab Reorganisation Act (31 of 1966), Section 88

Punj 12 B (C N 4)

RAILWAY ESTABLISHMENT CODE

—R. 157 — See Constitution of India, Art. 309, Proviso

SC 118 A (C N 25)

RAILWAYS ACT (9 of 1890)

—S. 3 (6) (Prior to its amendment in 1961) — See Railways Act (1890) (Prior to its amendments in 1961), S. 77

SC 23 A (C N 8)

—S. 72 (before its amendment in 1961) — See Constitution of India, Article 300

SC 23 C (C N 8)

—S. 72 — Damage to goods in transit — Damages — Absence to show the exact monetary loss suffered would not disentitle plaintiff to claim damages

Bom 7 C (C N 2)

—S. 74-A — Applicability — Conditions essential

Bom 7 A (C N 2)

—Ss. 74A and 74C — Negligence — Burden of proof — Railway obliged to place all material on record to decide whether Railway was negligent

Bom 7 B (C N 2)

—S. 74C — Negligence — Burden of proof — See Railways Act (1890), Section 74A

Bom 7 B (C N 2)

—Ss. 77, 140 and 3 (6) (Prior to its amendment in 1961) — Notice — Bengal and Assam Railway — Service on Chief Commercial Manager (Claims and Refunds), held sufficient — AIR 1962 Cal 42, Reversed

SC 23 A (C N 8)

—Ss. 78-B and 140 (as amended in 1961) — Service of notice of claims for refund on Refunds Officer is legal

Cal 39 (C N 8)

—S. 140 (Prior to its amendment in 1961) — See Railways Act (1890) (Prior to its amendments in 1961), S. 77

SC 23 A (C N 8)

—S. 140 (as amended in 1961) — Service of notice of claims for refund on Refunds Officer is legal — See Railways Act (1890) (as amended in 1961), Section 78B

Cal 39 (C N 8)

RAJASTHAN MUNICIPALITIES ACT (38 of 1959)

See under Municipalities.

RAJASTHAN STAMP LAW (ADAPTATION) ACT (7 of 1952)

See under Stamp Duty.

REGISTRATION ACT (16 of 1908)

—S. 18 (d) — Compromise — Registration — When necessary — See Registration Act (1908), S. 17 (1) (b)

Orissa 5 B (C N 3)

—S. 17 (1) (b) and (2) (v) — Compromise — Registration — Petition of compromise — No creation or extinction of right by itself — Registration unnecessary

Orissa 5 A (C N 3)

—Ss. 17 (1) (b), 18 (d) — Petition of compromise — Creation of rights in moveable property — Registration unnecessary

Orissa 5 B (C N 3)

—S. 17 (1) (b) — Property valued over Rs. 100 — Relinquishment can only be by a registered document

Orissa 10 B (C N 6)

REPRESENTATION OF THE PEOPLE ACT (43 of 1951)

—S. 7 — Disqualification — See Constitution of Jammu and Kashmir, Section 69

J and K 12 E (C N 5)

SALES TAX

—BENGAL FINANCE (SALES TAX) ACT (6 of 1941)

—S. 21 (1) — Reference under without court-fee stamp — Copy of order challenged not enclosed — Application entertained through oversight but rejected ex parte subsequently — Principles of natural justice as to right of audi alteram partem violated — See Constitution of India, Article 227 Delhi 1 (C N 1)

—CENTRAL SALES TAX ACT (74 of 1956)

—Pre. — Act is not ultra vires — (1967) 20 STC 150 (Mad), Held overruled by C. A. No. 763 of 1967, D/- 18-4-1968 (SC)

Punj 12 I (C N 4)

—S. 14 — See Sales Tax — Punjab General Sales Tax (Haryana Amendment and Validation) Act (President's Act No. 14 of 1967), Section 6

Punj 12 D (C N 4)

—S. 15 — See Sales Tax — Punjab General Sales Tax (Haryana Amendment and Validation) Act (President's Act No. 14 of 1967), Section 6

Punj 12 D (C N 4)

—S. 15 — Option to reopen cases which were struck down by Supreme Court decision in AIR 1967 SC 1616 — Option is not illegal — See Sales Tax — Punjab General Sales Tax Act (46 of 1948 as amended by Haryana Amendment and Validation Act 14 of 1967), S. 11AA

Punj 12 H (C N 4)

—M. B. SALES TAX ACT (30 of 1950)

—S. 17 — Civil P. C. (1908), S. 9 — Exclusion of jurisdiction of Civil Court — Case law summarised — Held on facts and circumstances of case that suit in question for declaration that provisions of law relating to assessment were ultra vires and for refund of tax illegally collected was not barred by Section 17 of M. B. Sales Tax Act (30 of 1950) — See Civil Procedure Code (5 of 1908), Section 9 SC 78 (C N 21)

—ORISSA SALES TAX ACT (14 of 1947)

—S. 12 (8) — Notice for showing cause against escaped assessment — Validity — Notice without disclosing any transactions from which the turnover is assumed to have escaped assessment is one purporting to make a roving enquiry and is invalid — Issue of such notice by Sales Tax Officer is in excess of his jurisdiction and violates principles of natural justice Orissa 1 (C N 1)

—PUNJAB GENERAL SALES TAX ACT (46 of 1948) (HARYANA AMENDMENT AND VALIDATION) ACT (PRESIDENT'S ACT NO. 14 of 1967)

—Formation of Punjab and Haryana States — Haryana State amending Punjab Act retrospectively — No discrimination or no violation of Art. 14 so far as Haryana State is concerned, as law in Haryana is uniform — See Constitution of India, Article 14 Punj 12 C (C N 4)

—S. 6 — Act amending Punjab General Sales Tax Act (46 of 1948), has retrospective effect in territory comprising Haryana State prior to its existence and is not ultra vires — Constitution of India, Article 246 — State can enact law retrospectively covering period prior to its coming into existence Punj 12 A (C N 4)

—S. 6 — Central Sales Tax Act (74 of 1956), Sections 14, 15 — Old Punjab State divided into Punjab, Haryana etc. — Haryana State amending Punjab General Sales Tax Act (46 of 1948) retrospectively — Amendment has the effect of taxing declared goods twice — If any person is taxed twice he can get a relief but it does not make the amending Act bad — It is only second levy that is bad (Obiter) Punj 12 D (C N 4)

(January) 1969 Indexes 3.

SALES TAX — PUNJAB GENERAL SALES TAX ACT (46 of 1948): (HARYANA AMENDMENT AND VALIDATION) ACT (contd.)

—S. 6 — Defect in Parent Act 46 of 1948 pointed out by Supreme Court is removed by Haryana Amendment and Validation Act, 14 of 1967 — It is impossible to make law that can cover all conceivable possibilities — If there is double levy the second levy is void but not the law Punj 12 F (C N 4)

—S. 11AA — Central Sales Tax Act (74 of 1956), S. 15 — Option given to assessee to reopen cases which were struck down by Supreme Court decision Punj 12 H (C N 4)

—Sch. D — Constitution of India, Arts. 301, 304 (a) — Cotton imported in Haryana taxed at stage of first sale — Cotton purchased in State taxed at stage of first purchase — There is no discrimination in the levy on imported cotton and cotton produced in State Punj 12 G (C N 4)

SAURASHTRA AGRICULTURAL DEBTORS RELIEF ACT (23 of 1954)

See under Debt Laws.

SHOPS AND ESTABLISHMENTS

—BOMBAY SHOPS AND ESTABLISHMENTS ACT (79 of 1948)

—Ss. 2 (4), 52 (e) read with S. 62 and R. 23 (1) of the Rules framed under Act — Words "Commercial Establishment" in S. 2 (4) — Interpretation of — Profession carried on by individual by his personal skill and intelligence — When can fall under S. 2 (4) — Test — Private dispensary of doctor is not commercial establishment — 8 Guj LR 395, Reversed SC 63 (C N 18)

—S. 52 (e) read with S. 62 and R. 23 (1) of the Rules framed under Act — Words "Commercial Establishment" in S. 2 (4) — Interpretation of — Profession carried on by individual by his personal skill and intelligence — When can fall under S. 2 (4) — Test — Private dispensary of doctor is not commercial establishment — See Shops and Establishments — Bombay Shops and Establishments Act (79 of 1948), S. 2 (4)

SC 63 (C N 18)

STAMP ACT (2 of 1899)

See under Stamp Duty.

STAMP DUTY

—RAJASTHAN STAMP LAW (ADAPTATION) ACT (7 of 1952)

—Art. 57 — Stamp Act (1899), S. 2 (5) (a) — In order to attract applicability of Art. 57, document itself must be mortgage deed or security bond — Promissory note and receipt though executed and given by way of security for performance of certain conditions that would not make either of these documents as security bond and could not be stamped as such

Raj 22 A (C N 5)

—STAMP ACT (2 of 1899)

—S. 2 (5) (a) — See Rajasthan Stamp Law (Adaptation) Act (7 of 1952), Art. 57

Raj 22 A (C N 5)

—Ss. 2 (6), 2 (12), 2 (14), 2 (10), Sch. 1, Article 23 — Instrument executed but conditions validating transfer of rights absent — Instrument not registered — However if instrument is fully dispositive in character it is chargeable to stamp duty. AIR 1936 Lah 449 (SB), Dissented

Mad 1 A (C N 1), (FB)

—Art. 35 — In order to hold that agreement to let may be stamped as lease, it is necessary

STAMP DUTY — STAMP ACT (contd.)

that such agreement should create actual demise
Raj 22 C (C N 5)
—Sch. I, Art. 23 — Instrument when charge-
able to stamp duty — See Stamp Act (1899), Sec-
tions 2 (6), 2 (12), 2 (14), 2 (10)
Mad 1 A (C N 1) (FB)

SPECIFIC RELIEF ACT (1 of 1877)

—S. 9 — Dispossession of tenant by landlord
— Remedies for tenant — See Tenancy Laws —
J. and K. Tenancy Act (2 of 1923) (as amended
by Act 12 of 1955), S. 85
J and K 9 A (C N 4) (FB)

SUCCESSION ACT (39 of 1925)

—S. 214 — Proof of representative title —
Absence of — Objection raised for the first time
at the hearing of second appeal — Held, decree
could not be set aside for want of succession
certificate and that plaintiff should be given op-
portunity to obtain succession certificate before
appeal could be disposed of Pat 24 (C N 7)

TENANCY LAWS**—ANDHRA TENANCY ACT (18 of 1956)**

—S. 13 — Provision of the section is man-
datory — See Constitution of India, Art. 227
Andh Pra 18 (C N 9)

—BIHAR LAND REFORMS ACT (30 of 1950)

—S. 14 — Applicability — Provisions do not
apply to rent decree charged upon a tenure
under S. 60 of Chhota Nagpur Tenancy Act —
Remedy of decree-holder is not under the provi-
sions of S. 14 Pat 1 (C N 1) (FB)

—CHHOTA NAGPUR TENANCY ACT (6 of 1908)

—S. 60 — Provisions of S. 14, Bihar Land Re-
forms Act 1950 do not apply to rent decree
charged upon a tenure under the section — See
Tenancy Laws — Bihar Land Reforms Act (30 of
1950), S. 14 Pat 1 (C N 1) (FB)

—J. AND K. TENANCY ACT (2 of 1923)

—S. 2 (5) (as amended by Act 12 of 1955) —
Dispossession of tenant by landlord — Tenant's
remedies — Civil suit maintainable — No alterna-
tive right to proceed in Revenue Court (Per
Majority) — See Tenancy Laws — J. and K.
Tenancy Act (2 of 1923) (as amended by Act
12 of 1955), S. 85 J and K 9 A (C N 4) (FB)

—S. 56 (1) (as amended by Act 12 of 1955)
— Dispossession of tenant by landlord — Re-
medies for tenant — See Tenancy Laws — J.
and K. Tenancy Act (2 of 1923) (as amended
by Act 12 of 1955), S. 85
J and K 9 A (C N 4) (FB)

—Ss. 85. 2 (5) and 56 (1) (as amended by Act
12 of 1955) — Dispossession of tenant by land-
lord — Remedies for tenant — Civil suit main-
tainable — No alternative right to proceed in
Revenue Court (Per majority) — (Civil P. C.
(1908), S. 9) — (Specific Relief Act (1877),
S. 9) J and K 9 A (C N 4) (FB)

—KERALA LAND REFORMS ACT, 1963 (1 of 1964)

—S. 2 (60), (8) — Varamdar as defined in
latter part of S. 2 (60) is entitled to apply for
fixation of fair rent under S. 31 — See Tenancy
Laws — Kerala Land Reforms Act, 1963 (1 of
1964), S. 31 Ker 11 (C N 4) (FB)
—S. 8 — Varamdar is a deemed tenant and
is included in definition of tenant — See Ten-
ancy Laws — Kerala Land Reforms Act 1963
(1 of 1964), S. 31 Ker 11 (C N 4) (FB)
—S. 10 (3) — Varamdar is a "deemed tenant"
— See Tenancy Laws — Kerala Land Reforms

**TENANCY LAWS — KERALA LAND REFORMS
ACT (contd.)**

Act, 1963 (1 of 1964), S. 31

Ker 11 (C N 4) (FB)
—S. 13 (1) — Benefit of section — Available
to all tenants including cultivating tenants —
See Tenancy Laws — Kerala Land Reforms Act
1963 (1 of 1964), S. 31 Ker 11 (C N 4) (FB)

—Ss. 31, 2 (60), 2 (8), 13 (1), 35, 8, 10 (3) —
"Varamdar" defined in latter part of S. 2 (60)
is entitled to apply for fixation of fair rent
under S. 31 — Varamdar is "a deemed tenant"
and is included in definition of "tenant" — He
has cultivating possession and is lessee — T. P.
Act (1882), S. 105 — Essentials of lease — Civil
P. C. (1908), Preamble — Interpretation of
Statutes — "Deeming" provisions in definition—
Inclusive definition, scope of

Ker 11 (C N 4) (FB)
—S. 35 — "Tenant" includes 'a deemed tenant'
— Varamdar is a deemed tenant — See Ten-
ancy Laws — Kerala Land Reforms Act 1963
(1 of 1964), S. 31 Ker 11 (C N 4) (FB)

**—MADRAS ESTATES (ABOLITION AND CON-
VERSION INTO RYOTWARI) ACT (26 of 1948)**

—S. 56 — Title to ryotwari land — Power of
Civil Court to decide, not taken away by the
Act much less by Section 56 — See Civil P. C.
(1908), S. 9 Mad 14 (C N 4)

**—PEPSU TENANCY AND AGRICULTURAL
LANDS ACT (3 of 1953)**

—S. 43 — Proceedings under — Nature
of — Proceedings are judicial — Collec-
tor required to pass orders not on subjective
satisfaction but on judicial determination of
facts SC 13 (C N 5)

**—U. P. GOVERNMENT ESTATES THEKEDARI
ABOLITION ACT (1958) (1 of 1959)**

—Act cannot be challenged on the ground
that it does not profess to pay what may be
called compensation at all, that the compen-
sation for the determined leases was nothing
but illusory and that the Act infringed Arti-
cle 31-A. The Act is completely protected by
Article 31-A from being affected by Arts. 14, 19
or 31 — Constitution of India, Arts. 31, 31-A,
14, 19 All 43 E (C N 8)

—S. 3 — Act applies not only to thekedaris
but also cultivating lessees on Government
Estate — Act intends to extend benefits of U.
P. Zamindari Abolition and Land Reforms Act
to cultivating lessees whose leases have been
abolished — State cannot single out leases in
any particular district, abolish them and not
extend benefit of Reforms Act — State cannot
use its discretion contrary to intention of Act
— Notification abolishing leases without apply-
ing Reforms Act, is an act of bad faith, ineffec-
tive and must be quashed — Constitution of
India, Art. 31 — Civil P. C. (1908), Preamble —
Interpretation of Statutes — Meaning of words
— Constitution of India, Article 226 — Use of
discretionary power by executive

All 43 B (C N 8)
—S. 3 — Abolition of leases on Government
Estate — Provisions are void under Article 31-A,
Second Proviso, of the Constitution inasmuch as
Act does not seek to provide compensation at
market rate — Applicability of Government
Grants Act (as amended in U. P.) Section 3 of
the Grants Act makes U. P. Imposition of Ceil-
ing on Land Holdings Act applicable — Provi-
sions are not severable — Thekedari Abolition
Act became void with effect from 20th June
1964, when Second Proviso to Art. 31-A came

TENANCY LAWS — U. P. GOVERNMENT ESTATES THEKEDARI ABOLITION ACT (contd.)

into force — Notification under Act abolishing leases is also void — Constitution of India, Article 31-A, Proviso 2 — Government Grants Act (1895) (as amended by U. P. Amendment Act 1960), S. 3 — Tenancy Laws — U. P. Imposition of Ceiling on Land Holdings Act (1960), S. 4 All 43 D (C N 8)

—U. P. IMPOSITION OF CEILING ON LAND HOLDINGS ACT 1960 (1 of 1961)

—S. 4 — Applicability — See Tenancy Laws
— U. P. Thekedari Abolition Act 1958 (1 of 1959), S. 3 All 43 D (C N 8)

—U. P. ZAMINDARI ABOLITION AND LAND REFORMS ACT (1 of 1951)

—S. 240-D — Scope — See Tenancy Laws —
U. P. Zamindari Abolition and Land Reforms
Act (1951), Ch. IX-A

All 26 A (C N 4) (FB)

—S. 240-G (as introduced by Act 20 of 1954)
— Words "person interested" means person in-
terested in receiving compensation

All 26 B (C N 4) (FB)

—S. 240-J (as introduced by Act 20 of 1954)
— Compensation statement sealed and signed
under Section 240-J is not conclusive as regards
status of a person as adhvasi — See Tenancy
Laws — U. P. Zamindari Abolition and Land
Reforms Act (1 of 1951), Ch. 9-A (as introduced
by Act 20 of 1954) All 26 A (C N 4) (FB)

—Ch. 9-A and Ss. 240-J and 240-D (as intro-
duced by Act 20 of 1954) — Scope — Compens-
ation statement sealed and signed under Sec-
tion 240-J is not conclusive as regards status of
a person as "Adhvasi" — Consolidation autho-
rities competent to go into question

All 26 A (C N 4) (FB)

TORT

—Damages — Military truck driver by his
negligent and rash driving killing a cyclist on
the road — Deceased 31 years old — His wife
27 years old — Deceased having two daughters
and four sons, all minors, youngest being about
six months old and the eldest 11 years old —
Deceased working in cutlery shop doing petro-
max lamp repairing, preparing tin boxes, fixing
glass panels to windows on salary of Rs. 150
P. M. — Besides this, deceased getting from em-
ployer Rs. 250 worth of clothes for him and his
family twice a year — No evidence that deceased
was in bad health at time of accident — Held
that the life expectancy of deceased could rea-
sonably be taken to be a further period of 30
years — Damages of Rs. 30,000 awarded by trial
court held were not excessive, taking into con-
sideration that the amount which was available
for the maintenance and education of the wife
and children from the earning of the deceased
was Rs. 125 per month or Rs. 1500 per year,
capitalising the same for a period of 20 years
and the fact that the pay of the deceased was
being increased from time to time and the fact
that the deceased died in a period of soaring
prices Bom 13 B (C N 3)

—Malicious prosecution — Proceedings under
Section 107, Criminal P. C. (1898) — Whether
'Prosecution' for maintainability of suit for
damages — Requisites

Andh Pra 29 A (C N 14)

—Malicious prosecution — Test whether a
proceeding under Criminal P. C. amounts to
prosecution — Explained

Andh Pra 29 B (C N 14)

TORT (contd.)

—Negligence — Fatal Accidents Act (1855),
S. 1-A — Tort — Negligence — Duties of doc-
tor towards his patient — See Fatal Accidents
Act (1855), S. 1-A SC 128 (C N 27)

—Negligence — Burden of proof — Collision
with motor-car — Suit for damages — Onus not
discharged by plaintiff — Suit held rightly dis-
missed Ker 9 B (C N 3)

—Vicarious liability — Tort by Government
servant — State is not liable if it is committed
in exercise of sovereign power — Sovereign
power, what is — Military driver driving motor
truck carrying Recod Sound Ranging Machine
from military workshop to military school of
Artillery — By rash and negligent driving a
cyclist killed on the road — Driver held was
not acting in exercise of sovereign power —
Union of India held liable — O. S. Suit No. 2706
of 1948 D/- 29-9-1952 (Bom). Overruled

Bom 13 A (C N 13)

TRADE AND MERCHANDISE MARKS ACT (45 of 1958)

—"International Convention for the protec-
tion of Industrial property" revised in Lisbon in
1958, Art. 6 — "Use" is use within India — See
Trade and Merchandise Marks Act (1958), Pre.
Cal 43 C (C N 9)

—Pre. — Trade Marks — Modes of acqui-
sition of proprietorship — See Trade and Mer-
chandise Marks Act (1958), S. 12

Bom 24 B (C N 5)

—Pre., Ss. 46, 1 (2), 2 (v) and "International
Convention for the protection of Industrial prop-
erty" revised in Lisbon in 1958, Art. 6—"Use"
is use within India Cal 43 C (C N 9)

—S. 1 (2) — 'Use' is use within India —
See Trade and Merchandise Marks Act (1958),
Pre. Cal 43 C (C N 9)

—S. 2 (v) — 'Use' is use within India —
See Trade and Merchandise Marks Act (1958),
Pre. Cal 43 C (C N 9)

—S. 11 (a) — 'Likely to deceive or cause
confusion' — Meaning of — Evidence — Ad-
missibility — Factors creating confusion — All
factors must be considered in combination —
Onus of proving that mark is not calculated to
deceive or cause confusion is on applicant

Bom 24 D (C N 5)

—Ss. 11 (e) and 18 (4) — Discretionary power
under — Scope — Prohibition under Section 11
(e) must be restricted to some illegality inherent
in mark itself Bom 24 E (C N 5)

—S. 12 and Pre. — Trade marks — Modes of
acquisition of proprietorship

Bom 24 B (C N 5)

—S. 12 (3) — Scope and applicability — See
Trade and Merchandise Marks Act (1958), Sec-
tion 46 (3) Cal 43 B (C N 9)

—S. 18 (4) — Discretionary power under —
Scope — See Trade and Merchandise Marks Act
(1958), S. 11 (e) Bom 24 E (C N 5)

—S. 18 (4) — Discretion to refuse registration
— It is for protecting interests of general public
Bom 24 F (C N 5)

—Ss. 18 (4), 109 — Discretionary power of
Dy. Registrar — Exercise of — When can be
interfered with Bom 24 G (C N 5)

—S. 28 — Burden of establishing proprietor-
ship of trade mark lies on the applicant — See
Evidence Act (1872), Ss. 101-104

Bom 24 C (C N 5)

—S. 46 — "Use" is use within India — See
Trade and Merchandise Marks Act (1958), Pre.
Cal 43 C (C N 9)

—S. 46 — Rectification — Question is not so
much between the applicant and the respon-

TRADE AND MERCHANDISE MARKS ACT (contd.)

dent as between the public and the respondent — Court or the Registrar therefore, has full discretion in granting or refusing the relief

Cal 43 E (C N 9)

—Ss. 46, 56 (3) and 109 (6) — High Court has as much power as the Registrar in proceedings under Section 46 to impose appropriate limitations, conditions and directions

Cal 43 F (C N 9)

—S. 46 (1) — "Person aggrieved" — Company 'A' being in the trade with a trade mark identical with the registered one of Company 'B' — 'B' threatening 'A' with legal consequences if the latter does not desist using the registered mark — 'A's application for registering the trade mark in its name being opposed by 'B' — 'A', held, a "person aggrieved" within the meaning of Section 46 (1) — 'A' could therefore seek to cancel the trade mark registered in the name of 'B'

Cal 43 A (C N 9)

—Ss. 46 (1) (e) and 46 (3) — Burden of proof

Cal 43 D (C N 9)

—Ss. 46 (3) and 12 (3) — Scope and applicability — "Special circumstances" meaning

Cal 43 B (C N 9)

—S. 56 (3) — Power of High Court to impose appropriate limitations, conditions and directions — Is the same as that of Registrar in proceedings under Section 46 — See Trade and Merchandise Marks Act (1958), S. 46

Cal 43 F (C N 9)

—S. 78 — Complaint for offence under against persons not traceable — Magistrate bound to cause an inquiry to be made before dismissing the complaint under Section 203, Cr. P. C. — Criminal P. C. (1898), S. 4 (1) (h)

Guj 14 B (C N 2)

—S. 79 — Complaint for an offence under, against persons unknown — Duty of Magistrate — See Criminal P. C. (1898), S. 4 (1) (h)

Guj 14 B (C N 2)

—S. 109 — Discretionary power of Dy. Registrar — Exercise of — When can be interfered with — See Trade and Merchandise Marks Act (1958), Section 18 (2)

Bom 24 G (C N 5)

—S. 109 (6) — Power of High Court to impose appropriate limitations, conditions and directions — See Trade and Merchandise Marks Act (1958), S. 46

Cal 43 F (C N 9)

TRANSFER OF PROPERTY ACT (1882)

—S. 6 — Power of attorney in favour of Bank to execute decree — Execution by Bank — Objections to maintainability of application by Bank and to jurisdiction of court — Objections entertainable at appellate stage having been based on legal grounds: AIR 1964 All 441, Reversed — Power of attorney, whether revocable — Nature of assignment — Power of Bank to execute — See Contract Act (1872), S. 202

SC 73 (C N 20)

—S. 60 — Joint usufructuary mortgage debt — Each mortgagor is liable for entire debt — There is no provision for splitting up the debt — See Debt Laws — Saurashtra Agricultural Debtors Relief Act (23 of 1954), S. 2 (5)

SC 69 A (C N 19)

—S. 60 — Suit for redemption of mortgage in erstwhile Tehri Garhwal State — Limitation — Starting and expiry of — See Limitation Act (1908), Art. 148

All 31 (C N 5)

—S. 67-A — Section incorporates no prohibition against institution of suit on one of mortgages in case where no objection to form of suit is taken on earlier occasion

Mys 20 A (C N 6)

T. P. ACT (contd.)

—S. 68 (1) (d) — Mortgagee's right to sue for mortgage-money — Right when acquired

Mys 20 B (C N 6)

—S. 68 (1) (d) — Limitation Act (1908), Article 132 — Suit for decree for sale of mortgage property — Limitation when commences to run

Mys 20 C (C N 6)

—Ss. 92, 95 — Mortgage by A and B of their joint property to C — B individually indebted to D on a pro-note — D obtaining decree against 'B', putting property to sale, purchasing the same and redeeming C's charge — D subrogated to rights of C — A is entitled to redeem his share by paying his dues on mortgage and expenses to D

Mad 27 A (C N 7)

—S. 95 — Mortgage of joint property by owners — Partial redemption — See T. P. Act (1882), S. 92

Mad 27 A (C N 7)

—S. 100 — Charge under Section 60, Chota Nagpur Tenancy Act — Applicability of S. 11 of Bihar Land Reforms Act, 1950, to it. See Tenancy Laws — Bihar Land Reforms Act (30 of 1950), S. 14

Pat 1 (C N 1) (FB)

—S. 105 — Essentials of lease — See Tenancy Laws — Kerala Land Reforms Act, 1963 (1 of 1964), S. 31

Ker 11 (C N 4) (FB)

—S. 105 — Tenancy at will — Lease of premises to Natya Parishad — Reservation of yearly rent — Lease expressed to be at will of lessee only, by providing that it shall continue to stage dramas as long as it liked — Held though tenancy was at the will of lessee it was equally a tenancy at will of the lessor, as it was tenancy at will — Reservation of yearly rent could make no difference

Raj 24 (C N 6)

—S. 106 — Nature of tenancy depends on how the tenancy agreement itself describes it — Intention of the tenant or even the actual user of the tenant after the taking out of the tenancy is not material

Cal 12 D (C N 4)

—Ss. 106, 111 (d) — Houses and Rents — Delhi Rent Control Act (59 of 1958), Ss. 14, 15 (1) — Application for eviction for non-payment of rent — Part of building rented out by A to B — B subletting part of it to C — C purchasing building including portion rented to B — By reason of purchase C not paying agreed rent to B — Held, transfer by A to C did not wipe out tenancy in favour of B and B continued to be landlord of C and C was liable to pay rent even after he had purchased the whole building

Delhi 14 (C N 6)

—S. 106 — Non-service of notice under the sections before action for eviction under Bihar Rent Control Act 1947 — Action not premature — See Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11 (1) (d)

Pat 16 C (C N 5)

—S. 106 — Notice of eviction — Monthly tenancy in Punjab — 15 days notice is necessary but it need not terminate with end of month of tenancy — See Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), S. 13

Punj 26 (C N 6)

—S. 108 (1) — Deposit of rent with Rent Controller, without previous tender is not valid payment — See Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), Section 17

Cal 12 A (C N 4)

—S. 111 (d) — Application under S. 14, Delhi Rent Act, for eviction of tenant for non-payment of rent — Maintainability by tenant against his sub-tenant, purchasing the whole building — See T. P. Act (1882), S. 106

Delhi 14 (C N 6)

—S. 122 — Gift of immovable property — Acceptance is essential — Acceptance must be

T. P. ACT (contd.)

before death of donor — Onus of proving acceptance — Evidence Act (1872), Ss. 101-104

Ker 21 A (C N 6)

—S. 130 — Power of attorney in favour of Bank to execute decree — Execution by Bank — Objections to maintainability of application by Bank and to jurisdiction of court — Objections entertainable at appellate stage having been based on legal grounds: AIR 1964 All 441, Reversed — Power of attorney, whether revocable — Nature of assignment — Power of Bank to execute — See Contract Act (1872), S. 202

SC 73 (C N 20)

TRAVANCORE NAYAR ACT (2 of 1100 ME)

—S. 31 — Section concerned with decrees binding on tarwad — It does not deal with capacity of person to represent tarwad — Section 31 does not affect Marumakkathayam Law — Section does not say who can obtain decree against a tarwad — If and when such decree would operate as res judicata (Obiter)

Ker 26 B (C N 8)

TRIPURA PUBLIC DEMANDS RECOVERY ACT (4 of 1326 T. E.)

—S. 20 — Scope — Auction-sale of land to realise arrears of land revenue — Even persons who were not parties to auction-proceedings are bound to file petition under S. 20 to get sale set aside and they can file petition under Section 20 (2) even after expiry of 30 days from date of sale if there are reasonable grounds for condoning delay

Tripura 15 D (C N 5)

TRUSTS ACT (2 of 1882)

—S. 1 — Cy pres Doctrine of — Applicability to wakf — See Mussalman Wakf Validation Act (1913), S. 3

All 35 C (C N 6)

U. P. GOVERNMENT ESTATES THEKEDARI ABOLITION ACT (1958) (1 of 1959)

See under Tenancy Laws.

U. P. IMPOSITION OF CEILING ON LAND HOLDINGS ACT 1960 (1 of 1961)

See under Tenancy Laws.

U. P. PANCHAYAT RAJ ACT (26 of 1947)

See under Panchayats.

U. P. PANCHAYAT RAJ RULES (1947)

See under Panchayats.

U. P. TOWN AREAS ACT (2 of 1914)

See under Municipalities.

U. P. ZAMINDARI ABOLITION AND LAND REFORMS ACT (1 of 1951)

See under Tenancy Laws.

WAKF ACT (29 of 1954)

—S. 5 (2) — What is final under Section 6 (4) is the "list of wakfs published under S. 5 (2)" — See Wakf Act (1954), S. 27

Raj 1 B (C N 1)

WAKF ACT (contd.)

—Ss. 6, 27 — Section 27 is comprehensive and is not to be read subject to S. 6

Raj 1 A (C N 1)

—S. 6 (4) — List of wakfs published — Wakf Board is not divested of its jurisdiction to enquire into disputed wakfs — See Wakf Act (1954), S. 27

Raj 1 B (C N 1)

—S. 27 — Section not to be read subject to S. 6 — See Wakf Act (1954), S. 6

Raj 1 A (C N 1)

—Ss. 27, 6 (4), 5 (2) — Inquiry under S. 27 — List of wakfs published — Lapse of one year without filing of any suit as required by S. 6 (1) — Wakf Board is not divested of its jurisdiction to enquire, into disputed wakfs

Raj 1 B (C N 1)

WEALTH-TAX ACT (27 of 1957)

—S. 3 — Levy of tax during successive years on same subject-matter is valid — Tax not chargeable on accretion to wealth since last valuation

SC 59 A (C N 17)

WEST BENGAL LAND DEVELOPMENT AND PLANNING ACT (21 of 1948)

—S. 8 (as amended by Act 23 of 1955) — Amendment is not made applicable retrospectively in Tripura

Tripura 7 B (C N 2)

—S. 8 — Market value of land as on 31-12-46 — Burden of proving correct value of land is on claimants

Tripura 7 C (C N 2)

—S. 8 (1) (b) — The Constitution (Fourth Amendment) Act (1955) — Decision in AIR 1954 SC 170 that date of 31-12-46 fixed by Section 8 (1) (b) for determining market value of land acquired for public purpose is no longer law in view of Constitution (Fourth Amendment) Act (1955) and the provision is constitutional.

Tripura 7 A (C N 2)

—S. 8 (1) (b) — Acquisition of land for construction of Industrial Training Centre — Fixation of market value of land for compensation — Evidence of sale transaction in respect of 'nal land' produced — Held, land acquired was 'table tilla' land and was as valuable as 'nal land', if not more and better fitted for building purposes — Fixation of compensation at half the rate at which 'nal land' was sold was, therefore, not proper and same should be fixed at the same rate at which 'nal land' was sold.

Tripura 7 D (C N 2)

WEST BENGAL PREMISES TENANCY ACT (12 of 1956)

See under Houses and Rents.

WORDS AND PHRASES

—"Any services" — See Constitution of Jammu and Kashmir, S. 69

J and K 12 E (C N 5)

—"Holds" — See Constitution of Jammu and Kashmir, S. 69

J and K 12 A (C N 5)

—"Revocation" — See Preventive Detention Act (1950), S. 13 (2)

SC 43 B (C N 14)

SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC IN A. I. R. 1969 JANUARY

DISS.=Dissented from in ; Not F.=Not Followed in ; OVER.=Overruled in ; REVERS=Reversed in.

BIHAR SUGAR FACTORIES CONTROL ACT (70 of 1937)

—S. 18 (2) — AIR 1959 Pat 398 — NOT F.

AIR 1969 Pat 8 A (C N 3).

—S. 18 (2) — AIR 1959 Pat 403 — NOT F.

AIR 1969 Pat 8 A (C N 3)

—S. 19 (2) — AIR 1959 Pat 398 — NOT F.

AIR 1969 Pat 8 A (C N 3).

BIHAR SUGAR FACTORIES CONTROL ACT

(contd.)

—S. 19 (2) — AIR 1959 Pat 403 — NOT F.

AIR 1969 Pat 8 A (C N 3).

BOMBAY GENERAL CLAUSES ACT (1 of 1904)

—S. 15 — AIR 1943 Sind 107 — DISS. AIR 1969 Guj 1 A (C N 1) (FB).

CIVIL PROCEDURE CODE (5 of 1908)

—S. 9 — ('65) First Appeals Nos. 68, 69, 71 and 70 of 1961, D/- 5-1-1965 (M. P.) — **REVERS.** AIR 1969 SC 78 (C N 21)

—S. 13 — AIR 1951 Bom 125 (FB) — **HELD IMPLIEDLY OVERRULED** by AIR 1962 SC 1737 as interpreted. AIR 1969 Guj 23 (C N 5).

—S. 13 — AIR 1951 Bom 190 — **HELD IMPLIEDLY OVERRULED** by AIR 1962 SC 1737 as interpreted. AIR 1969 Guj 23 (C N 5)

—S. 36 — AIR 1941 All 140 — **DISS.** AIR 1969 Guj 28 (C N 6).

—S. 36 — AIR 1945 Nag 134 — **DISS.** AIR 1969 Guj 28 (C N 6).

—S. 45 — AIR 1951 Bom 125 (FB) — **HELD IMPLIEDLY OVERRULED** by AIR 1962 SC 1737 as interpreted. AIR 1969 Guj 23 (C N 5).

—S. 45 — AIR 1951 Bom 190 — **HELD IMPLIEDLY OVERRULED** by AIR 1962 SC 1737 as interpreted. AIR 1969 Guj 23 (C N 5).

—S. 94 — AIR 1941 All 140 — **DISS.** AIR 1969 Guj 28 (C N 6).

—S. 94 — AIR 1945 Nag 134 — **DISS.** AIR 1969 Guj 28 (C N 6).

—S. 115 — (1958) 2 Mad LJ 93 — **DISS.** AIR 1969 Orissa 10 A (C N 6).

—S. 144 — AIR 1954 All 119 — **DISS.** AIR 1969 Ker 31 (C N 10).

—S. 144 — 1966 Ker LJ 844 — **OVER.** AIR 1969 Ker 31 (C N 10).

—O. 21, R. 1 (2) — AIR 1939 Nag 191 — **DISS.** AIR 1969 Ker 8 (C N 2).

—O. 21, R. 32 — AIR 1941 All 140 — **DISS.** AIR 1969 Guj 28 (C N 6).

—O. 21, R. 32 — AIR 1945 Nag 134 — **DISS.** AIR 1969 Guj 28 (C N 6).

—O. 33, R. 2 — (1958) 2 Mad LJ 93 — **DISS.** AIR 1969 Orissa 10 A (C N 6).

—O. 39, R. 1 — AIR 1941 All 140 — **DISS.** AIR 1969 Guj 28 (C N 6).

—O. 39, R. 1 — AIR 1945 Nag 134 — **DISS.** AIR 1969 Guj 28 (C N 6).

—O. 39, R. 2 (3) — AIR 1941 All 140 — **DISS.** AIR 1969 Guj 28 (C N 6).

—O. 39, R. 2 (3) — AIR 1945 Nag 134 — **DISS.** AIR 1969 Guj 28 (C N 6).

COMPANIES ACT (1 of 1956)

—S. 17 (3) and (4) — AIR 1957 Orissa 232 — **DISS.** AIR 1969 Cal 32 (C N 7).

—S. 17 (3) and (4) — ('57) A. H. O. No. 1 of 1957 (Orissa) — **DISS.** AIR 1969 Cal 32 (C N 7)

—S. 17 (3) and (4) — AIR 1961 Orissa 62 — **DISS.** AIR 1969 Cal 32 (C N 7).

CONSTITUTION OF INDIA

—Art. 226 — ('66) W. P. No. 1827 of 1963, D/- 3-3-1966 (All). — **REVERS.** AIR 1969 All 14 A (C N 3).

—Art. 227, Proviso — ('67) Civil Revn. Appln. No. 1116 of 1963, D/- 23-8-1967 (Guj) — **OVER.** AIR 1969 Guj 18 A (C N 3).

—Art. 309, Proviso — AIR 1963 Mys 265 — **OVER.** AIR 1969 SC 118 A (C N 25).

—Art. 309, Proviso — AIR 1965 Mys 25 — **OVER.** AIR 1969 SC 118 A (C N 25).

—Art. 372 — ('67) Civil Revn. Appln. No. 1116 of 1963, D/- 23-8-1967 (Guj) — **OVER.** AIR 1969 Guj 18 A (C N 3).

—Sch. 7, List I, Item 82 — 1955 All LJ 630 — **OVER.** AIR 1969 All 14 A (C N 7) (FB).

—Sch. 7, List I, Item 82 — AIR 1957 All 433 — **OVER.** AIR 1969 All 40 A (C N 7) (FB).

—Sch. 7, List I, Item 82 — 1961 All LJ 743 — **OVER.** AIR 1969 All 40 A (C N 7) (FB).

CONTEMPT OF COURTS ACT (32 of 1952)

—S. 1 — ('65) Cri. Misc. Contempt Case No. 7 of 1965, D/- 3-8-1965 (All) — **REVERS.** AIR 1969 SC 30 (C N 10).

CONTRACT ACT (9 of 1872)

—S. 56 — ('62) Appeal No. 367 of 1958, D/- 16-3-1962 (Mad) — **REVERS.** AIR 1969 SC 110 B (C N 24).

—S. 202 — AIR 1964 All 441 — **REVERS.** AIR 1969 SC 73 (C N 20).

CRIMINAL PROCEDURE CODE (5 of 1898)

—S. 145 — AIR 1963 All 256 — **DISS.** AIR 1969 Manipur 3 (C N 2).

—S. 145 — AIR 1966 Raj 5 — **DISS.** AIR 1969 Manipur 3 (C N 2).

—S. 222 — AIR 1917 Mad 524 — **DISS.** AIR 1969 Bom 1 A (C N 1).

—S. 234 — AIR 1917 Mad 524 — **DISS.** AIR 1969 Bom 1 A (C N 1).

—S. 251-A — AIR 1963 Madh Pra 337 — **OVER.** AIR 1969 SC 4 B (C N 2).

—S. 252 — AIR 1963 Madh Pra 337 — **OVER.** AIR 1969 SC 4 B (C N 2).

—S. 367 — ('65) Cri Appeal No. 545 of 1962, D/- 9-2-1965 (Pat) — **REVERS.** AIR 1969 SC 53 (C N 16).

—S. 403 — AIR 1917 Mad 524 — **DISS.** AIR 1969 Bom 1 A (C N 1).

—S. 510-A — AIR 1963 All 256 — **DISS.** AIR 1969 Manipur 3 (C N 2).

—S. 510-A — AIR 1966 Raj 5 — **DISS.** AIR 1969 Manipur 3 (C N 2).

—S. 539 — AIR 1963 All 256 — **DISS.** AIR 1969 Manipur 3 (C N 2).

—S. 539 — AIR 1966 Raj 5 — **DISS.** AIR 1969 Manipur 3 (C N 2).

—Ss. 539-A, 539-AA — AIR 1963 All 256 — **DISS.** AIR 1969 Manipur 3 (C N 2).

—Ss. 539-A, 539-AA — AIR 1966 Raj 5 — **DISS.** AIR 1969 Manipur 3 (C N 2).

—S. 561-A — AIR 1917 Mad 524 — **DISS.** AIR 1969 Bom 1 A (C N 1).

DEBT LAWS**—SAURASHTRA AGRICULTURAL DEBTORS RELIEF ACT (23 of 1954)**

—S. 2 (5) (6) (i) — ('63) C. R. Appln. No. 477 of 1960, D/- 12-2-1963 (Guj) — **REVERS.** AIR 1969 SC 69 A (C N 19).

—S. 7 — ('63) C. R. Appln. No. 477 of 1960, D/- 12-2-1963 (Guj) — **REVERS.** AIR 1969 SC 69 A (C N 19).

DISPLACED PERSONS (COMPENSATION AND REHABILITATION) ACT (44 of 1954)

—S. 16 (1) — ('66) Civil Writ No. 2417 of 1965, D/- 9-8-1966 (Punj) — **REVERS.** AIR 1969 Punj 4 (C N 2).

EASEMENTS ACT (5 of 1882)

—S. 2 (b) — AIR 1929 All 676 — **DISS.** AIR 1969 Raj 31 B (C N 8).

—S. 2 (b) — AIR 1963 All 340 — **DISS.** AIR 1969 Raj 31 B (C N 8).

—S. 18, Illu. (b) — AIR 1929 All 676 — **DISS.** AIR 1969 Raj 31 B (C N 8).

—S. 18, Illu. (b) — AIR 1963 All 340 — **DISS.** AIR 1969 Raj 31 B (C N 8).

EAST PUNJAB FACTORIES (CONTROL OF DISMANTLING) ACT (20 of 1948)

—S. 3 — ('61) L. P. A. No 405 of 1958, D/- 3-10-1961 (Punj) — **REVERS.** AIR 1969 SC 27 (C N 9).

HOUSES AND RENTS**—EAST PUNJAB URBAN RENT RESTRICTION ACT (3 of 1949)**

—S. 13 (1) and (2) — AIR 1933 Lah 134 — **DISS.** AIR 1969 Punj 26 (C N 6).

INCOME-TAX ACT (11 of 1922)

—S. 66 (1) — (1946) 14 ITR 272 (Bom) — **DISS.** AIR 1969 Punj 8 (C N 3).

INDUSTRIAL DISPUTES ACT (14 of 1947)

—S. 10 — AIR 1954 Bhopal 17 — DISS. AIR 1969 Goa 16 C (C N 3).
 —S. 25-FFF — ('67) Industrial Disputes Case No. 1 of 1967, D/-5-12-1967 (Spl. Ind. Tribunal Orissa) — REVERS. AIR 1969 SC 90 (C N 22).
JAMMU AND KASHMIR STATE CONSTITUTION (1956).

—S. 51 — AIR 1966 Madh Pra 18 — DISS. AIR 1969 J and K 16 D (C N 6).

—S. 51 — AIR 1968 Mys 18 — DISS. AIR 1969 J and K 16 D (C N 6).

MOTOR VEHICLES ACT (4 of 1939)

—S. 47 (3) — ('66) W. P. No. 1827 of 1963, D/-3-3-1966 (All) — REVERS. AIR 1969 All 14 B (C N 3).

—S. 48 — ('66) W. P. No. 1827 of 1963, D/-3-3-1966 (All) — REVERS. AIR 1968 All 14 B (C N 3).

—S. 110-F — AIR 1964 MP 133 — DISS. AIR 1969 Delhi 3 (C N 2).

MYSORE EXCISE ACT (21 of 1966)

—S. 24 — (1966) 1 Mys LJ 554 — HELD REVERS in AIR 1967 SC 1512 as interpreted AIR 1969 SC 23 F (C N 8).

PENAL CODE (45 of 1860)

—S. 161 — ('64) Cri. Appeal No. 656 of 1963, D/-14-12-1964 (Delhi) — REVERS. AIR 1969 SC 17 C (C N 7).

—S. 199 — ('67) Cri App. No. 4 of 1967, D/- 10-11-1967 (Pat) — REVERS. AIR 1969 SC 7 (C N 3).

—S. 200 — ('67) Cri. App. No. 4 of 1967, D/-10-11-1967 (Pat) — REVERS. AIR 1969 SC 7 (C N 3).

PRECEDENTS

—('63) C. R. Appln. No. 477 of 1960, D/-12-2-1963 (Guj) — REVERS. AIR 1969 SC 69 B (C N 19).

RAILWAYS ACT (9 of 1890)

—S. 3 (6) (prior to its amendment in 1961) —

RAILWAYS ACT (contd.)

AIR 1962 Cal 42 — REVERS. AIR 1969 SC 23 A (C N 8).

—S. 77 (prior to its amendment in 1961) — AIR 1962 Cal 42 — REVERS. AIR 1969 SC 23 A (C N 8).

—S. 140 (prior to its amendment in 1961) — AIR 1962 Cal 42 — REVERS. AIR 1969 SC 23 A (C N 8).

SALES TAX

—CENTRAL SALES TAX ACT (74 of 1956)

—Pre. — (1967) 20 STC 150 — HELD OVERRULED by C. A. No. 763 of 1967, D/-18-4-1968 (SC) as interpreted AIR 1969 Punj 12 I (C N 4).

SHOPS AND ESTABLISHMENTS

—BOMBAY SHOPS AND ESTABLISHMENTS ACT (79 of 1948)

—S. 2 (4) — 8 Guj LR 395 — REVERS. AIR 1969 SC 63 (C N 18).

—S. 52 (c) — 8 Guj LR 395 — REVERS. AIR 1969 SC 63 (C N 18).

—S. 62 — 8 Guj LR 395 — REVERS. AIR 1969 SC 63 (C N 18).

—Rules under R. 23 (1) — 8 Guj LR 395 — REVERS. AIR 1969 SC 63 (C N 18).

STAMP DUTY

—STAMP ACT (2 of 1899)

—S. 2 (14), (10), (6), (12) — AIR 1936 Lah 449 (SB) — DISS. AIR 1969 Mad 1 A (C N 1) (FB).

—Sch. 1, Art. 12 — AIR 1936 Lah 449 (SB) — DISS. AIR 1969 Mad 1 A (C N 1) (FB).

TORT

—Vicarious liability — ('52) O. S. Suit No. 2704 of 1948, D/- 29-9-1952 (Bom) — OVER. AIR 1969 Bom 13 A (C N 3).

COURTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC. IN A. I. R. 1969 JANUARY

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in; REVERS.=Reversed in.

ALLAHABAD

('29) AIR 1929 All 676: 1929 All LJ 1028: 119 IC 833: ILR 51 All 986, Bhagwan Das v. Zamurad Husain — DISS. AIR 1969 Raj 31 B (C N 8).

('41) AIR 1941 All 140: ILR (1941) All 295, Janak Nandini v. Kedar Narain — DISS. AIR 1969 Guj 28 (C N 6).

('54) AIR 1954 All 119: 1963 All LJ 549, Wasik Ali Khan v. Nand Kishore — DISS. AIR 1969 Ker 31 (C N 10).

('55) 1955 All LJ 630: 1955 All WR (HC) 520, Tata Oil Mills Co. Ltd. v. Dist. Board of Allahabad — OVER. AIR 1969 All 40 A (C N) (FB).

('57) AIR 1957 All 433, Western U. P. Electric Power and Supply Co., Ltd., Etawah v. Town Area Jaswant Nagar — OVER. AIR 1969 All 40 A (C N 7) (FB).

('61) (1961) All LJ 743: 1961 All WR (HC) 430, Ragubir Singh v. Town Area Committee — OVER. AIR 1969 All 40 A (C N 7) (FB).

('63) AIR 1963 All 256: 1963 (1) Cri LJ 722, Wahid v. State — DISS. AIR 1969 Manipur 3 (C N 2).

('63) AIR 1963 All 340, Basai v. Hasan Raza Khan — DISS. AIR 1969 Raj 31 B (C N 8).

('64) AIR 1964 All 441, Loon Karan Sethiya v.

ALLAHABAD (contd.)

Ivan E. John — REVERS. AIR 1969 SC 73 (C N 20).

('65) Cri. Mic. Contempt Case No. 7 of 1965, D/-3-8-1965 (All) — REVERS. AIR 1969 SC 30 (C N 10).

('66) W. P. No. 1827 of 1963, D/-3-3-1966 (All) — REVERS. AIR 1969 All 14 A, B (C N 3).

BHOPAL

('54) AIR 1954 Bhopal 17, Hamidia Match Manufacturing Co. Ltd. Bhopal v. State of Bhopal — DISS. AIR 1969 Goa 16 C (C N 3).

BOMBAY

(1946) 14 ITR 272 (Bom), Vissonji Sons and Co. v. Commr. of I. T. Central — DISS. AIR 1969 Punj 8 (C N 3).

('51) AIR 1951 Bom 125: 53 Bom LR 398 (FB), Bhagwan Shankar v. Rajaram Bapu Vithal — HELD IMPLIEDLY OVERRULED by AIR 1962 SC 1737 as interpreted AIR 1969 Guj 23 (C N 5).

('51) AIR 1951 Bom 190: ILR (1950) Bom 640, Chunnilal Kastarchand v. Dundappa Damappa — HELD IMPLIEDLY OVERRULED by AIR 1962 SC 1737 as interpreted. AIR 1969 Guj 23 (C N 5).

('52) O. S. Suit No. 2704 of 1948, D/-29-9-1952 (Bom) — OVER. AIR 1969 Bom 13 A (C N 3).

CALCUTTA

('62) AIR 1962 Cal 42: 65 Cal WN 876, Niranjanlal Agarwalla v. Union of India — REVERS. AIR 1969 SC 23 A (C N 8).

DELHI

('64) Cri. Appeal No. 656 of 1963, D/-14-12-1964 (Delhi) — REVERS. AIR 1969 SC 17 C (C N 7).

GUJARAT

('63) Civil Revn. Appln. No. 477 of 1960, D/-12-2-1963 (Guj) — REVERS. AIR 1969 SC 69 A, B (C N 19).

('67) Civil Revn. Appln. No. 1116 of 1963, D/-23-8-1967 (Guj), Kutbuddin Sarfudin Mush v. Nandlal Chunilal Shah — OVER. AIR 1969 Guj 18 A (C N 3).

('67) 8 Guj LR 395: (1966) 2 Lab LJ 389, State v. Devendra Prasad — REVERS. AIR 1969 SC 63 (C N 18).

KERALA

('66) 1966 Ker LJ 844: 1966 Ker LT 939, Sreedevi Amma v. Rugmini Amma — OVER. AIR 1969 Ker 31 (C N 10).

LAHORE

('33) AIR 1933 Lah 134: 34 Pun LR 162, Rattan Sen v. Krishan Kaur — DISS. AIR 1969 Punj 26 (C N 6).

('36) AIR 1936 Lah 449: ILR 17 Lah 223 (SB), Shamdin v. Collector Amritsar — DISS. AIR 1969 Mad 1 A (C N 1) (FB).

MADHYA PRADESH

('63) AIR 1963 Madh Pra 337: (1963) 2 Cri LJ 629, Sardar Khan Multan Khan v. State — OVER. AIR 1969 SC 4 B (C N 2).

('64) AIR 1964 Madh Pra 133: 1962 Jab LJ 661, Sushma Mehta v. C. P. Transport Services Ltd. — DISS. AIR 1969 Delhi 3 (C N 2).

('65) First, Appeals Nos. 68, 69, 71, and 70 of 1961, D/-5-1-1965 (MP) — REVERS. AIR 1969 SC 78 (C N 21).

('66) AIR 1966 Madh Pra 255: 1966 Jab LJ 91: 1966 MPLJ 77, Hariramsingh v. Kamtaprasad — DISS. AIR 1969 J and K 16 D (C N 6).

MADRAS

('17) AIR 1917 Mad 524: 17 Cri LJ 30, Appadurai In re — DISS. AIR 1969 Bom 1 A (C N 1).

('58) (1958) 2 Mad LJ 93: 1958 Mad WN 351, Chinnamani Nadar v. Devagirlbai Rajan — DISS. AIR 1969 Orissa 10 A (C N 6).

('62) Appeal No. 367 of 1958, D/-16-3-1962 (Mad) — REVERS. AIR 1969 SC 110 B (C N 24).

(1967) 20 STC 150: (1967) 2 Mad LJ 552, Larsen and Toubro Ltd. v. Joint Commercial Tax Officer — HELD OVERRULED by C. A. No. 763 of 1967, D/-18-4-1968 (SC) as interpreted AIR 1969 Punj 12 I (C N 4).

MYSORE

('63) AIR 1963 Mys 265, Govindaraju v. State of Mysore — OVER. AIR 1969 SC 118 A (C N 25).

('65) AIR 1965 Mys 25, Govindappa v. I. G. of Registration — OVER. AIR 1969 SC 118 A (C N 25).

(1966) 1 Mys LJ 554: (1966) 5 Law Rep 68, Suram Ruth Co. v. Dy. Commr. (Excise) — HELD REVERS in AIR 1967 SC 1512 as interpreted — AIR 1969 Mys 23 F (C N 8).

('68) AIR 1968 Mys 18: 13 Law Rep 153, K. K. Hushenkhan v. Nijalingappa — DISS. AIR 1969 J and K 16 D (C N 6).

NAGPUR

('39) AIR 1939 Nag 191: 1939 Nag LJ 211, Laxminarayan Ganeshdas v. Ghasiram Dalchand Paliwal — DISS. AIR 1969 Ker 8 (C N 2).

('45) AIR 1945 Nag 134: ILR (1945) Nag 336, Pannalal Bose v. Shreeram Daluran — DISS. AIR 1969 Guj 28 (C N 6).

ORISSA

('57) A. H. O. No. 1 of 1957 (Orissa) — DISS. AIR 1969 Cal 32 (C N 7).

('57) AIR 1957 Orissa 232: ILR (1956) Cut 697, Orient Paper Mills v. State — DISS. AIR 1969 Cal 32 (C N 7).

('61) AIR 1961 Orissa 62, Orissa Chemicals and Distilleries (P.) Ltd. In Re — DISS. AIR 1969 Cal 32 (C N 7).

('67) Industrial Dispute Case No. 1 of 1967, D/-5-12-1967 (Spl. Ind. Tribunal Orissa) — REVERS. AIR 1969 SC 90 A (C N 22).

PATNA

('59) AIR 1959 Pat 398, Sugauli Sugar Works v. Cane Commr. — NOT F. AIR 1969 Pat 8 A (C N 3).

('59) AIR 1959 Pat 403: ILR 38 Pat 431, Sasamusa Sugar Works v. Commr. — NOT F. AIR 1969 Pat 8 A (C N 3).

('65) Cri. Appeal No. 545 of 1962, D/-9-2-1965 (Pat) — REVERS. AIR 1969 SC 53 (C N 9).

('67) Cri App. No. 4 of 1967, D/-10-11-1967 (Pat) — REVERS. AIR 1969 SC 7 (C N 3).

PUNJAB

('43) AIR 1943 Sind 107: 44 Cri LJ 502, Emperor v. Udho Chandmal — DISS. AIR 1969 Guj 1 A (C N 1) (FB).

('61) L. P. A. No. 405 of 1958, D/-3-10-1961 (Punj) — REVERS. AIR 1969 SC 27 (C N 9).

('66) Civil Writ No. 2417 of 1965, D/-9-8-1966 (Punj) — REVERS. AIR 1969 Punj 4 (C N 2).

RAJASTHAN

('66) AIR 1966 Raj 5: 1966 Cri LJ 60, Hemdan v. State of Rajasthan — DISS. AIR 1969 Manipur 3 (C N 2).

COMPARATIVE TABLE

(9.12.1968)

A. I. R. 1969 January = Other Journals

AIR 1969 Supreme Court

AIR Other Journals

1 1968 Cur LJ 868

7 (1968) 2 S O W R 488

1968 Pat L J R SC)

100A

9 (1963) 1 S C W R 742

18 ...

AIR 1967 S. C.

AIR Other Journals

15 (1968) 2 S C W R 455

(1968) 70 Pun L R

D) 377

17 (1968) 2 S O J 676

1968 Mad L J (Cri)

668

AIR 1969 S. C.

AIR Other Journals

27 70 Pun L R 1078

30 1968 All Cr k 362

1968 All W R

H C) 580

1968 S C D 913

17 F-c L R 300

1968 All L J 1008

AIR 1969 S. C.

AIR Other Journals

33 70 Pun L R 1032

37 ...

40 70 I T R 95

43 ...

48 ...

53 ...

AIR 1969 S. C.		AIR 1969 And Pra		AIR 1969 J. & K.		AIR 1969 Mysore	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
59	1968 Ker L J 659	29	con 1968 Mad L J	8	...	1	15 Law Rep 188
69	1 T R 897		(Cri) 671	9	FB 1968 Kash L J 127		(1968) 2 Mys L J 48
	(1968) 2 I T J 724		AIR 1969 Assam	12	...	6	(1968) 2 Mys L J 36
63	34 F J R 376		Other Journals	16	...	8	(19 8) 2 Mys L J 42
	(1968) 2 S C W R 519	1	...		AIR 1969 Kerala		15 Law Rep 197
69	...	3	12	...
73	38 Com Cas 760	7	...		AIR Other Journals	17	(1968) 2 Mys L J 39
78	22 S T C 416	10	...	1	ILR (1968) 1 Ker 251		15 Law Rep 204
90	34 F J R 323	14	...	FE	1968 Ker L J 89	20	(1967) 2 Mys L J 56
	17 Fac L R 311		AIR 1969 Bombay		1968 Ker L J 816		11 Law Rep 248
101	...		Other Journals		70 I T R 548	22	(1968) 1 Mys L J 364
110	...	1	70 Bom L R 383	8	1968 Ker L J 136		1968 Mad L J
118	...		1968 Mah L J 640		1968 Ker L J 301		(Cri) 296
125	...	7	1968 Mah L J 678	9	1968 Ker L R 268		15 Law Rep 36
128	(1968) 2 S C W R 73	13	70 Bom L R 212	11	1968 Ker L T 428	23	(1968) 2 Mys L J 78
	1968 Mah L J 599		1968 Mah L J 463	FB	ILR (1968) 2 Ker 29		15 Law Rep 303
	1968 M P L J 607	20	70 Bom L R 399		1968 Ker L J 587		AIR 1969 Orissa
	1968 S C D 866		1968 Mah L J 616	19	1968 Ker L J 614		Other Journals
	AIR 1969 Allahabad	24	70 Bom L R 37	21	1968 Ker L R 327	1	34 Cut L T 1060
	Other Journals		AIR 1969 Calcutta	23	...	3	34 Cut L T 1021
	1 FB 1968 All W R		Other Journals	26	...	5	34 Cut L T 479
	(HO) 377	1	72 Cal W N 82	29	1968 Ker L T 500	6	34 Cut L T 401
	1968 All L J 518	SB	1969 Cri L J 40		1968 Mad L J	7	34 Cut L T 930
	(1968) 2 Com L J 137	4	...		(Cri) 494	10	34 Cut L T 971
11	...	11	72 Cal W N 795	31	ILR (1968) 1 Ker 62	12	34 Cut L T 937
14	1968 All I J 402	12	...		1968 Ker L T 442	13	34 Cut L T 1099
26	FB 1967 All W R	18	...		1968 Ker L R 219	16	34 Cut L T 1346
	(HC) 803	28	...		AIR 1969 Madh Pra		AIR 1969 Patna
	1968 All L J 89	32	72 Cal W N 384		Other Journals		Other Journals
31	...		(1968) 1 Com L J 129	1	1968 M P L J 586		1 FBILR 46 Pat 98
35	1967 All W R	39	38 Com Cas 487	FB	1968 M P W R 537	7	...
	(HC) 625	43	...		1968 Jab L J 779	8	...
	1968 All L J 938		AIR 1969 Delhi	4	1968 M P L J 545	11	1968 Pat L J R 337
40	FB 1968 All W R		Other Journals		1968 Jab L J 891		1968 B L J R 829
	(HO) 388	1	...		19 8 M P W 773	16	...
	1968 All L J 665	3	...	7	1968 Jab L J 351	21	1968 B L J R 602
43	...	6	...		1968 M P W R 492	24	...
	AIR 1969 Andh Pra	7	...	9	1968 M P L J 739	25	...
IR	Other Journals	12	(1968) 70 Pun L R	13	1968 M P L J 618	27	...
1	(1967) 2 Andh		(D) 390		1968 M P W R 5 8	28	...
	W R 248		(1969) Cri L J 43		1968 Jab L J 885	30	...
3	(1967) 2 Andh	14	...	15	1968 M P L J 651		AIR 1969 Punjab
	W R 294	15	...		1968 M P W R 690		Other Journals
4	(1967) 2 I T J 441	21	(1968) 70 Pun L R		AIR 1969 Madras	1	1968 Cur L J 770
	(1967) 2 I T J 311		(D) 230		Other Journals	4	1968 Cur L J 668
	(1967) 2 Andh	26		70 Pun L R 874
	W R 226		AIR 1969 Gujarat		...	8	...
6	66 I T R 195		Other Journals		...	12	22 S T C 335
	(1967) 1 I T J 887		25	...
	(1967) 2 Andh		AIR 1969 Goa		...	26	70 Punj L R 720
	W R 43		Other Journals		...		1968 Cur L J 607
9	66 I T R 46	1		AIR 1969 Rajasthan
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THE NEW YEAR

With this issue the A. I. R. is entering on the 47th year of its career. While doing so, it takes the opportunity of the commencement of a new year to express to the members of the Bench and the Bar its deep sense of indebtedness for their valuable and generous support during its long course of existence. It also expresses its warm greetings and best wishes to both branches of the legal profession for a happy New Year.

Our readers will not fail to observe the very much improved printing, including the use of better and far more readable type and wider margins for binding facility than hitherto, in this issue. The A. I. R. has made tremendous efforts to bring about these improvements, as it realised that good printing and get-up, causing as little strain as possible to the eyes while reading the Journal, were essential features of the usefulness of the Journal secured by exhaustiveness of reporting, superiority of head notes and other recognised merits of the Journal was not to be reduced. But, owing to the high cost of production, which has been mounting up year after year, even otherwise, it has been found unavoidable to resort to a slight increase in the price of the Journal from this year. The profession is aware of the rates of subscription of other comparable publications and also of the prices of law books in general and can very well appreciate our statement that the management had no choice in the matter if the Journal had to continue its useful service.

The Journal has been carrying on all these years only because of the generous support of the legal profession. The present increase in subscription is coming into force after the lapse of 14 years since the time when the rate of subscription was last revised. During this period other law journals and legal publications have been forced to increase their prices, but the A. I. R. has been staying its hands, as it was anxious that its services should be available to the profession at as economical a price as possible. But circumstances have forced the hands of the management and the decision to increase the price from this year has been taken most unwillingly, as a matter of sheer necessity. It is hoped that the profession will continue to give the Journal the same support as before, to enable it to carry on its useful service.

HIGH COURT OF MADHYA PRADESH, JABALPUR.

We have received the following from the Registrar of the Madhya Pradesh.
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GOVERNMENT OF INDIA, Ministry of Home Affairs.

New Delhi, the 28th November, 1968.

NOTIFICATION

The following Order made by the President is published for general information.

ORDER

In exercise of the powers conferred by sub-section (2) of Section 51 of the States Reorganisation Act, 1956 (37 of 1956), I, Zakir Husain, President of India, after consultation with the Governor of Madhya Pradesh and the Chief Justice of the High Court of Madhya Pradesh hereby establish a permanent Bench of the Madhya Pradesh High Court at Indore and further direct that such Judges of the High Court of Madhya Pradesh, being not less than four in number, as the Chief Justice may from time to time nominate, shall sit at Indore in order to exercise the jurisdiction and power for the time being vested in that High Court in respect of cases arising in the Revenue Districts of Indore, Ujjain, Dewas, Dhar, Jabua, Ratlam, Mandasaur, West Nimar, Shajapur and Rajgarh :

Provided that the Chief Justice may, for special reasons, order that any case or class of cases arising in any such district shall be heard at Jabalpur.

New Delhi,
November, 18, 1968

ZAKIR HUSAIN,
President.

GOVERNMENT OF INDIA, Ministry of Home Affairs.

New Delhi, the 28th November, 1968.

NOTIFICATION

The following Order made by the President is published for general information.

ORDER

In exercise of the powers conferred by sub-section (2) of section 51 of the States Reorganisation Act, 1956 (37 of 1956), I, Zakir Husain, President of India, after consultation with the Governor of Madhya Pradesh and the Chief Justice of the High Court of Madhya Pradesh, hereby establish a permanent Bench of the Madhya Pradesh High Court at Gwalior and further direct that such Judges of the High Court of Madhya Pradesh being not less than two in number, as the Chief Justice may from time to time nominate, shall sit at Gwalior in order to exercise the jurisdiction and power for the time being vested in that High Court in respect of cases arising in the Revenue Districts of Gwalior, Shivpuri, Datia, Guna, Vidisha (Bhilsa), Bhind and Morena;

Provided that the Chief Justice may, for special reasons, order that any case or class of cases arising in any such district shall be heard at Jabalpur.

New Delhi,
November, 18, 1968.

ZAKIR HUSAIN,
President.

In view of the Notifications No. 16/20/68—Judl. III dated 28th November 1968 issued by the President under section 51 (2) of the States Reorganisation Act, 1956 (No. 37 of 1956), establishing permanent Benches at Indore and Gwalior, the Notification issued by the Chief Justice on 1st November 1956 under section 51 (3) of the States Reorganisation Act, 1956 (No. 37 of 1956), directing that temporary Benches of the High Court will also sit temporarily at Indore and Gwalior until further orders is hereby cancelled.

Sd./ P. V. DIXIT
Chief Justice
30-11-1968.

In supersession of all previous orders and in exercise of the power conferred on me by the proviso to the Notification No. 16/20/68 Judl. III dated 28th November 1968 issued by the President under Section 51 (2) of the States Reorganisation Act, 1956 (No. 87 of 1956), establishing a permanent Bench of Madhya Pradesh High Court at Indore, I hereby order that with effect from today till further orders the following cases arising from the revenue districts of Indore, Ujjain, Dewas, Dhar, Jhabua, Ratlam, Mandasaur, West Nimar (Khargone), Shajapur and Rajgarh shall be heard at Jabalpur :

- (1) Income-tax, Wealth-tax, Expenditure-tax, Gift-tax, Estate Duty, Sales-tax and other Tax references.
- (2) All petitions under Articles 226 and/or 227 of the Constitution pertaining to tax matters.
- (3) All petitions under Articles 226 and/or 227 of the Constitution challenging the *vires* of any Act or Statute or any Order or Rule or Regulation made under any Act or Statute.
- (4) All petitions under Articles 226 and/or 227 of the Constitution directed against any order or decision of the State Transport Appellate Authority or State Transport Authority or Transport Commissioner or any Regional Transport Authority constituted under the Motor Vehicles Act, 1939.
- (5) All petitions under Articles 226 and/or 227 of the Constitution arising from the aforesaid revenue districts and pending for hearing and disposal at Jabalpur on the date of this order.

Sd./ P. V. DIXIT

Chief Justice

30.11.1968.

In supersession of all previous orders and in exercise of the power conferred on me by the proviso to the Notification No. 16/20/68 Judl. III dated 28th November 1968 issued by the President under section 51 (2) of the States Reorganisation Act, 1956 (No. 87 of 1956), establishing a permanent Bench of the Madhya Pradesh High Court at Gwalior, I hereby order that with effect from today till further orders the following cases arising from the revenue districts of Gwalior, Shivpuri, Datia, Guna, Vidisha (Bhilsa), Bhind and Morena shall be heard at Jabalpur :

- (1) Income-tax, Wealth-tax, Expenditure-tax, Gift-tax, Estate Duty, Sales-tax and other Tax references.
- (2) All petitions under Articles 226 and/or 227 of the Constitution pertaining to tax matters.
- (3) All petitions under Articles 226 and/or 227 of the Constitution challenging the *vires* of any Act or Statute or any Order or Rule or Regulation made under any Act or Statute.
- (4) All petitions under Articles 226 and/or 227 of the Constitution directed against any order or decision of the State Transport Appellate Authority or State Transport Authority or Transport Commissioner or any Regional Transport Authority constituted under the Motor Vehicles Act, 1939.
- (5) All petitions under Articles 226 and/or 227 of the Constitution arising from the aforesaid revenue districts and pending for hearing and disposal at Jabalpur on the date of this order.

Sd./ P. V. DIXIT,

Chief Justice

30.11.1968.

REDUCTION OF SHARE CAPITAL OF A LIMITED COMPANY

(A Comparative Study of Indian and English Law)

(By SURENDRA NATH *)

It is a vested right of a general body of share-holders (in a general meeting) to decide the amount of the nominal capital as well as the nature of the capital. Though, in the beginning, the nominal capital is fixed by the subscribers to the memorandum (who are mainly promoters of the company and who later may become the members of the company), the power to alter the capital is afterwards transferred to the general body of share-holders. Shareholders are authorised to increase⁽¹⁾ as well as reduce⁽²⁾ the share capital. However, as the reduction of a company's share capital will obviously affect the interests of the creditors and members of the company far more seriously than any other kind of alteration (e. g. increase, consolidation of shares, sub-division of shares, conversion of shares into stock and vice versa) the statutes in both countries, India and England, have imposed stringent conditions to be complied with in the case of a reduction. These stringent conditions (which we will be discussing below) are designed to ensure that (i) the creditors are protected, and (ii) no injustice is caused between different classes of members.

2. There are two sets of transactions one of which does not involve much risk of creditors being defrauded i.e., where the nominal capital of a company is reduced by cancelling the unissued capital. In such a case, the Act has relaxed the compliance of these stringent conditions. If the articles of the company authorise to do so, the shareholders in general meeting can reduce the nominal or authorised capital by cancelling the share which (at the date of the passing of the resolution in that behalf) have not been taken or agreed to be taken to any person. This mode of alteration of share capital cannot be said to be strictly a reduction of share capital, because issued or paid-up capital of the company is unaffected. Only shareholders withdraw their authority which they have given to the directors as regards the issuance of new shares. By the cancellation of such unissued shares, neither creditors nor shareholders are affected, as they do not have any claim or right relating to these shares. The directors may not issue these shares at all. An objection may be raised from the side of the directors that by such cancellation their authority has been restricted

or limited; nevertheless, they do not have any justifiable cause because the power to decide the nature and amount of the share capital has been given by the Act to the general body of shareholders, and the directors have to act only in accordance with the directions given, and restrictions imposed, by the shareholders. The diminution of share capital should be distinguished from the reduction of share capital. The statutes of both countries specifically state that the cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act.⁽³⁾ It should be noted in this connection that no sanction of the court is required for the diminution of the capital.⁽⁴⁾ In this paper we will deal with the reduction of capital excluding the diminution of share capital.

Reduction of Share Capital with the sanction of the Court:

3. Section 100 of the Indian Companies Act, 1956, which is almost similar to Section 66 of the English Companies Act, 1948, provides for the reduction of share capital. It runs thus:

"Subject to the confirmation by the court', a company limited by shares or a company limited by guarantee having a share capital may 'if so authorised by the articles, by special resolution' reduce its share capital 'in any way'; and in particular and without prejudice to the generality of the foregoing power, may:—

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up;

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost, or is unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company;

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly. (Emphasis added) here in

(3) (Indian) Companies Act, 1956, S. 94(3): (English) Companies Act, 1948, S. 61(3).

(4) There are other methods by which the capital is deemed to be reduced, e. g. forfeiture, surrenders, etc. But in reality, no capital is reduced; it is just one of the modes of variation of rights of shareholders.

(1) (Indian) Companies Act, 1956, S. 94: (English) Companies Act, 1948, S. 61.

(2) (Indian) Companies Act, 1956, S. 100: (English) Companies Act, 1948, S. 66.

* M. A., LL. B. (Banaras), LL. M. (Northwestern, U. S. A.); Advocate; Lecturer, Banaras Law School, Banaras Hindu University, Varanasi—5.

(2) A special resolution under this section is in this Act referred to as "resolution for reducing share capital."

Types of Capital Which can be Issued.

4. Before considering the modes of reduction of share capital under this section, it is important to examine which type of capital can be reduced under this section. The word "share capital" is used in different sense in company law. In a recent Indian case, this point was discussed and two principles were enunciated: (1) as shares include 'stock', a company can reduce its stock; and the word 'share capital' involved in reduction of capital includes (a) nominal share capital—(i) whether issued or (ii) unissued; (b) issued capital—(i) whether fully paid or (ii) unpaid. (5) This interpretation has given rise to one problem—does reduction of the unissued part of nominal capital also come under the scope of section 100? It has been just observed that the cancellation of unissued capital is not considered a reduction of share capital. A company can reduce its nominal capital by cancelling its unissued share capital in general meeting without obtaining any confirmation by the court. (6) It means that Section 100(7) is only applicable in those cases where there is a reduction of that nominal capital which has been issued—the fact of that it is or it is not fully paid is immaterial. If the above interpretation is correct why not, in place of the words "reduce its share capital" in Section 100(7) substitute the words "reduce its nominal capital which has been issued"? This change seems to be sensible as it would define the scope of Section 100 (7) more clearly. Moreover, the ambiguity in the Section will be removed. The Jenkins Committee was also of the similar view when it stated in its report that:—

".....limited company must not reduce its "capital" by which we mean (to use the nomenclature appropriate to par shares) the aggregate of the issued share capital of the company and the

share premium account and capital redemption reserve fund (if any)." (8)

5. It may also be mentioned here that from the wording (9) of Section 94(e) one gets the impression that this provision deals with that type of capital which has been issued but not subscribed by the investors. This type of capital can also be excluded from the operation of S. 100, and can be cancelled by ordinary resolution. So, in India, the unissued and unsubscribed capital can be reduced without complying with the conditions of Section 100. In England, the question of reducing unsubscribed capital does not arise because it is the presumption that as soon as the capital is issued it is subscribed either by investors or the underwriters. The practice of underwriting the entire issue is not so much prevalent in India, but the recent tendency is to sell shares either through banks or private underwriters.

6. The need to reduce capital may arise in many ways, e. g. trading losses, heavy capital expenses, and assets of reduced or doubtful value. As a result, the original capital may either have become lost or a company may find that it has more resources than it can profitably employ. (10) To present a clear balance sheet so that payment of dividends out of subsequent profits can be made, sometimes it becomes necessary for a company to reduce its capital for adjusting the relationship between capital and assets. Sometimes the company may be over-capitalised and it may desire to return to its shareholders the capital which is in excess of the wants of the company. Unlike an individual, a company has no power to write off the losses of this nature or to return capital to its shareholders except in the manner provided in the Act. (11)

Reasons for Stringent Conditions in the Case of Reduction of Capital:

7. The share capital of a company is regarded in law as something sacred, and, therefore, law does not permit any type of interference therewith by way of reduction except when it is done under strict scrutiny and is done for the benefit of the company as a whole. The prin-

(5) In re, Panruti Industrial Co. (Pvt.), Ltd., AIR 1960 Mad 537 (538); Re Anglo-French Exploration Co., (1902) 2 Ch 845; Re Ormiston Coal Co., (1949) SC 516.

"Every reduction of capital must reduce the nominal capital. A reduction of unissued capital may be combined with a reduction of issued capital, and issued capital may be reduced whether fully paid or not"—Halsbury's Laws of England, (3rd ed.), S. 323, p. 154.

(6) (Indian) Companies Act, 1956, S. 94(3); (English) Companies Act, 1948, S. 61 (3).

(7) (Indian) Companies Act, 1956: (English) Companies Act, 1948, S. 66.

(8) Report of the Company Law Committee, (London, 1962), Omnd. 1749, para 1.

(9) Section 94(e): "Cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken to any person, and diminish the amount of its share capital by the amount of the shares so cancelled. (English) Companies Act, 1948, S. 61(e).

(10) See, supra, note 5.

(11) In re, Panruti Industrial Co. (Pvt.) Ltd., AIR 1960 Mad 537, 538.

ciples regarding such scrutiny were stated by Allison, J., in *Bhagirath Spinning and Weaving Co. v. Balaji*, (12) thus:

....."the general principle of law founded on principles of public policy and rigidly enforced by Courts of law is that no action resulting in a reduction of capital of a company should be permitted unless the reduction is effected under statutory authority or by forfeiture, in strict accordance with the procedure laid in that behalf in the articles of association. Any reduction of capital contrary to this principle is illegal and ultra vires".

In a reduction of capital there is mainly a conflict between the interests of creditors and shareholders. The creditors of the company, who have a right to look to the issued capital as the fund out of which their debts are to be discharged, have a conflict with those persons who being members of the company claim that the company shall pay to them a part of the capital. There may be losses and the capital might be diminished but the creditors have a right to rely on the subscribed capital of the company. Lord Herschell said: (13)

"The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorised. Of this all persons trusting the company are aware, and take the risk".

His Lordship further continued:

"But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders". (14) Lord Watson's view was as follows:

"One of the main objects contemplated by the legislature, in restricting the power of limited companies to reduce the amount of their capital as set forth in the memorandum, 'is to protect the interests of the outside public who may become their creditors'. In my opinion, the effect of these statutory restrictions is to prohibit every transaction between a company and a shareholder by means of which the money already paid to the company in respect of his shares is returned to him, unless the Court has sanctioned the transaction. Paid-up capital may be diminished or lost in the course of the company's trading; but persons who deal with, and give credit to, a limited company naturally rely upon the fact that the company is trading with a

certain amount of capital already paid, as well as upon the responsibilities of its members for the capital remaining at call; and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid-out, except in the legitimate course of business" (15). (Emphasis (here in ' ') added).

8. As was pointed out by their Lordships in the above mentioned case, the protection of the interests of the creditors seems to be the main object in restricting the power of limited companies to reduce the amount of their share capital. The creditors were protected mainly in three ways:

(i) the Courts insisted (in order to preserve the creditors' guarantee fund) that the company would not apply its capital for objects other than those authorised by its memorandum; (the ultra vires doctrine) (15-A).

(ii) no return would be made to the shareholders in any way, thus reducing the net worth of the company below the share capital and share premiums fixed originally. The Courts have also declared that dividends must not be paid out of capital. The principle has been supported by a statutory provision in India that "no dividend shall be declared or paid by a company.....except out of the profits of the company....." (16)

(iii) a company could not purchase its own shares, nor provide any financial assistance for the purchase of its own shares (17). This was later on supplemented by the legislative provisions in both countries (18).

9. Although the Courts insisted that the share capital be retained untouched, on the other hand, it was also felt that the rigid application of the principle of maintaining original capital as yardstick might be unduly strict. As was pointed out earlier, owing to trading losses, heavy capital expenses, etc., the original capital might have been lost. A company may also curtail its activities so that it has more resources than it can profitably employ. In the first case the maintenance of the capital yardstick at its original figure is not of much practical

(15) *Trevor v. Whitworth*, (1887) 12 AC 409, at pp. 423-424.

(15-A) *Ashbury Railway Carriage Co. v. Riche*, (1875) LR 7 HL 653.

(16) (Indian) Companies Act, 1956, Section 205: No provision in the (English) Companies Act, 1948.

(17) *Trevor v. Whitworth*, (1887) 12 AC 409.

(18) (Indian) Companies Act, 1956, Section 77: (English) Companies Act, 1948, S. 54.

(12) AIR 1930 Bom 267.

Trevor v. Whitworth, (1887) 12 A.C. 409, 415.

(14) Ibid.

cal benefit to the creditors, as the figure no longer represents the actual assets to which the creditors can look for the payment of their debts. In the second case, there is no point in not allowing the excess capital to be paid to its members, because the creditors are still secured. Keeping these facts in mind, the Legislature by the Acts of 1867 and 1877 (now Companies Act, 1948, S. 66) in England, and in India by the Acts of 1882 and 1913 (now Companies Act, 1956, S. 100) allowed a limited company to reduce its share capital provided the interests of creditors and shareholders were not prejudiced, and the Court had consented to such a reduction.

10. According to S. 100, a limited company registered under the Companies Acts and having a share capital may reduce its share capital in any way, by passing a special resolution and subsequently obtaining the confirmation of the Court, provided that such a reduction is authorised by the articles. However, the Courts of England have held that it is not sufficient to provide the authority in the memorandum; it must be in the articles(19). Therefore, if there is no provision in the articles, it can be inserted afterwards by passing a special resolution(20). This additional procedure is not required in India. Sub-section (4) of Section 16 of the Indian Companies Act, 1956, (which is a new section and there is no corresponding provision in the English Companies Act, 1948) provides that all references to the articles of a company in this Act shall be construed as including references to the other provisions aforesaid contained in its memorandum. The provisions mentioned in sub-section (4) are those provisions which are not required to be mentioned in the memorandum of S. 13; evidently, S. 13 does not require that a provision regarding reduction of capital be mentioned in the memorandum. Therefore, even if there is a provision in the memorandum, it would be treated as part of the articles. By virtue of S. 16 (4), there does not seem to be any justification in insisting on a separate provision in the articles. Where the memorandum prohibits such reductions and the articles are silent, a company cannot reduce its capital under

English law(21). In India, it seems that a company would be able to reduce its share capital(22).

Conditions to be Complied with for Reduction of Capital:

(A) Statutory:

(i) Such reduction must be authorised by the articles(23).

(ii) A special resolution must be passed for the reduction of capital(23). It should be noted that, whereas in the case of other modes of alteration of capital, only an ordinary resolution is required, the share capital of a company cannot be reduced by a simple majority of shareholders. Three-fourth majority of votes cast by shareholders should consent to such a reduction.

(iii) Such a reduction must be confirmed by the Court(23).

(iv) The application for the confirmation of reduction has to be made by petition, and in the petition the company must show all facts and circumstances on which it relies in support of its prayer for sanction(24).

(To be continued.)

(21) Such a provision will be declared ineffective being the ultra vires the memorandum. *Ashbury Railway Carriage Co. v. Riche*, (1875) LR 7 HL, 653.

(22) Section 9 of the Indian Companies Act, 1956, expressly states that "the provision of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum" By prohibiting the reduction of capital in the memorandum, it would be indirectly taking away the rights and powers of the shareholders which have been given to them by the Act under S. 100. The Legislature did not contemplate that there could be a provision in memorandum too as regards the reduction of share capital. A provision prohibiting such a reduction would be contrary to the Act as well as to the wishes of the Legislature, and, therefore, would have no effect. The company would be allowed to reduce its share capital.

(23) (Indian) Companies Act, 1956, Section 100 (1); (English) Companies Act, 1948, S. 66 (1).

(24) In re, Panruti Industrial Co. (Pvt.) Ltd., AIR 1960 Mad 537 (539).

(19) Re, Dexine Patent Packing and Rubber Co., (1903) 88 LT 791.

(20) Re, Patent Investment Sugar Co., (1885) 1 Ch D 166 (CA).

AN INTRODUCTION TO EVIDENCE — FOURTH EDITION (1967) — BY G. D. NOKES, LL.D. of the MIDDLE Temple and the South-Eastern Circuit. Barrister-at-law, Sweet & Maxwell, London, (Agents in India — N. M. Tripathi (P) Ltd., Bombay.) Price £3-17-6.

The book under review is essentially meant for students. The very fact that this fifth edition has come out within a very short spell of 5 years shows how much the book has been useful and consequently its demand.

Arrangement of topics leaves nothing to be desired. Historical treatment and evolution of many rules have not lost their value in an appreciation of the subject.

The present edition has added some 400 decisions reported between the period of last five years, and over 30 new statutes. It is noteworthy that considerable number of cases reported after Long Vacation of 1966 have been incorporated. There is a useful Table of Cases and a Table of Statutes.

There is no doubt that this edition will be received as well as the previous editions. G.G.M.

AN INTRODUCTION TO AUSTRALIAN CONSTITUTIONAL LAW — BY P. H. LANE, B. A. LL. M. (Syd), S. J. D. (Harvard) Barrister-at-Law, Associate Professor in Constitutional Law, University of Sydney — The Law Book Company, Australia, (Agents in India — N. M. Tripathi (Private) Ltd., Bombay).

This paper-backed edition is one of the numbers of Australian Introduction to Law Series. It is intended to be easily read for those who want some general knowledge of the kind of constitution Australia has got.

The book is indeed a layman's guide. The subject has been very lucidly presented with a few leading cases that are really essential for understanding of the subject. There is a text of Commonwealth of Australia Constitution Act, 1900. The cases have been arranged, at the end subjectwise. There is a useful index at the end. G.G.M.

"TREATISE ON THE LAW OF BAILS" — By R. K. Soonavala, B. A. — (Hons) LL.B., District and Sessions Judge, Gujarat Judicial Service, Foreword by Hon'ble P. M. Bhagwati, Chief Justice, High Court of Gujarat. Published by N. M. Tripathi (Pvt. Ltd.), Princess Street, Bombay 2. 1968. Pages 898. Price Rs. 45.00.

As a part of procedural law "Bail" occupies an important and yet quantitatively

an insignificant part. To find a book on the subject running into nearly 900 pages evidently means that, the author has very exhaustively dealt with the subject. As the title suggests, it is a treatise written after a great deal of research.

It is a veritable mine of information on the subject of bail. Though a good deal of the material could have been dropped out, as being unnecessary from practical point of view, its inclusion has definitely increased the value of the book to research scholars and students of criminal jurisprudence. The book abounds with analytical data. The learned author, who has to his credit several books on legal subject has spared no labour to make this book, as exhaustive and complete at the cost of deliberate repetition on the law of bails, as possible. The emphasis is not only on case law but also on principles. The exposition is clear and lucid.

The book contains a chart of leading cases showing at a glance in what cases bail was granted and refused. Similarly, the author has given lists of cases triable by Sessions and powers of different Court.

The book is not a mere manual of law of bails. All allied topics such as arrest, detention, remand etc. are discussed at length. Model forms of applications for bail have been set out in an appendix.

The book supplies a long felt want. Lawyers practising on criminal side, the officers who are concerned in the administration of the law of bails and the students and research scholars will find this book of great practical value.

BDB/R.G.D.

CONVEYANCE PRECEDENTS AND FORMS — With notes By Shiva Gopal M. Sc. LL. B., Advocate. Fourth Edition 1968. Published by: Eastern Book Company, Law Publishers and Book Sellers, Head Office 34 Lalbagh, Lucknow; Branch Office, Kashmere Gate, Delhi. Pages 668. Price Rs. 14-00.

Though there are some standard works on the law and practice of conveyancing in India, there is a dearth of books for practising conveyancer and the public. The learned author of this book published the first edition of this work in 1953 and since then, it has gone through four editions. In the first edition were given 252 conveyancing precedents each one drafted and selected with a view to its practical utility and the need. This edition also includes forms of petitions to courts. That the first and subsequent editions were well received is obvious from the fact that within the space of

fifteen years, the book went through four editions.

The author does not claim originality. Each chapter and sub-chapter is prefaced by a general discussion of the legal aspect of the subject. This affords a rough and ready guide to a lawyer. At places, important short notes are given explaining briefly the law involved. The present edition consists of an increased number of precedents and forms. The chapter on "Divorce" has been substituted by a new chapter entitled "Matrimonial". The entire matter has been rearranged, and reduced in size but enlarged in matter. The legal notes have been made uptodate. This edition does not, however, claim to be a complete treatise, but still remains a guide for lawyers and conveyancers. But on the whole the present edition has been made more useful and practical than the previous ones. R.G.D.

FORMS AND PRECEDENTS OF CONVEYANCING AND OTHER INSTRUMENTS AND MAJOR PETITIONS TO COURT — By L. C. DeSouza and revised by Shri Shambhudas Mitra, M.A., LL. B. Advocate, — Eighth Edition. (1968) Published by Eastern Law House Private Ltd., Law Publishers and Booksellers, 54, Ganesh Chunder Avenue Calcutta-13. Pages 432. Price Rs. 9-00.

It is now nearly twenty years that Mr. L. C. DeSouza the author of this book expired but the book he wrote has survived behind him and run into eight editions. This alone is a good testimony of the usefulness of the book to the lawyer and the professional conveyancers.

As it should happen in every case of a new edition of a standard book that it should be revised and brought uptodate, the eighth edition of this work has been suitably revised and brought uptodate by inclusion of some new forms and making of improvements in some others.

It is always necessary that any document which creates, changes or extinguishes interest in person or property should be such as gives out the exact meaning intended by the parties and that words used in a deed, or a conveyance should not be capable of diverse interpretations, causing irreparable harm to the parties involved. It is for this reason that a book of the type under review is a welcome addition to the lawyer's bookshelf. The drafts given in this book, in our opinion, achieve the standard expected.

Unfortunately over ninety percent of conveyances and deeds, in India are in regional languages and to such a vast majority of the people this book will fail to serve. It is now high time that a serious attempt is made to convert all these English forms into one or more regional

languages, where the precision and exactitude of meaning are not lost.

BDB/R.G.D.

FUNDAMENTAL RULES EXPLAINED—

Published by — N. M. Khosla for Hind Publications, 24 Deepak, Peddar Road, Bombay 26. Pages 719. Price Rs. 25/-.

The Rules, Orders and decisions governing the service conditions of Central Govt. employees are contained in Fundamental Rules and Supplementary Rules, Vols. I & II and Civil Service Regulations. With the attainment of independence and all-round growth of various kinds of services to man the Govt. and semi Govt. organisations, the original rules under went drastic changes. The important conditions of service have been liberalised to suit the changing time and new concept of Society. Every day new rules or orders are either issued or the existing ones are suitably modified and the plethora of such orders is likely to confound and confuse Govt. employee.

The publishers of this book (which is one of the series) have taken pains to collect the various communications of Govt. of India that are germane to the subject and explained them by applying to typical problems. Rules relating to fixation of pay, foreign service, deputation, dismissal, removal, suspension, leave of all kinds and joining time, have been dealt with; the main rules have been printed in bold type followed by various decisions and orders of Govt. of India together with typical problems with their answers. An effort has also been made to explain the rules and orders and their implications. This helps to a great extent to understand the rules.

This publication is, no doubt, useful for reference in various offices but of immense assistance to those who prepare for various departmental examinations. This compilation will also be welcomed by the legal profession and the courts inasmuch as they would be saved the trouble and time in searching out the relevant rules. R.G.D.

"OMBUDSMEN" For American Government: Edited by Stanley V. Anderson, Published By — The American Assembly, Columbia University, Prentice Hall, Inc., Englewood Cliffs, N. J. (1968), Pages 192.

The 32nd American Assembly Session, participated by over sixty persons representing a cross-section of intellectuality considered the institution of the "Ombudsman" from all its angles and submitted its report thereon. The Assembly described the Ombudsman as "an independent high-level Officer who receives com-

plaints, who pursues inquiries into the matters involved and who makes recommendations for suitable action. He may also investigate on his own motion. He makes periodic public reports. His remedial weapons are, persuasion, criticism and publicity. He cannot as a matter of law, reverse administrative action".

This book was prepared as a background reading for the American Assembly and for other meetings on this subject as well as for the students and general reader. The book contains five articles on the nature of the institution of the Ombudsman and its relations with Government. To the book is appended a Model ombudsman statute annotated by Walter Gellhorn, one of the leading authorities on the Ombudsman.

In India, in recent years there has been going on a talk and discussions on the desirability of having the Ombudsman here also, in order to check the growing corruption and mal-administration.

Unfortunately many people have no clear notions of the nature and functions of the Ombudsman, though they seem to know him in a broad outline.

After a good deal of study and deep deliberations the American Assembly has in unequivocal terms recommended the creation of a special office, the Ombudsman, in the United States of America.

Although in India our elders in the Parliament have thought over the problem, no final decision was taken; though Vigilance Commissions for the Central and State Governments are already functioning over and above the Anti-Corruption Departments. For those statesmen in India who want to know more, about this special office, this book will go a long way to help them.

It cannot be denied that no sensible person would like his Government to be autocratic, inefficient, slovenly and corrupt. Similarly every member of the public would like to get a redress to his grievance, small or big, justly and quickly. He needs some agency independent of the executive authority, free and fearless, eager and willing to work, whose methods of work will be above board and who will have a free access even to the confidential records of the executive. It is such person, if there is any, who can hold the office of the Ombudsman.

Almost all countries who can boast of good administration have some such system. The book in Part I takes a review of such efforts throughout the world (and information about India is found on pages 28 and 29).

The concept of the Ombudsman is Scandinavian in origin and in Swedish language it means an "Agent". The specialised agent who performed the specialised duties was later on known as

the Ombudsman. One for civil matters was called "J. O.", the other for Military matters was called "M. O."

The reason why the Ombudsman idea spread so rapidly in recent years is the growth of the welfare state, which has made necessary new protections against bureaucratic mistakes & abuses of power. Till 1955 only three countries had the Ombudsman system. By 1968 some more countries adopted the system with local variations, while some, like the U. S. A. and India are still deliberating over the question.

In fact, if one decides to have the Ombudsman the book gives a model of a statute for creating the office of the Ombudsman. The American Assembly and the five authors who have written the five papers and the editor Mr. Stanley V. Anderson deserve praise for their deep study, the clear thought and straightforward recommendation they have made in this book. BDB/R.G.D.

SECOND SUPPLEMENT TO THE ANDHRA PRADESH BUILDINGS (LEASE, RENT AND EVICTION) CONTROL ACT (XV OF 1960) — By P. Venkataraman Murty, Advocate, Hyderabad High Court, Published by the Author, 1968. Pages 86. Price 3.50.

By the publication of this Second Supplement the author's commentary on the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act 1960, is brought up to the 29th February 1968. It contains 283 cases, notes of recent cases and 21 State notifications. Important earlier decisions under different Rent Control Acts, which are frequently cited in later decisions are also incorporated in this Supplement. The book has been approved by the High Court of Andhra Pradesh for the use of Subordinate Courts in the State. The original commentary with the two Supplements will meet the requirements of the Bench and the Bar of the State of Andhra Pradesh. R.G.D.

"THE INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT 1946" — By B. L. Gupta 1968. Published by the Universal Book Agency. Law Book Publishers, Elgin Road, P. B. 63, Allahabad; Pages 140. Price Rs. 10-00.

This is yet one more book added to the literature on labour laws. The Labour Jurisprudence has today taken a definite shape and at this juncture appearance of new books on labour laws is welcome.

Shri Gupta has already written four books on four different labour laws and the book under review is the fifth.

The Industrial Employment (Standing Orders) Act 1946 essentially deals with

the terms and conditions of industrial employment which should be precise and with which both the employer and employees should be well conversant.

Shri Gupta has treated the subject matter of the book section-wise. In the notes under the Preamble, the author has included general information necessary for the proper understanding of the law.

A good deal of this enactment is covered by the Bombay Industrial Relations Act which is applicable in Maharashtra State. The changes which are effected by the Bombay Act are noted under appropriate sections. So also local amendments in U. P. and Bengal have been given proper coverage. The notes are concise and adequate. Case law in support is noted in foot notes.

To render the book complete in as many respects as possible, the Central Rules, Notifications, the Model Standing Orders, the Bombay Rules, the Bengal Rules are also given in extenso. A Hindi translation of Central rules is an additional and welcome feature. Being exhaustive of the law the book will be found useful to the Industry. BDB/R.G.D.

LAW RELATING TO ADVOCATES, ADVOCACY AND PROFESSIONAL ETHICS. — By C. C. Anajwala, B. A. (Hons), LL. B., Advocate, High Court, Bombay, Gold Medallist, and Ex-Fellow, Sir L. A. Shah Law College, Ahmedabad and Nominee of the Registrar of Co-operative Societies, Maharashtra State. Published by C. Jamnadas and Co., Educational & Law Publishers, 146-C Princess Street, Bombay-2 and 1267/167, Relief Road, Ahmedabad Pages 150, Price Rs. 7.00.

Onerous as the legal profession is, the author of this book attempts to incorporate and expound the fundamental rules essential for the training and equipment of a successful lawyer. The book covers the course prescribed for the study of the law relating to advocates prescribed by the various Bar Councils, for the Advocates' Examinations. The Advocates Act and other allied Acts are incorporated with annotations and comments on their provisions. Every important proposition of law is supported by case law. Rules of Professional conduct and ethics and High Court Rules in the matter of fees are also embodied. Important questions set at Bar Council Examinations with their answers are also given at appropriate places. A separate Chapter on Advocacy gives models of cross-examination of witnesses with the author's notes. These will provide useful guide to young advocates. The primary aim of the book is to present a suitable textbook for students. But it is so designed

as to be of use as a hand-book to those in the profession for ready reference.

The subject has been made as simple and interesting as possible. After all, advocacy is an art and a complex one at that. It requires histrionic gift, logical faculty and gift of controlling temper and emotion. No amount of schooling in this respect will make a successful advocate. Experience alone, with a good ground work of knowledge of law and human nature will take a lawyer to the higher rungs. The book only attempts to guide the young lawyer to this end.

R.G.D.

LABOUR LAW AND LABOUR RELATIONS with Appendix. Indian Law Institute, New Delhi, 1968 Edition. Published By — Dr. G. S. Sharma, Director, Indian Law Institute. N. M. Tripathi Private Ltd., Princess Street, Bombay 2. Pages 621 plus 148 of Appendix Price (including Appendix) Rs. 50-00=£3= U. S. A. Dollars 7.

In India we have undertaken to solve the problems of labour welfare, social security and social justice by adopting a democratic Constitution which makes labour a concurrent subject and furnishes comprehensive directive principles on State policy. The labour policies of the Government are also stated in the various five year plans. For implementing the labour policies there is machinery at the Central and State levels. The working of the machinery is, in practice of course, greatly influenced by trade unions and the employers' organisations. At the top of all these are the law courts and their judges. Their role in the solution of labour problems in India has been very great. They enact into the law, parts of a system of social justice. Their decisions upon economic and social questions depend on their economic and social philosophy, and for the peaceful progress of our people we owe most to these judges who hold to a social philosophy and not to a long out-grown philosophy which was then the product of primitive economic conditions. The rapid space of growth of industrialisation in India is mostly due to peaceful settlement of industrial disputes, on basis of the principles of social justice formulated by our courts. A new jurisprudence, which may be called "social jurisprudence" has come into being and is being developed by our courts. It is therefore meet that the Law Institute has taken up this subject for their research study. No book is available in India which would serve as a text book on this subject, to help the teaching of labour law.

The notable feature of this book is that the subject is presented in the form of

discussion of cases. This is the second in the series of case books planned by the Indian Law Institute. The case book method has certain advantages over mere traditional methods. Case law method of teaching is widely adopted in America and is being cautiously introduced in England. It is however, made clear in the preface, that the preparation of this book in this method does not imply that every teacher of labour law will or should find the case or discussion method the most useful and congenial way to teach labour law. Method and style are personal matters. But as no suitable book dealing with labour and industrial relations law is available either in the form of a case book or otherwise, this book is bound to prove a useful tool, for teachers following either method of teaching. Its emphasis on human situations and human problems (it is this factor which makes this branch of law different from any other branch of law) as contrasted to dry rules of law, should help to serve, in whatever way the book be used, to bring out the human interest of this fascinating subject.

The subject is flexible and therefore more hospitable to innovations. It is for this reason that the case method is useful. It stimulates independent and creative thinking by the students in a way no other method can. The teacher is enabled to focus the attention of the students on the wisdom or lack of it on each particular decision. He can explore the social values and the individual and group interests, involved in any solution. The case method fans the flames of argument. With all this said, however the book is conceived as an experiment with the case or discussion method.

The book does not try to deal with the whole vast subject of labour law but with one special aspect of it. The book starts not from statutes but from problems. It concentrates on relations between employers, employees, unions and government, conveniently called labour-management-relations. The reason is not that such relations are more important than protective legislations, but that they constitute a peculiarly difficult field for a student to teach himself without guidance. The concepts of union recognition, of a tribunal's power to create new rights and duties, of a collective bargaining contract, of grievance, of labour arbitration, of the effect of award or contract to bind or benefit a shifting group of workmen for a student of conventional law, all these open windows into a strange new world. These concepts bearing no more than faint resemblances to laws of contract, or property or tort, mark this subject as a recondite one needing study in law school.

The editors have chosen cases for their

teachability, their importance and their interest, roughly in this order. No attempt is made to include or to mention all-important decisions. It must be remembered that the book is not meant for the practitioners but for the student and teacher. Where a case is important on more than one point, it is sometimes divided; but more reasonably it is inserted at a more important spot, with a cross reference to the other. There is more of textual material and less of excerpts from judgments and awards. This is mainly because much labour relations law is not found, in India, in statutes or in judgments. Moreover it is because good many textual props would be needed to help the students to understand the problems of this unfamiliar field. In presenting the nature and growth of labour law in the context of changing Indian society, reliance has therefore been placed on non-technical and extra legal material.

The book consists of six parts and an appendix. Part I consists of brief introductory texts, with a few cases. It covers economic background and history, with a short sketch of the history of trade unionism in India, elementary discussions of collective bargaining in India & abroad, some material on trade unions today and a brief comment on "tripartism". After a brief sketch of the constitutional frame work, Part II takes the students into cases and comments on the nature of industrial disputes and the methods and procedure for resolving them, including both the voluntary and statutory machineries. Strikes and lock-outs are dealt with in Part III, while the subjects of wages and other remuneration are dealt with in Part IV. Part V deals with lay-off and retrenchment. Standing orders, disciplinary proceedings and fair labour practices and victimization are the subjects of Part VI. The Appendix, which is published separately, contains up-to-date texts of Industrial Disputes Act. (1947), Industrial Disputes Rules 1957, Trade Unions Act, 1926 (as amended in 1964), Industrial Employment (Standing Orders) Act, 1946, Industrial Employment (Standing Orders) Central Rules, 1946 and model memoranda of settlement with the terms thereof. The State amendments to the texts of the statutes and rules are also given.

The book was conceived at a conference held at Ranikhet in April 1964, and sponsored by the Indian Law Institute. At the conference were some score of young labour law teachers from law faculties of various Indian Universities, doctoral candidates, members of the Institute's research staff and other interested persons. Professor Bertram Willcos, Visiting Professor of Indian Law Institute has contributed a brief preface. This

book is a product of the joint efforts of a group consisting of teachers of labour law and members of the staff of the Indian Law Institute. The book is bound to stimulate the students' interest in this new branch of jurisprudence. It will also have some influence, not entirely confined to the subject of labour law, in familiarising law students and law teachers with a method that can do much to strengthen the breadth and toughness of legal thinking in India. The book eminently deserves to be included amongst the recommended text books on labour law in our Universities. R.G.D.

MULLA ON THE INDIAN REGISTRATION ACT (Act XVI of 1908). Seventh Edition. By J. R. Dhurandhar, B.A., LL. B., Ex-President, Maharashtra Revenue Tribunal, One-time Remembrancer of Legal Affairs and Secretary, Legal Department, Govt. of Bombay; Hon. Professor, Govt. Law College, Bombay. Assisted by A. K. Sarkar, M.A. LL. B., Advocate, High Court, Bombay. Published by N. M. Tripathi Private Ltd., Princess Street, Bombay-2 1968. Pages 423, Price Rs. 20.00.

Mulla's commentary on the Indian Registration Act, 1908 does not require any introduction to the legal profession. It is one of his famous and popular legal works. The present edition, which is the seventh, has not lost in the standard and authoritativeness of the original book which made its appearance in the year 1923. Since the last edition (1963), several important decisions on various provisions of the Act, particularly Ss. 17 and 49 have been given. These factors necessitated the present edition. Even the latest important decisions upto December 1967 which could not be included in the body of the book, are given in the Addenda. Mention may be made of the decision of the Supreme Court reported in AIR 1966 SC 1300 which dissented from the view taken in ILR 17 Bom 235, referred to under S. 17 on page 54. Attempt also has been made to include the latest available State Rules under the Act. The present edition is edited by Shri J. R. Dhurandhar, the Ex-President, Maharashtra Revenue Tribunal and Hon. Professor, Government Law College, Bombay, with the assistance of Shri A. K. Sarkar, Advocate, Bombay High Court. Shri Dhurandhar had to his credit the editorship of the 6th edition also, which task he had ably carried out. R.G.D.

MANUAL OF PUBLIC INTERNATIONAL LAW — Edited by Max Sorensen — Macmillan.

1. International Co-operation is the very life-blood of any one actively engaged in the study and practice of international law. Yet this branch of legal science has not particularly distinguished itself as a field of joint research and writing by scholars of different nations. This is not because no need exists for co-operation.

2. A textbook that would reflect objectively, from an international rather than national point of view, the status and the role of international law in the complex world of to-day is necessary. Further such text should be available at a reasonable price to teachers, students, Government Officials, Practitioners and libraries, most particularly in the newly independent and developing countries. This has been the aim of the Carnegie Endowment for International Peace in bringing out the book under review.

3. The aim of the endowment was not merely to produce just a collection of essays by international lawyers. Necessary intelligent coherence had to be assured.

4. The book under review is a definite step in achievement of this goal. There are twelve essays contributed by research assistants including "Settlement of disputes" by B. S. Murty.

5. There is a Preface by Joseph, E. Johnson President Carnegie Endowment for International Peace. The Book contains biographies of author and research assistants. Besides Table of Cases, Bibliography and Index there is a Chronological tables of treaties cited in the essays.

G.G.M.

PRINCIPLES GOVERNING ARTICLE

226: By—B. L. Hansarai, M. Sc. (Econ.) (London) M. A. LL. B. Advocate. Foreword by: Sri Gopalji Mehrotra, Former Chief Justice High Court of Assam and Nagaland. 1968. Published by Srimati Gita Hansarai, Earl Road, Gauhati 1. Pages 88 plus 9. Price Rs. 10.00.

Under Art. 226 of the Constitution the High Court has power to issue directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them, for the enforcement of fundamental rights guaranteed by the Constitution or for any other purpose. Under Arts. 32 and 226 the High Courts and the Supreme Court have been made custodians and the guardians of the fundamental rights granted to the citizens of India. In petitions under Art. 226 varieties of topics come up for decision before High Court. Numerous decisions of the High

Courts and the Supreme Court have laid down the principles for the exercise of the power under Art. 226. In the exercise of the jurisdiction under this Article many technical aspects are involved and many a time lawyers are faced with unexpected problems. It is for this reason that a handy book dealing exhaustively with day-to-day problems arising out of petitions under Art. 226 is an urgent need. Shri Hansarai deserves the gratitude of the legal profession for bringing out such a book. In Chapter I, the author gives the historical background. Chapter II is devoted to general discussion, under twenty sub-heads. "Certiorari" is dealt with in Chapter III which consists of five topics. Topics of subjective satisfaction of authorities, of administrative orders, mala fide and writs of prohibition, mandamus, habeas corpus and quo warranto, form the subject matter of the remaining eight chapters. This small and handy book is claimed to be exhaustive. All important case-law has been given. It is hoped that it would prove to be of great value to the legal profession and to the Courts.

R.G.D.

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Shri B. N. Sampath. Published by —
Benaras Hindu University, Varanasi 5.

We received the delayed January 1966 Issue of the Journal almost thirty months late. The delay in the publication must have been due to factors beyond the control of the publishing authorities. The Editor, however has regretted the delay. The issue, however, contains three Articles, each being a result of research study. Dr. Mahesh C. Bijawat, Reader in the Law Faculty of the Benaras Hindu University and Pro-Vice-Chancellor of the University has contributed an article on "The Residence of the Companies". It is a comparative study of the provisions of the Indian and American Income-tax Laws. The criteria for determining the residence of a corporation under both the systems are so vague that they deter foreign investors from participating in the industrial development of these countries. This has somewhat adversely affected the industrial economy of India more than that of the United States, the leader amongst the industrial countries of the World. The writer of this article has suggested some amendments in the Indian Income-tax Act with a view to eliminate the uncertainty created by the vague and ambiguous phraseology, by redefining in precise language the criteria of classification. The learned contributor also hopes that our Courts should be more judicious in classifying a foreign corporation as a resident one, especially when the corporation has no such intention.

In the article entitled "Retrenchment; Retrenched and Reinstated", Shri S. Parasuraman, M. A. B. Com., LL. M., Lecturer in Law, Banaras Hindu University, discusses the provisions in the Industrial Disputes Act, 1947, relating to the definition of 'Retrenchment' and the provisions relating to re-instatement of retrenched workman against the background of the prevailing conditions. He has also discussed the emerging pattern of the response of Tribunals and the Legislature to problems connected with termination of employer-workman relationship. The article is based on the dissertation submitted by the writer for his LL. M., Degree under the able guidance from Dr. Anandjee, the Dean of the Law Faculty of the Benaras Hindu University and the Principal of the Law College.

Problem of "functus officio" under Section 33(2)(b) of the Industrial Disputes Act (1947) is discussed by Shri Joginder Singh, LL. M., a Research Scholar of the B. H. U. The question whether "The authority concerned" under S. 33(5) is competent to dispose of an application made to it under the proviso to S. 33(2)(b) for approval of the action taken by the employer against the workman, in regard to the matter connected with the dispute pending before the Authority, after the industrial dispute pending before it has been decided and the resulting award has become enforceable under S. 17-A of the Act, had come up before High Courts and they are not of one mind on this issue. The learned author of this article has reviewed the case law and has examined the question in all its bearings. The article was written a year ago. Since then the decision of the Supreme Court in AIR 1966 SC 880=1965-2 LLJ 128=(1965) 11 SC WR 516 came out. The decision is in substantial accord with the views expressed in this article namely, that the jurisdiction of the Tribunal should be deemed to be in existence by necessary implication (a sort of suspended animation), so that the purpose of the Act be served by approving the action taken during the pendency of the dispute before the authority concerned.

Like the previous issues, this issue of the Journal has maintained the high standard of the contributions. The notable feature is that the contributions are only from the teachers and the scholars of the Law Faculty of the Benaras Hindu University. The credit for this is mostly due to Dr. Anandjee, the learned Principal of the Law College and the Dean of the Law Faculty. Under his guidance, we are sure that the research department of the College will make great strides.

R.G.D.

FUNDAMENTAL RIGHTS AND AMENDMENT OF THE INDIAN CONSTITUTION. — By S. P. Sathe, Department of Law, University of Bombay, 1968 published by Shri T. V. Chidambaram, Registrar, University of Bombay, Fort, Bombay 1. Price Rs. 4-00. Pages 68.

This essay or monograph is expressly written to "critically examine various issues involved" in *Golak Nath v. State of Punjab*, (AIR 1967 SC 1643 et seq) in which the Supreme Court held that Parliament cannot amend the Constitution so as to take away or abridge the fundamental rights. As the author has said in the preface this decision will have far-reaching implications for constitutional development in India.

An academician that he is, the author has not confined himself to the letter or the expression of the Constitution but has gone into the history of the constitutional development of India vis-a-vis similar developments in countries like the U. S. A., Canada, Australia, Ceylon etc. While examining the specific question whether a constitutional amendment is or is not 'law' within the meaning of Article 13(2) of the Indian Constitution he has also dealt with the fundamental problem whether the Parliament has or has not power to amend the Constitution particularly with reference to the wording of Article 368. And, what is more, he has also delved into the deeper questions of the ideals or spirit of the Constitution, and advocated consequent necessity of awareness on the part of the courts (as e.g. shown by the Supreme Court in the instant case) as well as the Parliament.

As a book written by an academician, on a constitutional question of growing importance dealing with the several aspects historical, political, judicial and legislative, it will benefit not only lawyers and jurists but also students of politics, and also the judiciary.

The get up is neat and printing free from error. The authorities referred to are quoted in the footnotes and the cases and books referred to are also listed out at the end. D.A.R.

INTERNATIONAL SEMINAR ON COMMERCIAL ARBITRATION, New Delhi 18th and 19th March 1968 By the Indian Council of Arbitration, Federation House, New Delhi — Price Rs. 20 Pages 374.

The Indian Council of Arbitration New Delhi convened a two-day Seminar on Commercial Arbitration, on 18th and 19th March 1968. The main aim of the Seminar was to draw attention to the pro-

blems of Commercial Arbitration in the context of efforts at world-wide expansion of trade and development activities symbolised in the convening of the II UNCTAD in New Delhi in February 1968, and to evolve a common policy and mutually acceptable and viable norms for the promotion and development of international commercial arbitration.

The Seminar was inaugurated by the Chief Justice of India, the Hon. Mr. M. Hidayatullah. Three business Sessions and a concluding session were held. The subjects discussed were (1) The choice of Arbitrators in International Commercial Arbitration (2) Development of International Trade Law to facilitate wider recourse to International Commercial Arbitration. (3) Venue of Arbitration in International Commercial Disputes and (4) Promotional aspects of International Commercial Arbitration.

International Arbitration is of many kinds. International Commercial Arbitration is much younger than other International Arbitration. The book under review publishes, besides report of the proceedings of Seminar, twenty two learned papers, fourteen out of them being from overseas contributors. The paper by Prof. Pieter Sanders dealing with Venue of Arbitration in International Commercial Arbitration, merits special mention.

The book has reproduced these papers under various Sections followed by observations made by the participants.

There is a list of participants at the end. G.G.M.

A GUIDE TO LAW AND PRACTICE ACT, 1967 — By David Napley — UNDER THE CRIMINAL JUSTICE Published By Sweet & Maxwell — (Agents in India N. M. Tripathi (P) Ltd. Bombay) — Price 25s. net. Pages 180.

This book is meant to serve as a useful guide in the task of explaining the vital changes in the procedure of the English Criminal Courts effected by the Criminal Justice Act, 1967. The learned author has, at places, suggested the likely results and difficulties and pointed out the practical application of the amendments to procedure. The book, thus, besides serving as a guide to practitioners, may also lighten the way of the police, journalists, magistrates, their clerks, students and interested members of the public.

Besides the text of the Criminal Justice Act, 1967, there is a useful index. G.G.M.



The Hon'ble Mr. Justice S. C. MISRA,
Chief Justice, Patna High Court.

THE

All India Reporter

1969

Supreme Court

AIR 1969 SUPREME COURT 1
(V 56 C 1)

M. HIDAYATULLAH, C. J., J. C. SHAH,
S. M. SIKRI, V. RAMASWAMI AND
V. BHARGAVA, JJ.

Triloki Nath Tikku and another, Petitioners v. State of Jammu and Kashmir and others, Respondents.

Writ Petn. No. 107 of 1965, D/-23-4-1968.

Constitution of India, Art. 16 (4) — Reservation of appointments for “backward classes” — Determination of backward classes cannot be on basis of community, caste, race or religion — State policy of distribution of posts community-wise is hit by Art. 16 (1) and (4).

Article 16 in the first instance by Cl. (2) prohibits discrimination on the ground, inter alia, of religion, race, caste, place of birth, residence and permits an exception to be made in the matter of reservation in favour of backward classes of citizens. The expression “backward class” is not used as synonymous with “backward caste” or “backward community”. The members of an entire caste or community may in the social, economic and educational scale of values at a given time be backward and may on that account be treated as a backward class, but that is not because they are members of a caste or community, but because they form a class. In its ordinary connotation the expression “class” means a homogenous section of the people grouped together because of certain likenesses or common traits, and

who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. But for the purpose of Art. 16 (4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution. (Para 4)

The injunction to the Secretaries to select candidates “keeping in view the policy of adequate representation of such elements as were not adequately represented in the services,” is not a provision making reservation of appointments or posts in favour of backward class. Selections made in pursuance of such order could not be deemed to have been made on the basis of backwardness of the classes to which they belonged. The State policy of the State of J. and K. whereby 50 per cent of vacancies were reserved for the Muslims of Kashmir for the entire State, 40 p. c. were reserved for Jammu Hindus and 10 p. c. for Kashmiri Hindus, is a policy not of reservation of some appointments or posts: it is a scheme of distribution of all the posts communitywise. Distribution of appointments, posts or promotions made in implementation of that State policy is contrary to the constitutional guarantee under Art. 16 (1) and (2) and is not saved by Cl. (4) and the promotions granted in accordance with this policy are contrary to the provisions of Arts. 16 (1) and (4) of the Constitution and therefore void. This will not however prevent the State from devising a scheme, consistent with the

Constitutional guarantees, for reservation of appointments, posts or promotions in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State.

(Paras 5, 6, 7)

Mr. M. C. Setalvad, Senior Advocate, (M/s. Naunit Lal and R. Gopalakrishnan, Advocates with him), for Petitioners; Mr. C. K. Daphtary, Attorney General for India, (M/s. M. S. K. Sastri, R. H. Dhebar and R. N. Sachthey, Advocates, with him), for Respondents Nos. 1 and 2.

The following Judgment of the Court was delivered by

SHAH, J.: By order dated December 15, 1966,* this Court called upon the High Court of Jammu and Kashmir to "gather the necessary material, such as, the total population of the entire State, the break-up figures of the two provinces, the strength of different communities and the extent of their social and economic backwardness and the criteria applied by the State in that regard", and to make a report in that behalf. The report has now been submitted to this Court together with copies of the evidence oral and documentary produced by the parties. It is unfortunate that the learned Judge who heard the matter did not record his opinion on the evidence. We do not, however, on the view we take deem it necessary to send back the papers for recording the opinion of the High Court on the evidence led by the parties pursuant to the previous order.

2. The petitioners had by the writ petition claimed that in declining to promote them and others similarly circumstanced to the gazetted cadre, the State had "acted purely on communal basis inasmuch as senior members of the Service belonging" to one community had been placed below the junior-most members of other communities only on the basis of their respective community and on the basis of residence in a locality, and had thereby denied the guarantee of equality in matters of employment and appointment to the gazetted cadre of the Education Department under Art. 16 of the Constitution. By Cl. (1) of Art. 16 equality of opportunity in matters relating to employment or appointment between members of the same class is guaranteed by a positive injunction; Cl. (2) enjoins the State not to discriminate against citizens in respect of any

employment or office on the ground of race, religion, caste, sex, descent, place of birth or residence. Clause (4) provides a limited exception to the operation of the other clauses of Art. 16: it authorises the State to make provisions for reservation of appointments or posts in favour of backward classes of citizens, which are not adequately represented in the services under the State.

3. The petitioners claimed that they had been discriminated against in the matter of promotion to the gazetted cadre, solely on the ground of religion and place of residence. The case that junior officers were promoted to the gazetted cadre over officers senior to them on the ground solely that they — the junior members — belonged to the Muslim community or that they were Hindus belonging to the Jammu province of the State of Jammu and Kashmir was not denied. But this prejudicial treatment of senior officers was sought to be supported on the plea that the State had acted in consonance with the principles of Cl. (4) of Art. 16 of the Constitution. It was the case of the State that Muslims as a community in the whole of the State of Jammu and Kashmir formed a backward class of citizens and they were not adequately represented in the services under the State; similarly Hindus from the province of Jammu formed a backward community and were not adequately represented in the services of the State, and on that account reservation in the matter of appointments or posts and promotions in the services of the State was made in respect of those classes. Clause (4) of Art. 16 undoubtedly empowers the State to make reservation of appointments or posts in favour of any backward class of citizens so as to give the class an adequate representation in the services under the State. The provision making such reservation need not be by a statutory enactment: it may be made by an executive order or direction. But there is not even a formal executive order expressly dealing with reservation of posts and appointments in the Education Department. On behalf of the State it is claimed that as a matter of State policy, in making appointments and promotions, reservations in fact have been made by the State as alleged by the petitioners with some variations as to percentage reserved for the Hindus from the province of Jammu. No opinion need be expressed in this case on the question whether a provision

* (reported in AIR 1967 SC 1283)

under Art. 16 (4) is not effective, unless it is made by legislation, or by an executive order formally published.

4. Article 16 in the first instance by Cl. (2) prohibits discrimination on the ground, inter alia, of religion, race, caste, place of birth, residence and permits an exception to be made in the matter of reservation in favour of backward classes of citizens. The expression "backward class" is not used as synonymous with "backward caste" or "backward community". The members of an entire caste or community may in the social, economic and educational scale of values at a given time be backward and may on that account be treated as a backward class, but that is not because they are members of a caste or community, but because they form a class. In its ordinary connotation the expression "class" means a homogenous section of the people grouped together because of certain likenesses or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. But for the purpose of Art. 16 (4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution.

5. In the voluminous evidence produced before the High Court a formal order making a provision for reservation of appointments or posts in favour of any backward class of citizens does not find a place. The only evidence to which our attention has been invited is the statement of Malik Ghulam Nabi, who deposed

"that the policy laid down by the Government in matters of the employment to the State services is that 50 per cent of the vacancies are reserved for the Muslims of Kashmir (for the entire State). Out of the remaining 50 per cent, 40 per cent are reserved for the Jammu Hindus and 10 per cent for the Kashmir Hindus. There are a number of Government orders by which this policy has been laid down, but due to the short time at my disposal, I have been able to get only one copy of such order, which is signed by the Chief Secretary whose handwriting I know and identify".

In cross-examination Malik Ghulam Nabi stated that the order produced by him applied to all kinds of services under the

State and it was "being implemented even now and was still in force". The witness was unable to speak to the criteria on the basis of which the order was issued. The order of which a copy was produced by Malik Ghulam Nabi related to the promotion to the posts of Superintendents in the Civil Secretariat and other offices. It purports to be a record of the decisions taken by the Council of Ministers in the matter of promotion of Superintendents in the Secretariat. It was recorded in paragraph 4 of the order that a Selection Board consisting of four Secretaries to the Government was set up and they were asked "to prepare a Select List on the basis of merit-cum-seniority, keeping in view the policy of adequate representation of such elements as are not adequately represented in the services and to pay due regard to Provincial proportions". There is no reference in any of the clauses of the order to selection of officers on the basis that they belong to backward classes. The injunction to the Secretaries to select candidates "keeping in view the policy of adequate representation of such elements as were not adequately represented in the services," is not a provision making reservation of appointments or posts in favour of backward classes. Selections made, assuming that similar orders were passed enjoining the making of promotions to the gazetted cadre in the Educational Service, could not be deemed to have been made on the basis of backwardness of the classes to which they belonged.

6. The State of Jammu and Kashmir had, it is admitted, from time to time framed lists of backward communities that is evident from Ex. Z-3 which is a list of classes who are regarded by the State as backward. But it is not claimed that in making promotions to the gazetted cadre in the Educational Service, the authorities acted in pursuance of the List Ext. Z-3. As already observed, the normal rule contemplated by the constitutional provision is equality between aspirants to public employment, but in view of backwardness of certain classes it would be open to the State to make a provision for reservation of appointments or posts in their favour when the State proceeds not to make reservations in favour of any backward class, but to distribute the total number of posts or appointments on the basis of community or place of residence, no reservation permitted by Cl. (4) of Art. 16

can be said to be made. In effect the State policy which Malik Ghulam Nabi spoke to was a policy not of reservation of some appointments or posts: it was a scheme of distribution of all the posts communitywise. Distribution of appointments, posts or promotions made in implementation of that State policy is contrary to the constitutional guarantee under Art. 16 (1) and (2) and is not saved by Cl. (4).

7. The promotions granted to respondents 3 to 83 are accordingly declared contrary to the provisions of Arts. 16 (1) and (4) of the Constitution and therefore void. This will not however prevent the State from devising a scheme, consistent with the Constitutional guarantees, for reservation of appointments, posts or promotions in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State. The petitioners will be entitled to their costs of the petition including the costs of the hearing which culminated in the interlocutory order, and the costs incurred before the High Court.

R.G.D.

Petition allowed.

AIR 1969 SUPREME COURT 4 (V 56 C 2)

(From Madhya Pradesh: AIR 1966 Madh Pra 1 (FB))

V. RAMASWAMI AND C. A. VAIDIALINGAM, JJ.

Ashiq Miyan and others, Appellants v. State of Madhya Pradesh, Respondent.
Criminal Appeal No. 128 of 1963, D/- 1-5-1968.

(A) Penal Code (1860), Section 120-B — Opium Act (1878), Section 9 (a) — Prosecution of accused A, his two sons B and C and his nephew D under Section 120-B, I. P. C. and Section 9 (a) of the Act — Recovery of large quantity of opium from house of accused — Question whether accused persons were in conscious possession of opium recovered from their house — Plea of their living separately and that they were not present at time of recovery considered in detail and decided against accused — Chance of any outsider having thrown opium in court yard of house eliminated — Concurrent findings of trial court and appellate court accepted by High Court in revision — There was no legal error

IL/IL/C585/68

or infirmity committed by any of the courts — Findings not interfered in appeal by special leave — Constitution of India, Article 136. (Para 7)

(B) Criminal P. C. (1898), Secs. 251A, 252 — Opium Act (1878), Sections 20G, 9 (a) — Offence under Section 9 (a) — Offence investigated in accordance with provisions of Act by Police Sub Inspector — Report made by Sub-Police Officer under Section 20G — Trial held by Magistrate under Section 251A, Cr. P. C. — Held there was no illegality in the trial. AIR 1966 Madh Pra 1 (FB), Affirmed; Cri. Appeal No. 201 of 1963, D/- 11-12-1964 (SC), Foll.; AIR 1963 Madh Pra 337, Overruled.

(Paras 12, 13)

Cases Referred: Chronological Paras
(1966) AIR 1966 Madh Pra 1

(V 53) = 1966 Cri LJ 29 (FB),

Ashiq Miyan v. State of M. P. (1964) Criminal Appeal No. 201 of 1963, D/- 11-12-1964 (SC), Amalshah v. State of Madh. Pra.

(1963) AIR 1963 Madh Pra 337 (V 50) = 1963 (2) Cri LJ 629, Sardar Khan Multan Khan v. State

M/s. C. L. Sareen and R. L. Kohli, Advocates, for Appellants; Mr. I. N. Shroff, Advocate, for Respondents.

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.: This is an appeal, by special leave, in which the appellants challenge the propriety and correctness, of the order of the Madhya Pradesh High Court, confirming their conviction, under Section 120B, I. P. C., and Section 9 (a), of the Opium Act, 1878 (Act 1 of 1878), (hereinafter called the Act). Appellants 2 and 3 are the sons of the first appellant, and the 4th appellant since deceased, was his nephew.

2. On receiving information, that opium was being smuggled and secretly kept, in the house of the appellants, the Sub Inspector of Police, Station Malhar-ganj, Indore with a police party, raided their house, on September 19, 1960, and recovered a fairly large quantity of opium of about 2 maunds, 14 seers and 14 chhatacks. The appellants were arrested and charge-sheeted, for having committed offences, under Section 120B, I. P. C. and Section 9 (a) of the Act. They pleaded not guilty. Their defence was that each of them was living separately, and they were not also in the house,

when the opium was stated to have been recovered. The deceased, 4th appellant, raised a plea that one Altaf had come, in the morning of September 19, 1960, at about 9 A. M., and told him that the police were after him, and that he wanted to throw a bundle, which was, in his possession, in the house of the appellants. Accordingly, Altaf threw a bundle, in the court-yard of the house of the appellants.

3. The Additional City Magistrate, Indore, accepted the case of the prosecution and rejected the plea of the appellants. The trial Magistrate found that the opium was recovered from the possession of the appellants, who had no permit or licence, for its possession or transportation, and he also found that the appellants, along with others had conspired to possess the said opium. On these findings, each of the appellants, was convicted, under Section 120B, I. P. C., and Section 9 (a) of the Act, and sentenced to undergo two years' rigorous imprisonment, in respect of each of the offences, the sentences to run concurrently.

4. The appellants challenged their conviction and sentence, before the First Additional Sessions Judge, Indore, in Criminal Appeal No. 118 of 1963. The learned Sessions Judge, agreeing with the conclusions, arrived at by the trial Court, dismissed the appeal.

5. The appellants, again, moved the High Court of Madhya Pradesh, Criminal Revision No. 131 of 1964, to set aside their conviction; but the High Court also, by its order, dated December 23, 1965, which is under attack, dismissed the revision.

6. On behalf of the appellants, Mr. C. L. Sarin, learned counsel raised three contentions: (1) that there is no evidence of any conspiracy, to attract S. 120B, I. P. C.; (2) neither the High Court, nor the two Subordinate Courts, have considered the vital question, viz., whether the evidence establishes that the four appellants were in conscious possession of the opium, recovered from the house; and (3) the trial which was held, under Section 251A, of the Code of Criminal Procedure, was vitiated, as it should have been properly held, only under S. 252, Cr. P. C.

7. So far as the first two contentions are concerned, in our opinion, it is really an attack, on the concurrent findings, recorded by the Magistrate and, on appeal, by the Sessions Judge, and which

have been accepted by the High Court, in revision. The Magistrate, as well as the learned Sessions Judge, have posed, one of the questions for consideration, as to whether the appellants can be considered to have been in conscious possession of the opium, recovered from the house. It is, in considering this question, that the plea of the appellants, that each of them was living separately in the house and that they were not present, at the time of the recovery, and that it was possible, for some outsider, to have thrown the opium recovered, into the court-yard of the house, have all been considered, in detail, and findings, recorded, against the appellants. The chance of any outsider, having thrown this article in the court-yard of the appellants' house, has been eliminated. The court-yard has been found to be a place where various domestic Articles were kept, and has also been found to be a place in frequent use, by the appellants. Their presence, at the time of the recovery, has also been held to be established. In view of all these, and other circumstances, to which it is unnecessary for us to refer, the finding has been recorded that the opium, found in the court-yard of the house of the appellants was in their conscious possession and that the appellants, along with others, had also conspired together, to obtain, deal in, and possess opium. The further finding is that the presence of such a large quantity of opium could not have been possible, without each of them, taking the other, into confidence. These findings have been accepted, by the High Court, and we are satisfied that there is no legal error, or infirmity, committed by any of the Courts, in arriving at that conclusion. Therefore, the two contentions, noted above, will have to be rejected.

8. That leaves us, for consideration, the third contention, noted above, that the trial in this case, ought to have been held, under Section 252, Cr. P. C., and it is vitiated as it has been held, under Section 251A. Mr. Sarin, learned counsel for the appellants, urged that the officers who are to investigate offences and grant bail, to persons arrested under the Opium Act, as well as the procedure, for trial, in respect of offences, under the Act, and other incidental matters, connected therewith, have been laid down in Sections 20 to 20-I, introduced in the Act, by the Opium (Madhya Pradesh) Amendment Act, 1955

(M. P. Act XV of 1955). Counsel urged that the Officer empowered to investigate offences, under Section 20, be he an officer of the Department of Excise or a police officer, must be considered to be an excise officer; and though the report, made by such an officer, is treated under Section 20G, of the Act, as applied to Madhya Pradesh, as a report, made by a police officer, under Section 190 (1) (b), Cr. P. C., it cannot be held to be a police report within the meaning of Section 251A, and hence, the trial should have been held, in this case, not under Section 251-A, but under Section 252, Cr. P. C. Counsel referred us to the decision, of the Madhya Pradesh High Court in Sardar Khan Multan Khan v. State, AIR 1963 Madh Pra 337, in this connection. Counsel further stated that this question, regarding the illegality, of the trial held under Section 251A, was raised, in the present proceedings, when the appellants had filed in the High Court, a criminal revision, challenging their conviction, by the two Subordinate Courts. This question was referred, by a learned Single Judge, by his order dated August 3, 1965, to a Full Bench, for consideration. The Full Bench, in its decision, reported as Ashiq Miyan v. State of M. P., AIR 1966 Madh Pra 1 (FB), has overruled the earlier decision in Sardar Khan's case, AIR 1963 Madh Pra 337. The learned Judges, of the Full Bench, have rejected the contention of the appellants, that their trial was vitiated by the fact that the procedure prescribed by Section 251A, Cr. P. C., has been adopted. The Full Bench has further held that Section 251A, Cr. P. C., is attracted to a case, instituted under the Opium Act, on a report made by a police Officer, and that it logically follows that the trial, of an accused, under the Opium Act, instituted on a report, made by an excise officer, would also be governed, by Section 251A. According to the appellants, this decision of the Full Bench, is erroneous, and counsel wants the earlier decision of the Madhya Pradesh High Court, in Sardar Khan's case, AIR 1963 Madh Pra 337 to be restored.

9. Mr. I. N. Shroff, learned counsel for the State, pointed out that the case against the appellants was investigated in accordance with the provisions, contained in the Opium Act and was initiated, on a report, made by a police officer. These facts have been noted by the learned Judges of the Full Bench, and

it is, on that basis, that, ultimately, after a reference to the decision of this Court, in Amalshah v. State of Madhya Pradesh, Cri. Appeal No. 201 of 1963, D/- 1-12-1964 (unrep.) that the Full Bench has held that the trial is not vitiated.

10. It is not really necessary, for us, to consider the larger question, as to whether, when an excise officer makes a report, under Section 20-G of the Act, whether the trial, following it, in such a case, would be governed by Sec. 251A. In fact the Full Bench has gone further, and expressed an opinion, on this point also, that even in such a case, the trial would be governed, by Section 251A, Cr. P. C. We express no opinion, on that aspect of the matter. We will confine our decision, to the present case, on the basis that the crime was investigated, in accordance with the provisions, contained in the Opium Act, and the case was initiated against the appellants, on a report, made by a police officer.

11. The first information report, Exhibit P-20, shows that the search of the appellants' house was conducted, by the Sub-Inspector of Police, Malharganj Police Station, and the recovery of opium, as well as the arrest of the appellants, were made by the said officer. Investigation was also done, by him. Ultimately, the report, which is styled as a 'complaint' and dated October 23, 1960, was made and signed by Tehsildarsingh, Sub-Inspector of Police, Malharganj Police Station, as the Investigating Officer. It is on the basis of that report, that the Magistrate, in this case, conducted the trial of the appellants.

12. We have already referred to the Full Bench decision of the Madhya Pradesh High Court, wherein these facts have been stated. No doubt, counsel for the appellants has urged that, even under those circumstances, a trial, for an offence under the Opium Act cannot be held under Section 251-A. We are not inclined to accept the contention of the learned counsel. More or less, a similar question arose before the Constitution Bench of this Court, in Amalshah's case, Cri. Appeal No. 201, of 1963, D/- 11-12-1964 (unrep.) Similar contentions were also urged, and reliance was placed on Section 20-G, of the Act, as applied to Madhya Pradesh. This Court, after referring to the material provisions of Section 20-G, by its judgment, dated December 11, 1964, de-

clined to express an opinion on the larger question, that the report, made by an excise officer, cannot be held to be a police report, so as to attract Sec. 251-A, of the Code of Criminal Procedure. In that decision, this Court actually found that the proceedings, against the appellant before them, commenced on the report, of a police officer, and not on the report, of an excise officer, and that the complaint, lodged before the Magistrate, had been signed by the police officer, who investigated the offence. On these findings, this Court held that, inasmuch as the proceedings commenced, on a report made by a police officer, S. 251-A, Cr. P. C., in terms, would apply, and hence the trial held, under that section in that case, was perfectly legal. Therefore, it will be seen, that in respect of a trial conducted by a Magistrate on a report made by a police officer, under the Opium Act, as applicable to the state of Madhya Pradesh, for an offence under that Act, this Court held that S. 251-A, Cr. P. C. applied.

13. In the case before us, on the facts, it is clear that the investigation was done by a police officer, the seizure of the articles and the arrest, of the accused, were effected, by a police officer, and the complaint or report, dated October 23, 1960, to the Magistrate, was made, by the Police Officer. It is, on this report of the police officer, that the Magistrate acted further, and the trial also followed. Under these circumstances, it is clear that Sec. 251-A, Cr. P. C., directly applies and it was, in accordance with the procedure, indicated in that section, that the trial was held. It follows, that there is no illegality, in the trial.

14. The result is that this appeal fails, and is dismissed.

SSG/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 7
(V 56 C 3)

(From: Patna)*

S. M. SIKRI AND R. S. BACHAWAT, JJ.
Jotish Chandra Chaudhury, Appellant
v. State of Bihar, Respondent.

Criminal Appeal No. 1 of 1968, D/-
26-4-1968.

* (Cri. Appeal No. 4 of 1967, D/- 10-11-
1967—Pat.)

IL/IL/C563/68

Penal Code (1860), Sections 199 and 200 — Essential ingredients — For conviction under Section 199 false statement in a declaration must be proved to be touching any point material to object for which declaration is made — For conviction under Section 200 declaration should be used or attempted to be used corruptly — Appellant swearing affidavit giving date of birth of his minor son on basis of school record knowing that it was wrong — Giving of wrong data not touching any material point in appeal and appellant standing to gain no advantage therefrom — Declaration not shown to be used corruptly — Filing of complaint by court under Sections 199 and 200 against appellant is not justified. Cr. App. No. 4 of 1967, D/- 10-11-1967 (Pat), Reversed.
(Para 3)

Mr. Sarjoo Prasad, Senior Advocate, (Mr. S. N. Prasad, Advocate with him), for Appellant; Mr. U. P. Singh, Advocate, for Respondent.

The following Judgment of the Court was delivered by

SIKRI, J.: In this appeal by special leave Jotish Chandra Chaudhury, hereinafter referred to as the appellant, challenges the order of a Division Bench of the Patna High Court in Criminal Appeal No. 4 of 1967, refusing to interfere with the order of the learned Single Judge directing the prosecution of the appellant under Section 199 and S. 200 of the Indian Penal Code or such other sections as may be found to be applicable.

2. In order to appreciate the contentions of the learned counsel for the appellant it is necessary to set out the relevant facts. The appellant with his five sons constituted a joint Hindu family. In 1952 partition took place. At that time three sons were minor while two were major. As a result of the partition the joint family business, which was then being carried on under the name and style 'Ramnath Sarjug Prasad' was allotted exclusively to the appellant and his three minor sons. The appellant filed a suit (Suit No. 5 of 1958) for damages against M/s. Lakshmi Bombay Thread Factory and others on the ground that the defendants had infringed certain trade marks registered under the Trade Marks Act, 1940. This suit was decreed by the District Judge, Patna, on March 31, 1962. The defendant filed an appeal against the said decree. This appeal was numbered First Appeal No.

227 of 1962. In the suit one contention of the defendants was that the suit was not maintainable because although the suit had been instituted by the appellant in his capacity as proprietor of the firm Ramnath Sarjug Prasad, his three minor sons, who were also proprietors of the firm according to the partition deed dated November 2, 1962, had not been impleaded. The learned District Judge held on this point that it was open to the plaintiff to sue on behalf of the entire family comprising himself and his minor sons as karta of his family without impleading the minors. In the course of the hearing of the appeal before the learned Single Judge, the appellant filed a petition under Order 1, Rule 10, Cr. P. C., on May 1, 1967, for addition of parties. On the same day the learned Single Judge directed the appellant to file an affidavit by May 2, 1967, giving the respective dates of birth of his three minor sons who were to be added as parties to the said appeal. The appellant, who has a large family, did not remember the exact dates of birth of his sons and sought information from the school authorities. The appellant received information from the Principal, Ram Mohan Roy Seminary, Patna, on May 2, 1967, that the date of birth of Subhash alias Ashok Kumar Jayaswal was June 9, 1954. On the same date the appellant swore and filed an affidavit stating therein the above date of birth of Subhas alias Ashok Kumar Jayaswal. The learned Single Judge in the judgment disposing of Appeal No. 227 of 1962 observed:

"In conclusion, I would like to mention that the statement made by plaintiff-respondent Jotish Chandra Choudhury in the affidavit sworn and filed by him in this Court on 2-5-1967 about the date of birth of his youngest son Subhas being 9th June, 1954 appears to be false to his knowledge, as shown by the fact that this plaintiff-respondent himself was one of the executants in the Partition Deed (Ext. B) which is dated 2-11-1952 and he executed the same for himself as well as guardian of his three minor sons including the aforesaid Subhas. He is therefore directed to show cause by 21-7-1967 as to why he shall not be prosecuted for committing offences under Sections 199 and 200 of the Indian Penal Code or such other sections as may be found to be applicable."

The learned Single Judge, on cause being shown, was unable to accept the

plea of the appellant that the date of birth of Subhas had been wrongly mentioned due to a bona fide mistake. We may mention that Subhas was actually born on December 12, 1951, and not on June 9, 1954. The learned Single Judge observed:

"This plea about bona fide mistake does not appear to be all convincing or acceptable. As it is well known that the entries in the School Registers regarding the dates of birth are often wrong being based upon wrong information given at the time of admission of the students and Jotish Chandra Choudhary being himself the father of the boy and being a party to the aforesaid deed of partition could not be unaware of the fact that the date of birth as entered in the School Register was not correct. In this connection, it may be mentioned that he is not an illiterate villager but a business man living in Patna City and running a business since a long time.

On a consideration of all the above aspects, I am quite unable to accept the plea about the date of birth having been wrongly mentioned in the affidavit due to bona fide mistake and it is evident that this date was deliberately given as it was thought that time that this version could be supported by the certificate obtained from the school, and the fact that could be detected by reference to the registered deed of partition, which has been executed in 1952, had been overlooked at that time."

3. With respect to the learned Judge, he has not considered whether any advantage was likely to accrue to the appellant for giving the date of birth of his son Subhas as June 9, 1954, instead of December 12, 1951. As far as the appeal pending before the learned Single Judge was concerned, it is not disputed that this change did not make any difference to the decision of the question of impleading the minor son as a party or the decision on the question whether the suit was maintainable or not. Before a person can be punished under Section 199, I. P. C., it has to be proved *inter alia*, that the false statement is 'touching any point material to the object for which the declaration is made.' There is no suggestion that the change of the date of birth touched any material point in F. A. No. 227 of 1962. One of the ingredients of an offence under Section 200, I. P. C., is that the declaration should be used or attempted to be used corruptly. It has not been ex-

plained to us how the declaration was used 'corruptly'. Considering that the date of birth was obtained from the school records, and that the appellant stood to gain no advantage by giving a wrong date, the learned Single Judge should not, in our view, have directed the lodging of complaint under Sec. 199 or Section 200, I. P. C. It is not clear what other section of Indian Penal Code the learned Single Judge had in view.

4. In view of the above conclusion it is not necessary to consider whether the judgment directing the filing of complaint was in contravention of Sec. 479A (6), Cr. P. C.

5. In the result the appeal is allowed and the orders of the Division Bench and the learned Single Judge set aside and the complaint, which is stated to have already been filed, quashed.

KSB

Appeal allowed.

AIR 1969 SUPREME COURT 9
(V 56 C 4)

(From: Calcutta)*

**J. C. SHAH, V. RAMASWAMI AND
V. BHARGAVA, JJ.**

Modi Co., Appellant v. Union of India, Respondent.

Civil Appeal No. 395 of 1965, D/- 7-12-1967.

(A) Forward Contracts (Regulation) Act (1952), Sections 15 (1), 17, 18 (1) — Government can by a notification declare all forward contracts illegal except those which are non-transferable specific delivery contracts. (Paras 5 and 6)

(B) Forward Contracts (Regulation) Act (1952), Section 2 (f) — Specific delivery contract — Construction — Transferable or non-transferable — Absence of a specific clause in the agreement prohibiting transfer is not conclusive — Intention of the parties gathered from the contract as a whole and the surrounding circumstances is decisive — Contract placed by Central Purchase Organization, Government of India, in Form D. G. S. and D 68 — Held non-transferable specific delivery contract — (Contract Act (1872), S. 10) — (Deed — Construction).

The question as to whether a contract is a transferable or non-transferable specific delivery contract is a question

*(Matter No. 97 of 1963, D/- 18-9-1963 — Cal.)

HL/TL/E154/67

which ultimately depends on a reasonable construction of the contract. The absence of a specific clause in the contract which prohibits the transfer of the rights and liabilities is not by itself conclusive as to the intention of the parties. If, upon a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. Further, in construing a contract it is legitimate to take into account the surrounding circumstances for ascertaining the intention of the parties. AIR 1962 SC 1810, Rel. on.

(Para 8)

The appellant agreed to sell jute bags to the Director General, Supplies and Disposals for packing imported food grains and the bags were agreed to be delivered by a particular date to the officer named in the contract. The contract could not be sublet or assigned by the seller under condition 10 read with para 3(b) of the "Conditions of Contract contained in Form D. G. S. and D. 68" governing contracts placed by the Central Purchase Organization of the Government of India.

Held, the parties could not be said to contemplate transferring their respective rights under the contract. The contract was therefore a non-transferable specific delivery contract attracting the exemption under Section 18 (1) of the Act. From the contract as a whole and the surrounding circumstances, a term prohibiting transfer of rights under the contract was implied. (Para 9)

Cases Referred: Chronological Paras
(1962) AIR 1962 SC 1810 (V 49) =
1963-3 SCR 183, Khardah Company Ltd. v. Raymon and Co. (India) Private Ltd.

8
Mr. A. K. Sen, Senior Advocate (Mr. D. N. Mukherjee, Advocate, with him), for Appellant; Mr. B. R. L. Iyengar, Senior Advocate (Mr. R. N. Sachthey, Advocate with him), for Respondent.

The following Judgment of the Court was delivered by

RAMASWAMI, J.: This appeal is brought, by special leave, from the judgment of the Calcutta High Court dated September 18, 1963 dismissing an application under Section 33 of the Arbitration Act.

2. By its letter dated September 14, 1960, the appellant made an offer for sale

to the respondent of 500 Bales (1,50,000 bags) 'B' Twills on the terms and conditions mentioned in the said letter. The offer was accepted by the Director-General, Supplies and Disposals on behalf of the respondent by his letter No. CAL/DL-1/5750-L/II/Modi/158 dated September 16, 1960. The appellant deposited with the Reserve Bank of India the sum of Rs. 20,182.50 P. towards security deposit on September 22, 1960 as required by the acceptance letter. The date of delivery fixed under the contract was November 30, 1960 and the respondent sent the appellant despatch instructions dated November 21, 1960, through the Director of Supplies and Disposals. On November 30, 1960 the appellant, however, intimated to the respondent that the contract was void and illegal and requested that the security deposit should be refunded. The case of the appellant was that the contract was in violation of the provisions of the Forward Contracts (Regulation) Act, 1952 (Act 74 of 1952), hereinafter called the 'Act'. By his letter dated December 1, 1960 the Director of Supplies wrote on behalf of the respondent that the contract was legal and binding and as the appellant had failed to deliver the goods as provided in the agreement the respondent would purchase the goods at the risk of the appellant. The respondent incurred extra expenditure amounting to about Rs. 76,410 and after giving credit to the appellant for the amount of Security Deposit, a sum of Rs. 56,000 still remained due to be paid by the appellant to the respondent. As the appellant failed to pay, the respondent took recourse to the arbitration Clause 21 of the contract and appointed an Arbitrator to determine the dispute between the parties regarding the agreement. Before the Arbitrator could give his award, the appellant filed an application before the High Court under Section 33 of the Arbitration Act praying for a declaration that the arbitration clause was illegal and void and for an injunction restraining the respondent from prosecuting the arbitration proceedings. By its judgment dated November 19, 1963 the High Court held that the contract was a "non-transferable specific delivery contract" and was not hit by the provisions of the Act and accordingly dismissed the application of the appellant.

3. The question presented for determination in this appeal is whether the contract in question is a transferable or

non-transferable specific delivery contract within the meaning of the Act.

4. Section 2 (i) of the Act defines a "ready delivery contract" as meaning "a contract which provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days after the date of the contract.....". A "forward contract" is defined under S. 2(c) as meaning "a contract for the delivery of goods at a future date and which is not a ready delivery contract". S. 2(m) defines a "specific delivery contract" as meaning "a forward contract which provides for the actual delivery of specific qualities or types of goods during a specified future period at a price fixed thereby or to be fixed in the manner thereby agreed and in which the names of both the buyer and the seller are mentioned". Section 2 (f) defines a "non-transferable specific delivery contract" as meaning "a specific delivery contract, the rights or liabilities under which or under any delivery order, railway receipt, bill of lading, warehouse receipt or any other document of title relating thereto are not transferable". Finally S. 2 (n) defines a "transferable specific delivery contract" as meaning "a specific delivery contract which is not a non-transferable specific delivery contract".

5. Chapter IV of the Act contains provisions conferring authority on Central Government to prohibit certain classes of forward contracts. Section 15 (1) of the Act states as follows:

"15(1). The Central Government may, by notification in the Official Gazette, declare this section to apply to such goods or class of goods and in such areas as may be specified in the notification, and thereupon, subject to the provisions contained in Section 18, every forward contract for the sale or purchase of any goods specified in the notification which is entered into in the area specified therein otherwise than between members of a recognised association or through or with any such member shall be illegal.

Section 17 provides:

17. (1) The Central Government may, by notification in the Official Gazette, declare that no person shall, save with the permission of the Central Government, enter into any forward contract for the sale or purchase of any goods or class of goods specified in the notification and to which the provisions of Section 15 have not been made applicable

except to the extent and in the manner, if any, as may be specified in the notification.

(2) All forward contracts in contravention of the provisions of sub-section (1) entered into after the date of publication of the notification thereunder shall be illegal.

(3) Where a notification has been issued under sub-sec. (1), the provisions of Section 16 shall, in the absence of anything to the contrary in the notification, apply to all forward contracts for the sale or purchase of any goods specified in the notification entered into on or before the date of the notification and remaining to be performed after the said date as they apply to all forward contracts for the sale or purchase of any goods specified in the notification under Section 15."

Section 18 (1) states that these provisions will not apply to non-transferable specific delivery contracts for the sale or purchase of any goods.

6. According to the scheme of the Act therefore contracts of sale of goods are divided into two categories, 'ready delivery contracts' and 'forward contracts'. Forward contracts are classified into those which are 'specific delivery contracts' and those which are not. Then again, 'specific delivery contracts' are divided into 'transferable specific delivery contracts' and 'non-transferable specific delivery contracts'. Section 18 (1) exempts from the operation of the Act non-transferable specific delivery contracts. The net result of these statutory provisions is that all forward contracts except those which are non-transferable specific delivery contracts, can be declared illegal by a notification issued under the Act.

7. Such a notification was issued in this case by the Central Government on March 29, 1958 which is to the following effect:

"In exercise of the powers conferred by sub-section (1) of Section 15 of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) the Central Government hereby declares that the said Section shall apply to Jute/goods (Hessian cloth made of Jute or bags made of such Hessian cloth and sacking cloth made of jute or bags made of such Sacking cloth) in the City of Calcutta.

Explanation:— "The expression 'City of Calcutta' means:

(1) Calcutta as defined in clause (11) of Section 5 of the Calcutta Municipal Act, 1951, (West Bengal Act No. 33 of 1951), together with part of the Hastings North or South edge of Clyde Row and Strand Road to the river bank and the areas which were previously under the new defunct Tollygunge Municipality,

(2) the Port of Calcutta; and

(3) The Districts of 24 Paraganas, Nadia, Howrah and Hooghly".

8. It was argued on behalf of the appellant that the contract in question was a forward contract within the meaning of the Act and was prohibited by the Government notification and therefore no right or liability accrued to the parties on the basis of the contract. The contention of the appellant was that the contract was not a non-transferable specific delivery contract as defined in S. 2(f) of the Act and as such it was illegal and void and the arbitration clause contained therein was of no effect and could not be availed of by either of the parties. We are unable to accept the argument put forward on behalf of the appellant as valid. The question as to whether the contract was a transferable or non-transferable specific delivery contract is a question which ultimately depends on a reasonable construction of the contract. On behalf of the appellant it was pointed out that there was no specific clause in the contract which prohibited the transfer of the rights and liabilities or which prohibited transfer of the bill of lading. But the absence of such a specific clause is not conclusive as to the intention of the parties. It is true that when a contract is reduced to writing we must look only to that writing for ascertaining the terms of the agreement between the parties but it does not follow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If upon a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of the contract can be expressed or there can be a necessary implication of a term from what has been expressed in the contract. The question therefore resolves in the ultimate analysis upon the construction of the terms of the contract between the

parties. In this connection it is well established that in construing such a contract it is legitimate to take into account the surrounding circumstances for ascertaining the intention of the parties. As was pointed out by this Court in *Khardah Co. Ltd. v. Raymon and Co. (India) Private Ltd.*, 1963-3 SCR 183 = (AIR 1962 SC 1810) the absence of a specific clause prohibiting transfer is not conclusive one way or the other on the question whether there was an agreement between the parties that the contract was to be non-transferable. What has to be seen is whether it could be held on a reasonable interpretation of the contract, aided by such considerations as can legitimately be taken into account that the agreement between the parties was that it was not to be transferred. In the present case, it should be noticed that the contract cannot be sublet or assigned by the seller under condition 10 read with para 3 (b) of the "Conditions of Contract contained in Form D. G. S. and D. 68 governing contracts placed by the Central Purchase Organisation of the Government of India, 1959 edition". Para 3(b) states:

"(b) Subletting of Contract.— The Contractor shall not sublet, transfer or assign the contract or any part thereof without the written permission of the Purchaser. In the event of the Contractor contravening this condition the Purchaser shall be entitled to place the contract elsewhere on the Contractor's account and at his risk and the Contractor shall be liable for any loss or damage which the Purchaser may sustain in consequence or arising out of such replacing of the contract."

So far as the buyer is concerned, the contract itself shows that the jute bags were intended for "packing foodgrains which were arriving in bulk" at an Indian port. The last paragraph of the letter of acceptance dated September 16, 1960 states that "the gunnies are very urgently required at the destination for packing imported foodgrains which are arriving in bulk" and "it was therefore of utmost importance that shipment of the total quantity ordered shall be made in the vessels nominated by the purchaser." There is also a specific provision in the contract that the "stores shall be inspected prior to shipment by the A. T. I. G. S., East India, Hastings, Calcutta, or his representative." There is also a further stipulation that after the goods are ins-

pected arrangements should be made to ship the stores in accordance with the instructions contained in the contract and that goods which are not accepted in inspection should not be shipped. The name of the consignee is given in the contract as Asst. Director (Storage), Ministry of Food and Agriculture, Transit Shed No. 4, Visakhapatnam Port, Visakhapatnam and payment is to be made according to the procedure specified in the contract and the cost was debitable to the Pay and Accounts Officer, Ministry of Food and Agriculture, Bombay or New Delhi as the case may be under Head of Account "87 — Capital Outlay on the Schemes of Government Trading-Schemes for purchases of Foodgrains A. I. (3) (1) expenditure in India Section IV Special Purchases both for Civil and Defence requirements — other Purchases — Purchase of gunnies for imported foodgrains". In view of all these circumstances we are of opinion that it was not contemplated by the parties that the rights under the contract should be transferred either by the buyers or by the sellers. It was pointed out for the appellant that normally the Bill of Lading partakes of the nature of a negotiable instrument and by endorsing it the holder of the Bill of Lading can transfer the property in the goods to which the Bill of Lading relates and by parting with it the holder parts not only with the property in the goods but also with their possession. The proposition contended for by Counsel for the appellant is no doubt correct, but the question in this case is not the abstract question as to what the purchaser could or might have done but what was in fact contemplated by the parties who were entering into the contract. For the reasons already given, we hold that on a proper construction of the terms of the contract and having regard to the surrounding circumstances there was an implied agreement between the parties that the rights and liabilities under the contract were not to be transferred and the Bill of Lading relating to the contract was also not to be transferred. It follows therefore that the contract in question was a non-transferable specific delivery contract within the meaning of S. 2 (f) of the Act and the contract was not hit by the notification dated March 29, 1958 issued by the Central Government under S. 15 (1) of the Act.

9. For the reasons expressed we hold that the decision of the Calcutta High

Court dated September 18, 1963 is correct and this appeal must be dismissed with costs.

TVN/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 13

(V 56 C 5)

(From: Punjab)*

J. C. SHAH AND V. BHARGAVA, JJ.

State of Punjab and others, Appellants v. Bhai Ardaman Singh and others etc., Respondents.

Civil Appeals Nos. 1016 to 1050, 1052 to 1075 and 1077 to 1084 of 1964, D/- 3-5-1968.

Tenancy Laws — Pepsu Tenancy and Agricultural Lands Act (8 of 1953), S. 43 — Proceedings under — Nature of — Proceedings are judicial — Collector required to pass orders not on subjective satisfaction but on judicial determination of facts.

Proceedings of the Collector under S. 43 are judicial in character. The trial is summary, but the Collector is bound to exercise the jurisdiction vested in him not on a subjective satisfaction but on a judicial determination of facts which invest him with jurisdiction to pass an order in ejectment. When the condition precedent to the exercise of jurisdiction does not exist, the Collector cannot clothe himself with authority to pass the impugned orders. In order that the jurisdiction of the Collector to hold a summary enquiry and pass the order complained of may be attracted, it is further necessary to establish that under Cl. (b) of S. 43 (1) the person in wrongful or unauthorised possession was not entitled to the use and occupation of the lands under the provisions of the Act.

(Paras 3 and 4)

Mr. N. S. Bindra, Senior Advocate, (Mr. R. N. Sachthey, Advocate with him), for Appellants; Mr. M. C. Chagla, Senior Advocate, (Mr. R. V. Pillai, Advocate, with him), for Respondents.

The following Judgment of the Court was delivered by

SHAH, J.: In this group of appeals the dispute relates to agricultural lands situate in village Dialpura-Bhaika, District Bhatinda in the former State of Pepsu and now in the State of Punjab.

**(L. P. A. No. 148 of 1958 etc., D/- 3-5-1968 — Punj.)*

IL/JL/C604/68

The lands originally belonged to Bhai Arjan Singh. On his death in 1946 the lands devolved upon his son Bhai Ardaman Singh, the first respondent in these appeals. Alleging that Bhai Arjan Singh forcibly deprived them of the lands some time in May-June 1943, seventy tenants applied to the Collector Sangrur and Bhatinda for an order for restoration of possession under S. 43 of the Pepsu Tenancy and Agricultural Lands Act 8 of 1953. The Collector granted the applications and ordered that possession be restored to the tenants. The orders were confirmed in appeal by the Commissioner. The Commissioner was of the view that the order under S. 43 could be passed by the Collector on his subjective satisfaction that a person was in wrongful or unauthorised possession of lands. The Financial Commissioner confirmed the order of the Commissioner on the ground that substantial justice had been done by the subordinate revenue authorities, and no interference with the orders was called for.

2. Bhai Ardaman Singh then filed writ petitions in the High Court of Punjab challenging the orders passed by the Financial Commissioner. The petitions were heard by Gosain, J. In the view of the learned Judge Act 8 of 1953 was a complete code in itself and provided for a complete machinery for the decision of disputes like the dispute before him. He observed:

“Under this law Tribunals of special jurisdiction have been created and invested with powers which should enable them to effectively deal with disputes not only those which arise between the landlord and the tenant, but also those which arise between persons entitled to possession and persons wrongly dispossessing them. It may be that in the latter case the enquiry contemplated to be made by the Collector is only summary and that the aggrieved party may be able to have recourse finally to the civil court but the jurisdiction to make enquiry and to order eviction has been given by the law to the Collector.”

2-A. In appeals under the Letters Patent the High Court reversed the order passed by Gosain, J. The High Court was of the opinion that Act 8 of 1953 which came into force on December 13, 1953, had no retrospective operation and that Gosain, J., was in error in making an order for possession of the lands when dispossession had taken place before the

Act was brought into force. The High Court also held that the proceedings of the Collector were vitiated because the Collector declined to give to the first respondent opportunity to lead evidence which he desired to lead. With certificate granted by the High Court, these appeals have been preferred by the State of Punjab.

3. Section 43 of the Pepsu Act 8 of 1953 provides:

"(1) Any person who is in wrongful or unauthorised possession of any land—

(a) the transfer of which either by the act of parties or by the operation of law is invalid under the provisions of this Act, or

(b) to the use and occupation of which he is not entitled under the provisions of this Act, may, after summary enquiry, be ejected by the Collector who may also impose on such person a penalty not exceeding five hundred rupees."

Clause (a) has evidently no application. It is not the case of any party that there was any transfer of the lands which was invalid by virtue of the provisions of the Act. The tenants alleged that the first respondent was in wrongful or unauthorised possession of the lands previously occupied by them. But in order that the jurisdiction of the Collector to hold a summary enquiry and pass the order complained of may be attracted, it was further necessary to establish that under Cl. (b) of S. 43 (1) the person in wrongful or unauthorised possession was not entitled to the use and occupation of the lands under the provisions of the Act. Counsel for the State of Punjab is unable to invite our attention to any provision which renders the first respondent disentitled by virtue of the provisions of the Act to the use and occupation of the lands. Section 43(1) (b) has, therefore, no application. The condition precedent to the investment of jurisdiction in the Collector being absent, the revenue authorities had no power to pass the order in ejectment which they purported to pass.

4. We must point out that the proceedings of the Collector are judicial in character. The trial is summary, but the Collector is bound to exercise the jurisdiction vested in him not on a subjective satisfaction, as the Commissioner assumed, but on a judicial determination of facts which invest him with jurisdiction to pass an order in ejectment. When the condition precedent to the exercise of

jurisdiction does not exist, the Collector cannot clothe himself with authority to pass the impugned orders. We also agree with the High Court that in view of the terms of Cl. (b), S. 43 had no retrospective operation. On the view we take, it is unnecessary to consider the argument advanced by Mr. Chagla on behalf of the first respondent that S. 43 has no application to cases in which a dispute relating to tenancy of land arises between the landlord and his tenant.

5. It is also not necessary to consider in this group of appeals whether the proceedings of the Collector were vitiated, because as alleged by the first respondent the collector did not afford sufficient opportunity to lead evidence on the first respondent's plea that there had been no wrongful dispossession of the tenants.

6. Mr. Bindra on behalf of the State contended that in any event this Court should not countenance interference with the impugned orders of the revenue authorities, even if erroneous, because those authorities have in passing the orders done substantial justice. Counsel contended that the tenants had been wrongfully deprived of possession of the lands by the use of force by the first respondent and the order passed by the Collector though not strictly warranted by law was not liable to be disturbed by the High Court in exercise of their jurisdiction to issue a writ of certiorari. We are unable to agree with that contention. If the Collector had no jurisdiction except in the special conditions prescribed by Section 43, his order could not be substantiated merely because another authority may, if the proceedings were before that authority, on the findings recorded, have granted relief to the tenants of restoration to possession of their respective lands. Authorities which are vested with powers—judicial or quasi-judicial—can exercise their power within the limits of their jurisdiction and their actions without jurisdiction cannot be sustained merely because another body or authority, which if lawfully approached, may have jurisdiction to pass the order complained of.

7. The appeals are therefore dismissed with costs. One hearing fee.

GGM/D.V.C.

Appeals dismissed.

AIR 1969 SUPREME COURT 15
(V 56 C 6)

(From: Punjab)*

R. S. BACHAWAT AND A. N.
GROVER, JJ.

Jai Lal, Appellant v. Delhi Administration, Respondent.

Criminal Appeal No. 38 of 1965, D/- 30-4-1968.

Penal Code (1860), Section 84 and Chapter IV, General — Applicability — Conditions essential — Plea of insanity — State of mind before and after commission of act relevant — Held on evidence that defence of insanity was not made out.

To establish that the acts done are not offences under Section 84 it must be proved clearly that at the time of the commission of the act the appellant by reason of unsoundness of mind was incapable of either knowing that the acts were either morally wrong or contrary to law. The question is whether the appellant was suffering from such incapacity at the time of the commission of the acts. On this question, the state of his mind before and after the crucial time is relevant. If a person by reason of unsoundness of mind is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law he cannot be guilty of any criminal intent. Such a person lacks the requisite mens rea and is entitled to an acquittal. The general burden is on the prosecution to prove beyond reasonable doubt not only the actus reus but also the mens rea. Held on reviewing the evidence that the defence of insanity was not made out.

(Paras 9 and 12)

Mr. S. N. Prasad, Advocate (Amicus Curiae), for Appellant; M/s. H. R. Khanna and S. P. Nayyar, Advocates, for Respondent.

The following Judgment of the Court was delivered by

BACHAWAT, J.: The Additional Sessions Judge, Delhi, convicted the appellant under Section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life. The Judge also convicted the appellant under Section 324 of the Indian Penal Code, sentenced him to undergo six months rigorous imprisonment and directed that the

*(Criminal Appeal No. 40-D of 1963, D/- 28-7-1964—Punjab at Delhi.)

two sentences would run concurrently. An appeal was filed in the High Court of Punjab. The High Court dismissed the appeal. The appellant has filed this appeal after obtaining special leave.

2. The appellant lives at Sat Nagar in Delhi. On November 25, 1961 at 1.45 p. m. he entered the house of his neighbour Somawati and stabbed her daughter Leela aged 1½ years with a knife. He inflicted five stab wounds, one on the back trunk, one on the right gluteal region, two on the right thigh and one on the chest. The injury on the back of trunk, proved fatal. Leela died in the hospital at 4. p. m. The appellant then returned to his house and bolted the front door. A crowd collected near the front door and raised an alarm. After some time the appellant went out by the back door and stabbed another neighbour Parabati and then Raghubir who tried to intervene on her behalf. The injuries were simple incised wounds. Raghubir and others tried to apprehend him. He then ran back to his house, bolted the door and started throwing brickbats from the roof. He was later arrested by the police. All these facts are proved by unimpeachable evidence.

3. One Dhani Ram was the father of Leela. Dhani Ram, his wife Somawati, his daughter Leela and his brother Baburam lived together in the same house. Indra is the appellant's sister. The appellant and his father suspected that Baburam was prone to making illicit approaches to Indra. On this account, the appellant had a long standing grudge against Baburam. This enmity is said to be the motive of the attack by the appellant on Leela, a member of the family of Baburam. The motive for the attack on Parabati is not clear. Raghubir was attacked because he tried to intervene.

4. The defence plea was of insanity. The Additional Sessions Judge and the High Court concurrently rejected this defence.

5. We may briefly notice the evidence bearing on the plea of insanity. Since 1958 the appellant was an employee in the Stores Branch of the Northern Railway Headquarters in Baroda House, New Delhi. In 1958 and 1959 he had altercations with other clerks in the office. On May 20, 1959 his superior officer observed that he was prone to lose temper in no time. In his

moments of excitement he became dangerous and used to hit his colleagues with any thing that he could lay his hands on. But at the time of his greatest excitement he could distinguish between right and wrong. After May 1959 he worked at his desk as a normal man. In March 1960 he again quarrelled with another clerk. He was suspended and sent for medical examination. At this stage he was suffering from mental illness. On October 12, 1960 he was examined by a psychiatrist who found that he exhibited symptoms of acute schizophrenia and showed disorder of thought, emotion and perception of external realities. The psychiatrist said that he was harbouring certain delusions. The nature of the delusions is not stated. It is not proved that the appellant suffered from any particular delusion or hallucination. The appellant was put on a drug named Largactil and was given convulsive electro-therapy treatment. On January 12, 1961 he was cured of his illness and was advised to join his duties. On resuming his duties the appellant worked in the office in the normal manner.

6. There is some evidence that on the morning of November 25, 1961 and the preceding night, the appellant complained that he was unwell and took medicine. But on the morning of November 25, he went to his office as usual. He was late in attendance and was marked absent. He applied in writing for one day's casual leave stating that he had an urgent piece of work at home. Nobody noticed any symptoms of mental disorder at that time. He left the office at about 11.30 A. M. and returned home alone. At 1.45 p. m. he stabbed Leela, Parbati and Raghubir with a knife. He concealed the knife and a search for it has proved fruitless. At 2.45 p. m. the investigating officer arrived on the spot, arrested the appellant and interrogated him. He was then found normal and gave intelligent answers. On the same date he was produced before a Magistrate. His brother was then present but the Magistrate was not informed that he was insane. On November 27, he was interrogated by an Inspector. It does not appear that he was then insane.

7. On November 30, the appellant's brother filed an application before the committing magistrate stating that the appellant was insane at the time of the occurrence. The appellant was later remanded to judicial custody. On receipt of another application from his brother

he was kept under medical observation from December 16 to December 23. On December 19 the medical officer noted that the appellant was indifferent to his surroundings and personal cleanliness, preoccupied in his thoughts muttering to himself, making meaningless gestures, losing track of conversations, given to delayed and repetitive answers and unable to give detailed account of incidents leading to his arrest. On December 23, he was declared to be a lunatic though not violent. The psychiatrist noted that the appellant had a relapse of schizophrenia and was suffering from disorder of thought, emotion and loss of contact with realities. From his attitude and manner of talk he was found to be aggressive. On September 6, 1962 the psychiatrist reported that the appellant was cured and was in a position to understand proceedings in court. The commitment order was made on January 4, 1963. The trial started in February 1963. The appellant was sane at the time of the trial.

8. The group of ailments dubbed schizophrenia is discussed in James D. Page's *Abnormal Psychology*, Ch. XI, pages 236 to 261 and Modi's *Medical Jurisprudence and Toxicology*, 14th Ed., pages 349 to 401. Schizophrenia is a general term referring to a group of severe mental disorders marked by a splitting or disintegration, of the personality. The most striking clinical features include general psychological disharmony, emotional impoverishment, dilapidation of thought processes, absence of social rapport, delusions, hallucinations and peculiarities of conduct.

9. The question is whether the appellant is criminally responsible for the acts done on November 25, 1961. Section 84 of the Indian Penal Code says:—

"Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

To establish that the acts done are not offences under Section 84 it must be proved clearly that at the time of the commission of the act the appellant by reason of unsoundness of mind was incapable of either knowing that the acts were either morally wrong or contrary to law. The question is whether the appellant was suffering from such incapacity at the time of the commission of the acts. On this question, the state of his

mind before and after the crucial time is relevant. There is evidence of a medical character that between October 12, 1960 and January 12, 1961 he was suffering from Schizophrenia. He was completely cured of this disease on January 12, 1961 when he resumed his normal duties. He had another attack of this disease in the middle of December 1961. The attack lasted till September 1962 when he was found to be normal again. But it is to be observed that the defence witnesses do not say that even during these two periods the appellant was incapable of discriminating between right and wrong or of knowing the physical nature of the acts done by him.

10. After the appellant was cured of the disease on January 12, 1961 he was found to be normal. He had a highly strung temperament and was easily excitable. But there is positive evidence that even at the moment of his greatest excitement he could distinguish between right and wrong. From January 12, up to November 24, 1961 he attended his office and discharged his duties in a normal manner. On the morning of November 25, 1961 his mind was normal. He went to and from his office all alone. He wrote a sensible application asking for casual leave for one day. At 1.45 p. m. he stabbed and killed a child and soon thereafter he stabbed two other persons. On his arrest soon after 2.45 p. m. he gave normal and intelligent answers to the investigating officers. Nothing abnormal in him was noticed till December 16, 1961.

11. The thing in favour of the appellant is that though he had a motive for attacking Baburam, no clear motive for attacking the child Leela or Parbati is discernible. But there is clear evidence to show that he knew that his act of stabbing and killing was wrong and contrary to law. He concealed the weapon of offence. The knife could not be recovered in spite of searches. He bolted the front door of his house to prevent arrest. He then tried to run away by the back door. When an attempt was made to apprehend him he ran back to his house and bolted the door. He then tried to disperse the crowd by throwing brickbats from the roof. His conduct immediately after the occurrence displays consciousness of his guilt. He knew the physical nature of stabbing. He knew that the stabbing would kill and maim his victims. On a comprehensive review of the entire evidence the two

courts below concurrently found that the defence of insanity under Section 84 was not made out. We are unable to say that the verdict of the courts below is erroneous.

12. If a person by reason of unsoundness of mind is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law he cannot be guilty of any criminal intent. Such a person lacks the requisite mens rea and is entitled to an acquittal. But it is not established in the present case that the appellant was suffering from this incapacity. The general burden is on the prosecution to prove beyond reasonable doubt not only the actus reus but also the mens rea. The prosecution satisfactorily discharged this burden. The appellant was not insane at the time of the killing and stabbing and he knew the consequences of his acts. We must hold that he is criminally responsible for the acts.

13. In the result, the appeal is dismissed.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 17 (V 56 C 7)

(From: Rajasthan)*

G. K. MITTER AND K. S. HEGDE, JJ.

Dalpat Singh and another, Appellants
v. State of Rajasthan, Respondent.

Criminal Appeal No. 28 of 1965, D/-
13-2-1968.

(A) Evidence Act (1872), Ss. 133 and 114 Illus. (b)—Accomplice, who is—Trial of offences under Prevention of Corruption Act — Persons giving illegal gratification under coercion and fear of being harassed are not accomplices — Their evidence is not required to be corroborated — (Prevention of Corruption Act (1947), Ss. 5 (1) and 5 (2)) — (Penal Code (1860), S. 161). (Para 5)

(B) Evidence Act (1872), Ss. 133 and 114 Illus. (b) — Trap witnesses — Evidence — Corroboration — Trial of offences under Prevention of Corruption Act — Though trap witnesses are interested witnesses, as a matter of law, their evidence cannot be rejected for want of corroboration. AIR 1958 SC 500, Rel. on. (Prevention of Corruption Act (1947),

* (Cri. Appeal No. 656 of 1963, D/-
14-12-1964 — Raj.).

Mr. B. C. Misra, Senior Advocate, (Mr. S. S. Shukla, Advocate, with him), for Appellants; Dr. V. A. Seyid Muhammad, Senior Advocate, (M/s. K. L. Hathi and R. N. Sachthey, Advocates with him), for Respondent.

The following Judgment of the Court was delivered by

MITTER, J.: This is an appeal by certificate under Article 133 (1) (c) of the Constitution of India from a judgment and decree of the High Court of Calcutta confirming a decree of dismissal of the suit of the appellant herein instituted in the court of the Subordinate Judge, 8th Court at Alipore, District 24 Parganas, West Bengal.

2. The only two points canvassed in the appeal to this Court are: (1) whether notices under Section 77 of the Indian Railways Act were properly served on the Railway Administration in this case? and (2) whether the suit was barred by limitation?

3. The relevant facts are as follows: The appellant was entitled to delivery of two lots of goods booked at Sealdah, Calcutta on June 9, 1945 and September 24, 1945 respectively. The goods were for delivery at Cooch Behar. They were to be transported by Bengal and Assam Railway owned by the State and having its Head Office at the relevant time at No. 3 Koilaghat Street, Calcutta. In respect of the first lot, there was a short delivery of 104 umbrellas and a certificate of shortage was issued to the plaintiff on July 20, 1945. The appellant wrote a letter to the Chief Commercial Manager (Claims and Refunds) of the Bengal and Assam Railway at No. 3 Koilaghat Street on August 11, 1945 claiming the value of the goods short delivered i. e. Rs. 1,284 as per bill enclosed and the short delivery certificate issued to him. On November 12, 1945 the plaintiff sent a letter to the Governor-General in Council representing the Bengal and Assam Railway through the Secretary, Government of India, New Delhi giving full particulars of the claim and stating that the Chief Commercial Manager had already been approached for payment. This letter was replied to by the Secretary, Railway Board on November 27, 1945 to the effect that the plaintiff's letter had been forwarded for disposal to the General Manager, Bengal and Assam Railway. In respect of the second lot of goods, the plaintiff made a similar claim to the Chief Commercial

Manager of Rs. 12,742-7-4 as per the short delivery certificate of October 10, 1945. The plaintiff also wrote a letter to the Governor-General in Council on February 14, 1946 giving full particulars about the two invoices and the railway receipts covering the consignments despatched on September 24, 1945 and mentioning further that a claim had been preferred on October 24, 1945 enclosing the plaintiff's bill. It was stated expressly in this letter that notice to the Chief Commercial Manager had been given under Section 77 of the Railways Act. It does not appear that this particular claim of the plaintiff was referred to the General Manager, Bengal and Assam Railway by the Secretary to the Railway Board as in the previous case.

4. Failing to get any redress the plaintiff served a notice under Section 80 of the Code of Civil Procedure on February 14, 1946 on the Governor-General in Council through the Secretary to the Railway Board and on the 14th August 1946 filed a suit on the Original Side of the High Court at Calcutta for recovery of the two sums of money for non-delivery of the goods and alternatively for damages for wrongful conversion or detention of the said goods. It was defended by the Governor-General in Council and one of the pleas taken was that the Court had no jurisdiction to entertain the suit as no part of the cause of action for the suit had arisen within the said jurisdiction. On July 16, 1954, the suit was dismissed on the ground that the court had no jurisdiction to try the same. Thereupon the appellant filed a suit out of which the present appeal arises on August 5, 1954. In the plaint of the second suit, it was stated that the earlier suit had been filed on the Original Side of the High Court on a bona fide mistake on the part of the plaintiff's solicitor and prosecuted with due diligence by the plaintiff till it was dismissed on July 16, 1954. The plaintiff prayed for exclusion of the time taken between the date of the institution of the earlier suit and the dismissal thereof under Section 14 of the Limitation Act. A defence similar to that taken in the High Court suit was put up by the Union of India, the defendant in the later suit.

5. The Subordinate Judge who tried the suit dismissed it on various grounds, inter alia that the notice served upon the Chief Commercial Manager was not in terms of the Railways Act and that the

first suit had not been pursued bona fide and with diligence on the Original Side of the Calcutta High Court.

6. In appeal to the High Court, it was argued that (a) no notice under Section 77 was necessary in the case of non-delivery of goods (b) alternatively, notice in terms of the said section had been served by the appellant and (c) the plaintiff was entitled to the benefit of S. 14 of the Limitation Act. The greater part of the judgment of the High Court was devoted to the first question which was answered against the appellant. The second contention was summarily turned down by the observation that there was nothing on the record to show that the Chief Commercial Manager had been held out as the authority competent to receive notice under Section 77 of the Act. The question of limitation was not decided in view of the above although the learned Judges felt inclined to allow the appellant the benefit of Section 14 of the Limitation Act.

7. The relevant portion of Section 77 of the Indian Railways Act (IX of 1890) provided that

“a person shall not be entitled to.... compensation for the loss, destruction or deterioration of animals or goods delivered to be.....carried unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway.”

Section 140 of the Act provided that “any notice or other document required or authorised by the Act to be served on a railway administration may be served, in the case of a railway administered by Government..... on the Manager.....by delivering the notice or other documents to the Manager.... or by leaving it at his office or by forwarding it by post in a pre-paid letter addressed to the Manager.....at his office.” Under Section 3 Cl. (6) of the Act, unless there is something repugnant in the subject or context “railway administration” or “administration” in the case of a railway administered by the Government means “the manager of the railway, and includes the Government.. ..”

8. In this case, there can be no dispute that if notices to the Chief Commercial Manager (Claims and Refunds)

complied with the terms of Section 77 of the Act the most serious obstacle to the appellant's success in this appeal would be overcome. It therefore becomes necessary to consider the ambit and effect of the said section.

9. The scope of Section 77 has come up for consideration by various High Courts at different times. It is not necessary to refer the same; but we may refer to a decision of this Court in Governor General in Council v. Musaddi Lal, 1961-3 SCR 647 at p. 651 = (AIR 1961 SC 725 (at p. 727)). It was there observed that:

“Section 77 of the Railways Act is enacted with a view to enable the railway administration to make enquiries and if possible to recover the goods and to deliver them to the consignee and to prevent stale claims. It imposes a restriction on the enforcement of liability declared by Section 72. The liability declared by S. 72 is for loss, destruction or deterioration. Failure to deliver is the consequence of loss or destruction of goods; it does not furnish a cause of action on which a suit may lie against the railway administration, distinct from a cause of action for loss or destruction.” This aspect of Section 77 was again referred to in Jetmull Bhojraj v. Darjeeling Himalayan Railway Co. Ltd., 1963-2 SCR 832 at p. 845 = (AIR 1962 SC 1879 at p. 1884). There it was observed that the object of service of notice under Section 77 being essentially to enable the railway administration to make an enquiry and investigation as to whether the loss, destruction etc. was due to the consignor's laches or to the wilful neglect of the railway administration and its servants, the notice under Section 77 should be liberally construed. To quote the words of the judgment of the majority Judges:

“In enacting the section the intention of the legislature must have been to afford only a protection to the railway administration against fraud and not to provide a means for depriving the consignors of their legitimate claims for compensation for the loss or damage caused to their consignments during the course of transit on the railways.”

In the light of Section 3 (6) there would be sufficient compliance with section 77 if the notice was served on the Manager of the State owned railway. Section 140 only provides for the manner of service of notice. The Bengal and Assam Rail-

way administration did not have an authority known as the Manager. It had a General Manager as also another high ranking officer i. e. the Chief Commercial Manager (Claims and Refunds) working in the head office of the company at Calcutta. As the said statutory provisions do not make it obligatory to serve a notice under Section 77 on the General Manager of a State-owned Railway, it is difficult to see why a notice served on the Chief Commercial Manager (Claims and Refunds) would not be a proper notice under the said section. The General Manager is in overall charge of many departments of the railway administration and is not particularly or immediately concerned with dealing with claims against the railway administration. The Chief Commercial Manager (Claims and Refunds) is the authority specially engaged in the enquiry into such claims and would therefore *prima facie* appear to be competent to deal with the claims by consignors or consignees against the railway administration envisaged by Section 77 of the Act. He is not a person of such inferior status that it can be said that a claim preferred as regards non-delivery would not be properly investigated or looked into for finding out the truth or falsity of the claim preferred. Apart from any authority it seems to us that a notice on the Chief Commercial Manager (Claims and Refunds) of a State owned railway administration would be in terms of S. 77.

9a. The question came up for consideration before a Full Bench of the Patna High Court in *Governor-General in Council v. Gouri Shankar Mills Ltd.*, ILR 28 Pat 178 = (AIR 1949 Pat 347). There the learned Judges of the Patna High Court examined the various authorities of the High Courts of Madras, Lahore, Bombay, Allahabad and Calcutta. On a conspectus of all the authorities referred to, the answer to the question posed before the Full Bench was as follows:

"The requirements of Section 77 read with Section 140, Railways Act, 1890 are satisfied by serving a notice within the prescribed time on the Chief Commercial Manager or any other subordinate officer of a Railway owned by the Government of India, provided it is established as a fact that the Railway Company by its course of business or the terms of the contract between the parties has held out a particular official as competent to

deal with the claims on receipt of a notice to him."

There is a current of authority in the Calcutta High Court which is in line with the above Patna decision. We are in complete agreement with the view expressed by the Full Bench of the Patna High Court. In our opinion, it is only in the case of an authority subordinate or inferior in rank to the Chief Commercial Manager that proof of competence to deal with the claims would be called for. The question has now become academic in view of the recent amendment of the Railways Act.

10. The second point about limitation is not of any substance. The appellant had filed a suit in the Calcutta High Court on its Original side for recovery of compensation within time. The despatch of the goods had taken place from Sealdah which is on the border of the territorial limits of the jurisdiction of the Calcutta High Court. It would appear from the plaint that the plaintiff was under the impression that the head office of the Bengal and Assam Railway administration being situate within the said limits, his suit could properly be instituted in the High Court. The Subordinate Judge was not right in holding that the suit had not been proceeded with *bona fide*. The learned Judges of the Division Bench of the High Court were disposed to give the plaintiff the benefit of Section 14 of the Limitation Act and nothing has been shown to induce us to take a different view.

11. The judgment and decree of the High Court are therefore reversed. The appeal is allowed with costs throughout and the plaintiff's suit decreed for the amount claimed and interest *pendente lite* at 6 per cent per annum.

12. Before parting with the case, we however wish to make a remark against the conduct of the authorities of the railway administration concerned in the disposal of claims like the one in the present appeal. There is no suggestion anywhere that the plaintiff's claim was not genuine. The railway authorities had promptly issued certificates of shortage in respect of the consignments. There is nothing to show that the Chief Commercial Manager found any defect in the plaintiff's claim. If the claim had been settled in good time, the public exchequer would have been spared not only of its own costs of litigation which will be considerable but the costs which

will have to be paid to the appellant. It does not behove the State to contest a good claim on the offchance of success on some unsubstantial technical plea.

TVN/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 27

(V 56 C 9)

(From Punjab)*

J. C. SHAH, V. RAMASWAMI AND
G. K. MITTER, JJ.

Mst. Lajwanti, Appellant v. Lal Chand and another, Respondents.

Civil Appeal No. 687 of 1965, D/- 22-3-1968.

East Punjab Factories (Control of Dismantling) Act (20 of 1948), Section 3 — Scope and applicability — Provision does not bar execution of a decree for eviction — L. P. A. No. 405 of 1958, D/- 3-10-1961 (Punj.), Reversed but on a different ground.

The East Punjab Factories (Control of Dismantling) Act makes no reference to any decree for possession against the owner of a factory. Hence, Section 3 of the Act cannot be held to bar execution of a decree for eviction. By ordering delivery of possession of the premises, the executing Court does not make an order for dismantling a factory. So far as the judgment-debtor, the owner of the factory is concerned, it is for him to take up the matter with the State Government, which will not in the absence of collusion between the owner of the factory and the landlord, prosecute the former or refuse to accord sanction to him for removal of the machinery from the premises of which he cannot lawfully continue in possession: L. P. A. No. 405 of 1958, D/- 3-10-1961 (Punj.), Reversed on a different ground. (Para 9)

Mr. C. B. Agarwala, Senior Advocate (Mr. K. P. Gupta, Advocate, with him), for Appellant; Mr. S. N. Anand, Advocate, for Respondent No. 1.

The following Judgment of the Court was delivered by

MITTER, J.: This is an appeal by special leave from a judgment and order of the Punjab High Court in Letters Patent Appeal No. 405 of 1958.

2. The matter arises out of an application for execution of an order for

* (LPA No. 405 of 1958, D/- 3-10-1961—Punj.)

possession passed on a compromise between the parties. The Division Bench of the Punjab High Court felt itself unable to help the decree-holder because of an earlier decision in the execution proceedings which was held to constitute *res judicata* against her. The main question for consideration is, whether it was right in doing so.

3. The relevant facts are as follows. As far back as April 1950, Harbans Lal, the late husband of the appellant before us, obtained an order for eviction from the Rent Controller against Lal Chand and Ram Rattan Dass Jain in respect of certain premises which were being used as a factory. This decree was upheld in appeal and in July 1951 the decree-holder applied for execution. The court bailiff made a report dated the 14th July 1951 that on his going to give delivery of possession resistance was offered by a number of persons and being apprehensive of breach of peace he could not effect delivery of possession. The judgment-debtors appear to have approached the Department of Industries and informed them of the attempt at their eviction by the decree-holder. The copy of a letter from the Extra Assistant Director of Industries to the Chief Inspector of Factories dated July 18, 1951 exhibited at the instance of the judgment-debtors goes to show that the machinery installed in the factory could not be removed without the prior permission of the Chief Inspector of Factories. Obviously the judgment-debtors wanted to thwart the decree-holder from getting possession through court by invoking the aid of the East Punjab Factories (Control of Dismantling) Act XX of 1948, hereinafter referred to as the Act. The judgment-debtors applied for stay of execution of the decree on August 23, 1951. The Subordinate Judge issued notices but did not grant stay. On appeal the District Judge accepted the appeal noting that the Subordinate Judge had not given any finding about the applicability of the Act. He had before him the report of the bailiff that possession of the premises could not be given over as there were machinery stored therein. By order dated October 11, 1951 he directed the Subordinate Judge to decide the objections under the Act.

4. The Subordinate Judge framed a number of issues including one which read: "whether the judgment-debtors could not be dispossessed of the factory and machinery could not be dismantled

without permission of the Government? Taking evidence of the parties and noting the contents of the letter of the Industries Department, he observed that the judgment-debtors had not secured permission but the decree-holder might follow up the matter through court. He stayed execution of the decree in so far as it involved the dismantling or removal of the machinery but allowed the same for securing possession of the part of the premises where no machinery was stored. This was on 7th February, 1953.

5. Both parties filed appeals from this order which were dismissed. The appellate court was of the view that machinery and spare parts were lying practically in all the rooms of the building and the locking and sealing of the factory would result in its closure which would go against the provisions of the above-mentioned Act. The decree-holder was therefore directed to pursue the matter with the State Government. Incidentally the court noted that the decree-holder had not challenged the proposition that the court could not order delivery of possession without the requisite sanction for the dismantling of the factory. This order dated 22nd April 1953 was not challenged by any appeal to the High Court. It appears that the court consigned the execution proceedings to the record room on July 25, 1953.

6. On August 18, 1953 the decree-holder applied for execution proceedings being re-started. On November 7, 1953 the executing court observed that a reply from the State Government had been received to the effect that permission for demolition of the factory could not be given. The execution file was therefore ordered to be consigned to the record room once more. From this order, an appeal was preferred by the decree-holder. The Additional District Judge held that in view of the imperative provisions of section 3 of the Act the decree-holder could not be granted possession in execution of the decree and dismissed the appeal by order dated January 8, 1954. On further appeal, a learned Judge of the High Court by order dated July 13, 1955 observed that in the execution proceedings no evidence had been adduced on the points arising under Punjab Act XX of 1948. He therefore said as follows:

"On the present record it is not possible for me to decide whether the execution of the decree would defeat the

provisions of section 3 of the Punjab Act XX of 1948. That being the position of matters, I set aside the order passed by the Subordinate Courts and direct the Court of execution to give fresh decision on the points that arise under Section 3 of Punjab Act XX of 1948.

In proceedings pursuant to this order parties will be given opportunity to examine (sic) (witnesses?) bearing on the points that arise under Section 3 of Punjab Act XX of 1948."

7. On remand the Subordinate Judge by order dated 30th December, 1955 held that the Act was not intended to cover involuntary dismantling in execution of orders of competent courts: further the Rent Restriction Act, 1949 passed after Act XX of 1948 did not take any notice of the prohibition contained in the said Act. In the result he found that the respondent was liable to be ejected in execution of the decree for eviction but as the application had become over a year old it would be struck off the file and the decree-holder be at liberty to take out execution of the decree by a fresh application.

8. The judgment-debtors went up in appeal to the court of the District Judge. The District Judge by order dated December 31, 1956 held that the Act did not apply to involuntary dismantling of factories and that the issue raised by the Subordinate Judge in this connection did not arise but in fact it had been decided against the landlord by the High Court in Revision. According to him, the order of the High Court went to show that S. 3 of Act XX of 1948 covered delivery of possession even in execution of the order of the Rent Controller for otherwise the revision application would have been accepted by him straightway. In the result he dismissed the execution petition.

9. The appellant went up in Second Appeal to the High Court at Chandigarh. A single Judge of that Court dismissed the appeal. The decree-holder filed a Letters Patent Appeal. Although of the view that delivery of possession was not barred in execution of the decree by Act XX of 1948, the Division Bench concluded that so far as the parties before it were concerned, the matter had become *res judicata* in consequence of the decisions of the executing court and the first appellate court on the first execution application and the decision of a

single Judge in revision on the previous occasion in the second execution application.

S. 3, sub-s. (1) of East Punjab Act XX of 1948 provides as follows:

"No person shall, without the written permission of the State Government or of an officer authorised in this behalf by the State Government, dismantle any factory or remove from a factory any spare parts kept for maintaining the machinery of the factory in order."

The Act which contains only eight sections makes no reference to any decree for possession against the owner of a factory. By ordering delivery of possession of the premises, the executing court does not make an order for dismantling a factory and a bailiff charged with execution of a warrant for possession does not infringe the above provision of law by rendering possession of the property to the decree-holder. So far as the judgment-debtor, the owner of the factory, is concerned, it would be his look-out to take the matter up with the State Government, if necessary, and we have no doubt that in a case like this where there is no collusion between the decree-holder and the judgment-debtors the State Government would not prosecute the judgment-debtors or refuse to accord sanction to the judgment-debtors for removal of the machinery from the premises of which they could not lawfully continue in possession.

10. It appears that the Subordinate Judge, the District Judge and the Judges of the Punjab High Court were all of the view that the Act did not bar the delivery of possession in execution of a decree.

11. In our opinion there was no final order about the inexecutability of the decree on the first application for execution which was consigned to the record room by order dated July 25, 1953. Further, the judgment of the learned single Judge of the Punjab High Court dated July 13, 1955 did not decide the question as to whether the decree for possession would be inexecutable in view of Act XX of 1948. He stated expressly that it was not possible for him to decide whether the execution of the decree would defeat the provisions of S. 3 of Punjab Act XX of 1948 and being unable to come to a decision on the record he remanded the matter to the court of execution. He found himself unable to interpret the section on the evidence before him. The proceedings

subsequent to the remand order culminated in the order of the Division Bench from which the present appeal arises. The order dated July 13, 1955 was not a final order which put a seal on the proceedings.

12. The course of litigation subsequent to the order for eviction in 1950 is truly amazing. For 17 years the decree-holder has been unable to reap the fruits of the decree although practically all the courts felt that the Act of 1948 could not be called in aid by the judgment-debtors to resist execution by delivery of possession. We cannot but condemn in very strong terms the attitude of the judgment-debtors who, to say the least, are persons who have little regard for sanctity of their own solemn promise made before a court of law. On June 29, 1950 in Miscellaneous Civil Appeal No. 39 of 1950 they stated on oath that they had reached an agreement with the landlord that they would "remain on the premises only up till 31st March 1951 when they would of their own accord vacate the premises" and on their failure to do so the landlord would be entitled to take out execution against them. Even before the time to vacate the premises came one of the judgment-debtors filed a suit for a perpetual injunction to restrain the decree-holder from obtaining possession in terms of the consent order of 29th June 1950. The suit was dismissed on July 11, 1951. The judgment-debtors also lost the appeal filed against that dismissal. At every step and turn for nearly two decades they have successfully resisted delivery of possession by raising an illusory plea.

13. Learned counsel for the respondents argued that even now his clients can urge the plea that the decree was not executable because of the provisions of Act XX of 1948. According to him, the agreement was in contravention of statute and the respondents could not be estopped from pleading or proving facts which would render the agreement void. His case was that Act XX of 1948 being in force on June 29, 1950 any agreement arrived at between the parties in contravention of its provisions would not be binding on the parties. No exception can be taken to the broad proposition of law but no question of estoppel ever arose in this case because Act XX of 1948 did not operate as a bar to the delivery of possession of premises in execution of a decree.

14. In the result, the appeal is allowed with costs throughout from the 18th August 1953 irrespective of any order in that behalf made at any time thereafter. It is unfortunate that the decree-holder has been kept out of possession so long; but she is partly responsible for it herself. If she had preferred an appeal from the order of the District Judge passed on 22nd April, 1953 to the High Court, probably her troubles would have ended long ago.

TVN/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 30

(V 56 C 10)

(From: Allahabad)*

S. M. SIKRI AND R. S. BACHAWAT, JJ.

Jang Bahadur Singh, Appellant v. Baij Nath Tiwari, Respondent.

Criminal Appeal No. 187 of 1965, D/- 26-4-1968.

Contempt of Courts Act (1952), S. 1 — Interference with due course of justice in pending proceedings — Domestic inquiry into misconduct of employee during pendency of parallel inquiry before Court in the absence of stay order — No contempt — Criminal Misc. Contempt Case No. 7 of 1965, D/- 3-8-1965 (Allahabad), Reversed — (Intermediate Education Act (U. P. Act II of 1921), S. 16-G and Regulations 31 to 45) — (Constitution of India, Art. 311 — Misconduct by employee — Parallel inquiries by domestic tribunal and court.)

An enquiry by a domestic tribunal, in good faith in exercise of powers statutorily vested in it, (in this case, under the U. P. Intermediate Education Act (2 of 1921) and the Regulations framed thereunder), into the charges of misconduct against an employee does not amount to contempt of court merely because an inquiry into the same charges is pending before a civil or a criminal court. The initiation and continuation of disciplinary proceedings in good faith do not obstruct or interfere with the course of justice in the pending court proceeding. The employee is free to move the court for an order restraining the continuance of the disciplinary proceedings. If he obtains a stay order, a wilful violation of that order would of course amount to contempt of court. In the absence of a

stay order the disciplinary authority is free to exercise its lawful powers. AIR 1968 SC 1050 and (1900) 2 QB 36 and 1951 AC 482, 488 and AIR 1962 Madh Pra 72; AIR 1961 SC 633 and AIR 1960 SC 806 and AIR 1965 SC 155, Rel. on. AIR 1955 Andh 156, Dist.; Broad observation of Narayan J. in AIR 1949 Pat 222 (FB), to the contrary Disapproved. Cri. Misc. Contempt Case No. 7 of 1965, D/- 3-8-1965 (All), Reversed.

(Paras 3, 4, 7 to 9)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 1050 (V 55) =

1968 Cri LJ 1234 = Civil Appeal No. 1597 of 1967, D/- 8-3-68, Tukaram Gaokar v. S. N. Shukla 4

(1965) AIR 1965 SC 155 (V 52) = (1964) 7 SCR 555, Tata Oil Mills Co. Ltd. v. The Workmen 6

(1962) AIR 1962 Madh Pra 72 (V 49) = 1962 (1) Cri LJ 342, In re, Mehra 5

(1961) AIR 1961 SC 633 (V 48) = (1961) 3 SCR 460, Saibal Kumar Gupta v. B. K. Sen 5

(1960) AIR 1960 SC 806 (V 47) = (1960) 3 SCR 227, Delhi Cloth and General Mills Ltd. v. Kushal Bhan 6

(1955) AIR 1955 Andhra 156 (V 42) = 1955 Cri LJ 1028, Jones Shield v. Ramesam 7

(1951) 1951 AC 482 = 95 S. J. 333, A. R. Perera v. The King 4

(1949) AIR 1949 Pat 222 (V 36) = 50 Cri LJ 474 (FB), The King v. Parmanand 7

(1900) 2 QB 36 = 69 LJ QB 502, Reg. v. Gray 4

M/s. U. P. Singh and D. N. Mishra, Advocates, for Appellant; M/s. Sobhagmal Jain, S. P. Singh and J. P. Goyal Advocates, for Respondent.

The following Judgment of the Court was delivered by

BACHAWAT, J.: The appellant is the manager of Hiralal Memorial Intermediate College, Bhaurauli, in the District of Azamgarh. The respondent was the principal of the College. On December 14, 1963 the respondent drew from the Boys' Fund of the college two sums of Rs. 189 for payment of scholarship to the two Harijan students for the period from May to November 1963. On withdrawal of the monies he sent to the Harijan Tatha Samaj Kalyan Adhikari a form called Form No. 14 containing a receipt of the scholarship signed by the two students and

* (Cri. Misc. Contempt Case No. 7 of 1965, D/- 3-8-1965 — All.).

countersigned by himself. The Adhikari wrote to the appellant informing him of the complaint made by the students that in spite of the submission of Form No. 14 they had not received the scholarship. On March 24, 1964 the District Inspector of Schools visited the College and on finding that the scholarships had not been paid called for an explanation for non-payment. On April 10, 1964 the appellant forwarded the Inspector's letter of March 24 to the respondent and asked him to give an explanation. The respondent sent a reply stating that payments were made to the students on March 31, 1964 and that the delay in payment was due to the absence of the students from the College and the fact that the register on which receipts had to be obtained were with the Inspector from December 8, 1963 to March 10, 1964. A meeting of the managing committee was called on April 14, 1964 to consider the Inspector's letter and the respondent's explanation. According to the appellant, on April 19, 1964 the managing committee met and resolved to take disciplinary action against the respondent. On April 21, 1964 the appellant passed an order suspending the respondent pending the inquiry. The order stated that it was passed in exercise of the power vested in the appellant by the rules and the resolution of the managing committee dated April 19, 1964. A copy of the resolution was attached. On April 24, 1964 the respondent filed a writ petition in the High Court of Allahabad praying for appropriate writs quashing the order of suspension. He alleged that the appellant had no authority to pass the order and that the order was made in bad faith. On the same date the respondent obtained an ex parte order from the High Court staying the operation of the suspension order. On July 22, 1964 after hearing both the parties the High Court vacated the stay order. On December 25, 1964 the appellant served a charge sheet on the respondent. Charge No. (IV) was as follows:—

"The scholarship amounts of Rs. 216/25 and Rs. 216/25 of Sri Karam Deo Ram and Sri Jai Raj Ram, students of Class XII for the months of May 1963 to November 1963 were withdrawn by you on 14th December, 1963 but the same have neither been disbursed to the students concerned nor refunded to the Treasury. Thus you are guilty for misappropriation of the aforesaid amount. Evidence which

is proposed to be considered in support of the charge:

1. Letter of D. J. O. dated 24th March, 1964.
2. Letter of H. W. O. dated 31st March, 1964.
3. Statement of students.

Thus it is evidently clear that you being entrusted with the aforesaid money have dishonestly misappropriated the amount for your own use and the poor students have been put to loss by your misconduct. As such you have committed criminal breach of trust dishonestly punishable under Section 406 I. P. C." The respondent was required to submit his explanation by January 24, 1965. Instead of submitting his explanation the respondent filed a petition in the High Court asking for committal of the appellant for contempt of court. His contention was that the aforesaid charge was the subject-matter of inquiry in the pending writ petition, and that as the respondent had launched a parallel inquiry in the matter he had committed contempt of court. The High Court accepted the contention and held that the respondent was guilty of contempt of court and directed him to pay a fine of Rs. 500 and costs. The respondent has filed this appeal after obtaining special leave from this Court.

2. The conditions of service of the teachers in the College are governed by Section 16-G of the Intermediate Education Act, 1921 (U. P. Act II of 1921) and the Regulations framed thereunder. Regulations 31 to 45 provide for punishment, inquiry and suspension. The Committee of Management is the punishing authority. The punishments of dismissal, removal, discharge and reduction in rank and diminution in emoluments require prior approval of the Inspector. If it is decided to take disciplinary action against an employee, the inquiry is made by an authority appointed by the committee. The ground on which it is proposed to take action is reduced in the form of definite charges. The charges are communicated to the employee, who is required to submit a written statement of his defence. If the employee or the inquiring authority so desires, an oral inquiry takes place. The inquiring authority then makes a report. On receipt of the report the punishing authority takes its decision on the case. On receipt of the decision of the committee the Inspector gives his decision. The Committee then implements the decision of the

Inspector. The Regulations indicate definite time limits for the communication of the charge, submission of the written statement of defence, completion of the inquiry, the making of the report by the inquiring authority, the taking of decisions by the punishing authority and the Inspector and the implementation of the decision. Pending the inquiry and final orders, the employee may be suspended by the committee. The power of suspension may be exercised by the manager if it is delegated to him under the rules of the institution. The employee under suspension is paid a subsistence allowance of an amount equal to half his pay.

3. The issue in the disciplinary proceedings is whether the employee is guilty of the charges on which it is proposed to take action against him. The same issue may arise for decision in a civil or criminal proceeding pending in a court. But the pendency of the court proceeding does not bar the taking of disciplinary action. The power of taking such action is vested in the disciplinary authority. The civil or criminal court has no such power. The initiation and continuation of disciplinary proceedings in good faith is not calculated to obstruct or interfere with the course of justice in the pending court proceeding. The employee is free to move the court for an order restraining the continuance of the disciplinary proceedings. If he obtains a stay order, a wilful violation of the order would of course amount to contempt of court. In the absence of a stay order the disciplinary authority is free to exercise its lawful powers.

4. An authority holding an inquiry in good faith in exercise of the powers vested in it by statutory regulations is not guilty of contempt of court, merely because a parallel inquiry is imminent or pending before a court. In *Tukaram Gaokar v. S. N. Shukla*, Civil Appeal No. 1597 of 1967, D/- 8-3-1968 = (AIR 1968 SC 1050) this Court held that the initiation and continuance of proceedings for imposition of penalty on the appellant for his alleged complicity in the smuggling of gold under Section 112 (b) of the Customs Act, 1962 did not amount to a contempt of court though his trial in a criminal court for offences under Section 135 (b) of that Act and other similar offences was imminent and identical issues would arise in the proceedings before the customs authorities and in the trial before the criminal court. This Court observed:—

"To constitute contempt of court, there must be involved some 'act done or writing published calculated to bring a court or a judge of the court into contempt or to lower his authority' or 'something calculated to obstruct or interfere with the due course of justice or the lawful process of the court'. Reg v. Gray, 1900-2 QB 36; A. R. Perers v. The King, 1951 AC 482 at p. 488. The customs officers did nothing of this kind. They are acting bona fide and discharging their statutory duties under Ss. 111 and 112. The power of adjudicating penalty and confiscation under those sections is vested in them alone. The criminal court cannot make this adjudication. The issue of the show cause notice and proceedings thereunder are authorised by the Act and are not calculated to obstruct the course of justice in any Court. We see no justification for holding that the proceedings amount to contempt of court."

5. In *Re Shri Mehra*, AIR 1962 Madh Pra 72 the High Court of Madhya Pradesh held that the bona fide holding of a departmental inquiry on a charge of misappropriation against a government servant did not amount to contempt of court merely because a criminal prosecution on the same charge was pending against him. A fortiori the inquiry cannot amount to contempt of court if it is not a parallel investigation on a matter pending before a court, see *Saibal Kumar Gupta v. B. K. Sen*, 1961-3 SCR 460 = (AIR 1961 SC 633).

6. In *Delhi Cloth and General Mills Ltd. v. Kushal Bhan*, 1960-3 SCR 227 = (AIR 1960 SC 806) and *Tata Oil Mills Co. Ltd. v. The Workmen*, AIR 1965 SC 155 the Court held that a domestic inquiry by the employer into the charges against a workman was not vitiated because it was held during the pendency of a criminal trial into the same or similar charges. It may be desirable to stay the domestic inquiry pending the final disposal of the criminal case but the inquiry could not be characterised as mala fide merely because it was held during the pendency of the criminal proceedings.

7. In *The King v. Parmanand*, AIR 1949 Pat 222 (FB) a Full Bench of the Patna High Court held that the giving or withholding of consent to the withdrawal of the prosecution under Section 494 of the Code of Criminal Procedure was a judicial act and it was improper for the court to permit withdrawal

of the prosecution on orders of the Government without making any attempt to exercise its discretion, that the power to grant adjournments of pending proceedings under S. 344 of the Code and the power to call for records in a pending or completed case under Sections 423, 435 of the Code and the general rules and circular orders were vested in the court and not in executive officers. Those questions do not arise for decision in this case. Narayan, J. in a separate judgment observed that in an inquiry with regard to a matter which is sub judice was bound to interfere with the even and ordinary course of justice and a parallel inquiry of this kind would amount to opening the door for contempt. In that case the executive officers were issuing orders to the criminal court calling for its records and asking it to adjourn the proceedings and to consent to the withdrawal of the prosecution and on those facts it might be possible to hold that the officers were guilty of contempt. But we cannot agree with the broad observation that a parallel inquiry on a matter pending before a court necessarily amounts to a contempt of court. We think that an inquiry by a domestic tribunal in good faith into the charges against an employee does not amount to contempt of court merely because an inquiry into the same charges is pending before a civil or criminal court. In *D. Jones Shield v. Ramesam*, AIR 1955 Andhra 156 the Andhra Pradesh High Court agreed with the observations of Narayan, J. but the decision is distinguishable because the court found that the inquiry by the Collector into the charges against a sub-magistrate was not a parallel inquiry and did not amount to contempt of court.

8. After the High Court vacated the stay order the appellant bona fide believed that the disciplinary proceedings could be continued. The service of the charge sheet on the respondent was made in good faith and was not intended or calculated to interfere with the court proceedings. We are inclined to think that the respondent instituted the contempt proceeding with ulterior motives. He was under suspension and was drawing half pay for doing nothing. His intention was to delay the inquiry into the charges against him. Having failed to obtain the stay order he launched the contempt proceeding so that the inquiry might be indefinitely held up. In view

of the order under appeal he has successfully delayed the inquiry so far.

9. In the result, we allow the appeal, set aside the judgment and order of the High Court dated August 3, 1965 and dismiss the petition filed under the Contempt of Courts Act.

TVN/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 33 (V 56 C 11)

(From (1) Punjab: AIR 1964 Punj 246;
(2) Punjab* and (3) Punjab**)

J. C. SHAH AND V. RAMASWAMI, JJ.
Civil Appeal No. 937 of 1965

Chief Settlement Commissioner, Punjab and others, Appellants v. Om Parkash and others, Respondents.

Civil Appeal No. 938 of 1965

Chief Settlement Commissioner, Punjab and others, Appellants v. Ajit Singh Kalha, Respondent.

Civil Appeal No. 1195 of 1967

Union of India and others, Appellants v. Partap Singh and others, Respondents.

Civil Appeals Nos. 937, 938 of 1965, and 1195 of 1967, D/- 5-4-1968.

(A) East Punjab Refugees (Registration of Land Claims) Act (12 of 1948), Section 2 (e) and (d) — 'Displaced person' and 'Refugee' — Person who has died before the disturbance took place and has never migrated to India, is not either a displaced person or a refugee — No allotment can be made in his favour even though his name appears in revenue records — Para 17 of Tarlok Singh's Land Resettlement Manual is no statutory authority. (Para 4)

(B) Constitution of India, Articles 13 and 14 — Executive instructions — Statutory provisions must prevail over executive instructions.

The notion of inherent or autonomous law-making power in the executive administration is a notion that must be emphatically rejected. With all its defects, delays and inconveniences men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law

* (Civil Writ No. 526 of 1963, D/- 13-9-1963—Punj.)

** (L. P. A. No. 136 of 1964, D/- 6-8-1964—Punj.)

be made by parliamentary deliberations. In our constitutional system, the central and most characteristic feature is the concept of the rule of law which means, in the present context the authority of the law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the appropriate action in the competent court. The rule of law rejects the conception of the Dual State in which governmental action is placed in a privileged position of immunity from control by law. Such a notion is foreign to our basic constitutional concept. (1952) 343 U. S. 579, Rel. on. (Para 6)

Cases Referred: Chronological Paras
(1952) 343 US 579 = 96 Law Ed
1153, Youngstown Sheet and Tube
Co. v. Sawyer 6

In C. A. No. 937 of 1965:

Mr. D. R. Prem, Senior Advocate
M/s. R. N. Sachthey and S. P. Nayar,
Advocates with him), for Appellants.
In C. As. Nos. 938 of 1965 and 1195 of
1967:

M/s. R. N. Sachthey and S. P. Nayar,
Advocates, for Appellants.

In C. A. No. 937 of 1965:

Mr. S. V. Gupte, Senior Advocate,
(M/s. Bhawani Lal and B. P. Jha, Advoca-
tes with him), for Respondents (Nos.
1 to 3).

In C. A. No. 938 of 1965:

Mr. R. V. Pillai, Advocate, for Respon-
dent.

In C. A. No. 1195 of 1967:

M/s. H. L. Mittal and Naunit Lal,
Advocates, for Respondents.

Civil Appeal No. 937 of 1965

The following Judgment of the Court
was delivered by

RAMASWAMI, J.: This appeal is
brought, by certificate, from the judg-
ment of the Punjab High Court dated
September 13, 1963 in Civil Writ No.
841 of 1962.

2. Nanak Chand owned agricultural
lands in Bahawalpur State now forming
part of West Pakistan. He also owned
some property at Kot Kapura, Tehsil
Faridkot, District Bhatinda now located
in India. Nanak Chand had in normal
course of business come to Bhatinda
where he died in June, 1947 leaving be-
hind three sons, Om Parkash, Sat Narain
and Ram Parshotam who are the res-
pondents in this appeal. As a result of
the partition of India the land originally

owned by Nanak Chand and after his
death by his sons in Bahawalpur State had
to be abandoned. After the partition of
India the three respondents migrated to
India and filed separate claims in ac-
cordance with law and obtained allot-
ment of certain area in village Kot
Kapura, District Bhatinda in lieu of the
land abandoned by them in Pakistan.
The Revenue Authorities allotted an area
measuring 206.8½ standard acres in vil-
lage Kot Kapura, District Bhatinda. After
the allotment was made one Rur Singh
filed a complaint before the Managing
Officer that these respondents had re-
ceived double allotments in village Kot
Kapura. The complaint was examined
by Shri Shankar Das Katyal, Managing
Officer who held that Shri Rur Singh
failed to substantiate the allegation of
double allotment. But the Managing
Officer came to the conclusion that
Nanak Chand although he had died
long before the partition of the country
must be treated as a displaced land
holder for the purpose of allotment of
land. The reason given was that his
name continued to be shown in the Jama-
bandi as the owner of the abandoned
land in Pakistan. In consequence of this
finding a large portion of the land al-
lotted to the three respondents was can-
celled by the Managing Officer by his
order dated September 18, 1961. The
three respondents preferred an appeal
before the Assistant Settlement Commis-
sioner and a revision petition before the
Chief Settlement Commissioner, Pun-
jab but the appeal and revision
petition were both dismissed. In
dismissing the revision petition the
Chief Settlement Commissioner, relied
upon paragraph 17 of Tarlok Singh's
Land Resettlement Manual, 1952 Edition,
page 180 which was to the following
effect:

"Even where a displaced land holder
in whose name the land stands in the re-
cords received from West Punjab has
died, the allotment is made in the name
of the deceased. In the fard taqsim,
therefore, the entry will be in the name
of the deceased land holder. Possession
is ordinarily given to the heirs but there
must be regular mutation proceedings
before the entry in column 3 of the fard
taqsim is altered in favour of the heirs."
It was held by the Chief Settlement
Commissioner that this paragraph related
to all persons who continued to be
shown as owners in the revenue records
irrespective of the fact whether they had

died before or after migration. In other words, the Chief Settlement Commissioner took the view that the land could only be allotted in the name of Nanak Chand even assuming that he had died in June 1947. Against the order of the Chief Settlement Commissioner the respondents filed a Writ Petition (Civil Writ No. 841 of 1961) before the Punjab High Court. The Writ Petition was allowed by the High Court by its order dated September 13, 1963 and the orders of the Chief Settlement Commissioner dated June 8, 1962, of the Assistant Settlement Commissioner dated December 26, 1961 and of the Managing Officer dated September 18, 1961 were all quashed by the grant of a writ in the nature of certiorari.

3. It is necessary at this stage to set out the provisions of the relevant statutes. Section 2 (b) of the East Punjab Evacuees' (Administration of Property) Act, 1947 (East Punjab Act No. XIV of 1947) defines an "evacuee" as meaning "a person ordinarily resident in or owning property or carrying on business within the territories comprised in the Province of East Punjab, who on account of civil disturbances, or the fear of such disturbances, or the partition of the country: (i) leaves, or has since the first day of March, 1947, left the said territories for a place outside India, or (ii) cannot personally occupy or supervise his property or business." Section 4 of that Act provided that "All evacuee property situated within the Province shall vest in the Custodian for the purposes of this Act and shall continue to be so vested until the Provincial Government by notification otherwise directs." In pursuance of the powers conferred by the rules made by the State Government under Clauses (f) and (ff) of S. 22 (2) of the East Punjab Evacuees' (Administration of Property) Act, 1947, the Custodian issued a notification No. 4892/S on July 8, 1949 regarding the conditions on which he was prepared to grant allotment of land vested in him under the provisions of the said Act to displaced persons. Para 2 (e) of this notification states:

"Displaced person' means a landholder in the territories now comprised in the province of West Punjab or a person of Punjabi extraction who holds land in the Provinces of North-Western Frontier Province, Sind or Baluchistan or any State adjacent to any of the aforesaid Provinces and acceding to the Dominion

of Pakistan and who has since the 1st day of March, 1947, abandoned or been made to abandon his land in the said territories on account of civil disturbances, or the fear of such disturbances, or the partition of the country." Section 2 (d) of the East Punjab Refugees (Registration of Land Claims) Act, 1948 (East Punjab Act No. XII of 1948) states:

"2. Interpretation.—In this Act unless there is anything repugnant in the subject or context,—

(d) 'refugee' means a landholder in the territories now comprised in the Province of West Punjab, or who or whose ancestor migrated as a colonist from the Punjab since 1901 to the Provinces of North-West Frontier Province, Sind or Baluchistan or to any State adjacent to any of the aforesaid Provinces and acceding to the Dominion of Pakistan and who has since the 1st day of March, 1947, abandoned or been made to abandon his land in the said territories on account of civil disturbances, or the fear of such disturbances, or the partition of the country;"

Section 2 (c) defines a "landholder" to mean "an owner of land or a tenant having a right of occupancy under the Punjab Tenancy Act, 1887 (XVI of 1887) or a tenant as defined in Section 3 of the Colonization of Government Lands Act, 1912 (Punjab Act V of 1912) and such other holder or grantee of land as may be specified by the Provincial Government." Section 2 (c) of the East Punjab Displaced Persons (Land Resettlement) Act, 1949 (East Punjab Act No. XXXVI of 1949) defines a "displaced person" as follows:

"displaced person' means a landholder in the territories now comprised in the Province of West Punjab or a person of Punjabi extraction who holds land in the Provinces of North-West Frontier Province, Sind or Baluchistan or any State adjacent to any of the aforesaid Provinces and acceding to the Dominion of Pakistan and who has since the 1st day of March, 1947, abandoned or been made to abandon his land in the said territories on account of Civil disturbances, or the fear of such disturbances, or the partition of the country".

Section 2 (b) of this Act defines an "allottee" as follows:

"allottee' means a displaced person to whom land is allotted by the Custodian under the conditions published with

East Punjab Government notification No. 4892/S, dated the 8th July, 1949, and includes his heirs, legal representatives and sub-lessees”.

4. The main question to be considered in this appeal is whether Nanak Chand was a ‘displaced person’ as defined in para 2 (e) of the notification dated July 8, 1949 or a ‘refugee’ as defined under Section 2 (d) of Act No. XII of 1948 and whether he was entitled for allotment of land. It is manifest that the expression “displaced person” or the word “refugee” has been used in the relevant enactments with reference to a person who has migrated to India as a result of disturbances or fear of disturbances or the partition of the country. Therefore if a person had died before the disturbances took place or he had never migrated to India as a result of the disturbances and he died before such migration, he could not come within the meaning of the expression “displaced person” or the word “refugee” under the relevant statutory enactments. It is manifest in the present case that Nanak Chand died in June, 1947 long before the partition of the country and he did not abandon or was not made to abandon his land in Bahawalpur on account of the civil disturbances or the fear of such disturbances or the partition of the country.

5. It was, however, contended by Mr. D. R. Prem on behalf of the appellants that even though Nanak Chand never became a refugee or a displaced landholder, the allotment had to be made in his name because he was shown in the revenue records received from West Punjab as the owner of the land and there had been no mutation of the names of the respondents in the revenue records. Reference was made in this connection to paragraph 17 of Tarlok Singh’s Land Resettlement Manual which has already been quoted. It was contended by Mr. Prem that the instructions contained in this paragraph would apply even though Nanak Chand had never become a refugee or a displaced landholder and the allotment has to be made in his name by the revenue authorities because his name still stands in the revenue records received from West Punjab. We are unable to accept this argument as correct. It is not disputed that paragraph 17 of Tarlok Singh’s Manual has no statutory authority but it merely embodies executive or administrative instructions for general guidance. If there

is a conflict between the provisions contained in this paragraph and the statutory enactments already referred to it is manifest that the statutory provisions must take precedence and must prevail over the directions contained in para 17 of Tarlok Singh’s Manual.

6. In this context it is essential to emphasise that under our constitutional system the authority to make the law is vested in the Parliament and the State Legislatures and other law making bodies and whatever legislative power the executive administration possesses must be derived directly from the delegation of the legislature and exercised validly only within the limits prescribed. The notion of inherent or autonomous law-making power in the executive administration is a notion that must be emphatically rejected. As observed by Jackson, J. in a recent American case—*Youngstown Sheet and Tube Co. v. Sawyer*, (1952) 343 US 579 at p. 655—“With all its defects, delays and inconveniences men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.” In our constitutional system, the central and most characteristic feature is the concept of the rule of law which means, in the present context, the authority of the law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the appropriate action in the competent court. The rule of law rejects the conception of the Dual State (*) in which governmental action is placed in a privileged position of immunity from control by law. Such a notion is foreign to our basic constitutional concept.

7. In our opinion, however, it is possible to give a restricted interpretation to paragraph 17 of Tarlok Singh’s Manual so as to make it consistent with the requirements of the statutory enactments. The intention of para. 17 is that it is applicable only to such persons who are land-holders at the time of their becoming displaced persons or refugees and who died afterwards before allotment could be made in their favour. In other words, the paragraph applies to a displaced land-holder who dies after having

(*) This term is derived from Frankel, *The Dual State* (1941).

become a "displaced person" within the meaning of the relevant statutory enactments referred to above. The paragraph does not apply to a case of a person who was not a displaced land-holder at the time of his death. In the present case it is admitted that Nanak Chand never became a displaced land-holder. On the other hand, Nanak Chand died before he became a displaced land-holder and therefore para 17 of Tarlok Singh's Manual has no application to the facts of the present case.

8. For these reasons we hold that this appeal has no merit and it must be dismissed with costs.

Civil Appeals Nos. 938 of 1965 and 1195 of 1967:

9. The question arising in these two appeals is identical with the question of law in Civil Appeal No. 937 of 1965. For the reasons given in that judgment we hold that the decision of the High Court challenged in these appeals is correct and these appeals must be dismissed with costs.

GGM/D.V.C. Appeals dismissed.

AIR 1969 SUPREME COURT 37 (V 56 C 12)

(From Gujarat)*

R. S. BACHAWAT, J. M. SHELAT AND
A. N. GROVER, JJ.

Maganlal Chhotabhai Desai, Appellant
v. Chandrakant Motilal, Respondent.

Civil Appeal No. 392 of 1965, D/-
22-4-1968.

(A) Civil P. C. (1908), Section 115, Order 20, Rules 12, 17 — Exercise of jurisdiction illegally or with material irregularity — Suit by landlord against tenant for possession, arrears of rent and mesne profits — In decree passed in such suit, Court giving direction that landlord do render account of overpayments made to him — Court acts illegally and with material irregularity — High Court has full power to revise this decree under Section 115 and give such direction in the matter as it thinks fit.

(Para 3)

(B) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates

*(Civil Revn. Appln. No. 456 of 1960,
D/- 20-11-1962—Guj.)

IL/JL/C292/68

Control Act (57 of 1947), Section 2 Scope.

Section 20 gives the tenant a general right of recovery of the overpaid rent within six months from the date of payment. Without prejudice to any other mode of recovery, he may deduct the overpayment from any rent payable by him to the landlord. Deduction is one mode of recovery. If the amount is incapable of recovery because of the bar of limitation, it cannot be recovered by deduction. In other words, the right of recovery by deduction is barred at the same time as the right of recovery by suit. If the tenant seeks recovery of the overpaid amount he must bring the suit or make the deduction within six months. (1954) 56 Bom LR 619, Approved; (1925) 1 KB 447, Applied. (Para 7)

(C) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Sections 12 (1) and 12 (3) (b) — Suit by landlord against eviction of tenant — Tenant in arrears of rent — During pendency of suit, tenant not paying standard rent, nor was he ready or willing to pay — Instead, he claimed that he was not liable to pay any amount — Tenant, held could not claim protection from eviction.

(Paras 10, 11)

Cases Referred: Chronological Paras
(1956) 58 Bom LR 680 = ILR

(1956) Bom 805, Soharab Tavaria
v. Jafferalli 8

(1954) 56 Bom LR 619 = ILR

(1954) Bom 1056, Karamesy Kanji
v. Velji Virji 8

(1925) 1 KB 447 = 94 LJ KB 430,
Bayley v. Walker 8

Mr. M. C. Chagla, Senior Advocate (Mr. B. R. Agarwala, Advocate of M/s. Gagrati and Co., with him), for Appellant; Mr. S. T. Desai, Senior Advocate (Mr. P. C. Bhartari, Advocate and M/s. J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji and Co., with him), for Respondent.

The following Judgment of the Court was delivered by

BACHAWAT, J.: This appeal arises out of a suit between landlord and tenant. The defendant was a tenant of Moti Villa, Bungalow No. 1 in Ahmedabad under the plaintiff. The contractual rent was Rs. 300 per month. Since October 1, 1948 the defendant stopped payment of rent on the ground that it was excessive. The disputes between the parties

were referred to the arbitration of one Sankalchand Parikh who made an award fixing the standard rent at Rs. 300 per month and directing the defendant to deliver possession of the premises and to pay arrears of rent and future rent at that rate. A decree was passed according to the award on September 21, 1949. The plaintiff recovered moneys by executing the decree but the defendant continued in possession. On April 20, 1950 the defendant made an application for fixation of standard rent. This application was withdrawn by him on November 11, 1950. On August 1, 1955 the High Court declared that the award decree was null and void on the ground that the claim for fixation of the standard rent and recovery of possession could not be referred to arbitration.

2. On September 5, 1955 the plaintiff served a notice upon the defendant demanding payment of arrears of rent and asking him to vacate the premises on the expiry of the month of October next. On December 26, 1955 the plaintiff instituted Suit No. 5092 of 1955 claiming possession on the ground of non-payment of rent and sub-letting and also claiming arrears of rent and mesne profits. The defendant filed his written statement on May 1, 1956 asking for fixation of the standard rent at Rs. 125 per month, denying the sub-letting and alleging that the plaintiff had recovered more than the rent legitimately due to him. On March 14, 1957 he filed Suit No. 34 of 1957 against the plaintiff claiming refund of Rs. 15224 realised in execution of the void decree. The first date of the hearing of Suit No. 5092 of 1955 was December 26, 1957. On June 19, 1958 the Trial Court decreed the suit and directed the defendant to give possession of the premises and to pay Rs. 10750 on account of arrears of rent and mesne profits at the rate of Rs. 500 per month from the date of the suit. The Trial Court held that the defendant sublet the premises, that having withdrawn his application for fixation of the standard rent it was not open to him to ask for fixation of the standard rent, that if the matter were still open the standard rent would be Rs. 125 per month, that a sum of Rupees 14169/2/- was realised from the defendant in execution of the award decree, that the defendant was liable to pay rent at Rs. 300 per month, that the rent was in arrear and that the notice to quit

dated September 5, 1955 was valid. The defendant filed an appeal against this decree. During the pendency of the appeal the plaintiff recovered the sum of Rs. 10,750 decreed by the Trial Court. The Assistant Judge Ahmedabad allowed the appeal, set aside the decree of the Trial Court and directed the plaintiff to render an account of the overpayments made to him. He held that the defendant did not sub-let the premises, that the standard rent was Rs. 125 per month, that it was open to the defendant to ask for fixation of standard rent, that in execution of the award decree since 1950 the plaintiff recovered Rs. 14,169/2/- before the institution of the suit and Rs. 10,750 during the pendency of the appeal and that taking into account all the recoveries the rent was not in arrear. The plaintiff filed a revision application against this decree. On November 20, 1962 the High Court allowed the revision application, set aside the decree of the Assistant Judge, restored the decree for eviction passed by the Trial Court and directed the defendant to pay mesne profits at Rs. 125 per month from the date of the suit until recovery of possession. The High Court accepted the findings of the courts below that there was no sub-letting of the premises, that the standard rent was Rs. 125 per month, that it was open to the defendant to ask for fixation of the standard rent and that Rs. 14,169/2/- was recovered from him in execution of the award decree before the institution of the suit. The High Court held that the rent was in arrear, that the defendant was not ready and willing to adjust the overpayment against the rent falling due, that the amount recovered from the defendant was less than the standard rent due from him and the cost of the suit and that he was not entitled to the protection of Secs. 12 (1) and 12 (3) (b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bombay Act No. LVII of 1947). The High Court refused to allow the defendant to raise a new contention, viz., that there was no valid notice under Section 12 (2) of the Act. The defendant filed this appeal after obtaining special leave from this Court.

3. Mr. M. C. Chagla contended that the High Court had no jurisdiction to interfere with the decree of the Assistant

Judge under Section 115 of the Code of Civil Procedure. We are unable to accept this contention. The decree passed by the Assistant Judge was manifestly illegal. Suit No. 5092 of 1955 was for possession, arrears of rent and mesne profits. In his written statement, the defendant asked for fixation of standard rent and prayed for dismissal of the suit. In that suit the court had no power to pass a decree directing the plaintiff to render an account in respect of any overpayment of rent made to him. In giving the direction that "the landlord do render an account of the overpayments made to him", the Assistant Judge acted illegally and with material irregularity. The High Court had full power to revise this decree under Section 115 and to give such direction in the matter as it thought fit.

4. Mr. Chagla then contended that there was no valid notice under S. 12 (2). He argued that this point arose on the pleadings and the issues. But we find that in the Trial Court the contention was that there was no valid notice to quit. It was not argued there that there was no valid notice under Section 12 (2). The point regarding the validity of the notice was not raised before the Assistant Judge. The High Court properly refused to allow the point to be taken for the first time in revision. We are of the opinion that the point about the absence of a proper notice under S. 12 (2) is not now open.

5. The crucial point in the case was whether the defendant paid or was ready and willing to pay the standard rent due from him. According to the defendant he was compelled to pay Rs. 15,224/2 between March 14, 1950 and August 4, 1954. The courts below found that between those two dates he paid Rupees 14,169/2/- on account of rent from October 1, 1948 at Rs. 300 per month. From the plaint in Suit No. 34 of 1957 it appears that until March 14, 1957 the defendant did not make any other payment. As the High Court pointed out, no further payment was made by the defendant till the disposal of suit No. 5092 of 1955.

6. Thus up to August 4, 1954 the defendant paid Rs. 14,169/2/- on account of rent due up to that date at Rs. 300 per month. The payments were in excess of the standard rent. He did

not pay the rent falling due after August 4, 1954. The question is whether the rent was in arrear or whether it should be treated as paid by adjustment or deduction of the overpayments. The right of a tenant to recover the overpaid rent is regulated by Section 20. That section reads:—

"Any amount paid on account of rent after the date of the coming into operation of this Act shall, except in so far as payment thereof is in accordance with the provisions of this Act, be recoverable by the tenant from the landlord to whom it was paid or on whose behalf it was received or from his legal representative at any time within a period of six months from the date of payment and may, without prejudice to any other remedy for recovery, be deducted by such tenant from any rent payable by him to such landlord."

7. The section gives the tenant a general right of recovery of the overpaid rent within six months from the date of payment. Without prejudice to any other mode of recovery, he may deduct the overpayment from any rent payable by him to the landlord. Deduction is one mode of recovery. If the amount is incapable of recovery because of the bar of limitation, it cannot be recovered by deduction. In other words, the right of recovery by deduction is barred at the same time as the right of recovery by suit. If the tenant seeks recovery of the overpaid amount he must bring the suit or make the deduction within six months.

8. In *Karamesy Kanji v. Velji Virji* (1954) 56 Bom LR 619 the learned Chief Justice of the Bombay High Court repelled the tenant's contention that for deduction of rent no period of limitation was provided by Section 20. He observed:—

"It seems to me clear on a plain and natural construction of the section itself that if a tenant could not recover any excess amount paid by him beyond six months from the date of payment and if such amounts became irrecoverable, it is difficult to understand how a tenant could deduct what he could not recover and what was irrecoverable in law. The same view of the law has been taken in a parallel piece of legislation in England in *Bayley v. Walker*, (1925) 1 KB 447. I see no reason to take a view different from that taken by the appellate court that the interpretation put by the Eng-

lish Court on a similar provision of law is the correct interpretation."

In (1925) 1 KB 447 (supra) the tenant on discovering that he had overpaid considerable sums in excess of the standard rent stopped payment of rent retaining the amounts as they fell due by way of deduction under the provisions of S. 14, sub-section (1) of the Increase of Rent and Mortgage Interest (Restriction) Act, 1920. He continued to deduct his rent after expiry of the period of limitation prescribed by Section 8, sub-section (2) of the Rent and Mortgage Interest Restrictions Act 1923. The landlord contended that the tenant had no right to so continue to deduct and that consequently his rent was in arrear and on that ground brought an action for possession. The question was whether the rent was in arrear or not. The matter turned on the construction of Section 14 of the Act of 1920, and Section 8 of the Act of 1923. Section 14, sub-section (1) gave the tenant a general right of recovery of overpaid rent and the amount recoverable might without prejudice to any other mode of recovery be deducted by the tenant from any rent payable by him. Section 8, sub-section (2), provided that "any sum which under sub-s. (1) of Section 14 of the principal Act (of 1920) is recoverable by the tenant..... shall be recoverable at any time within six months from the date of payment, but not afterwards or in the case of a payment made before the passing of this Act, at any time within six months from the passing of this Act but not afterwards." Salter, J., held that the period of limitation prescribed by Section 8 of the Act of 1923 applied to recovery by deduction as well as recovery by action. As the amount was incapable of recovery by action it could not be recovered by deduction. The rent was therefore in arrear and the landlord was entitled to recover possession on that ground. In *Soharab Tavaria v. Jafferli*, (1956) 58 Bom LR 680 at pp. 687-88 a Division Bench of the Bombay High Court approved of these decisions.

9. Now the right of recovery of the excess rent paid before August 4, 1954 became barred on and after February 4, 1955. Within that period the defendant took no steps for recovery of the amount by filing a suit or making a deduction. As the claim for recovery of the amount became barred after February 4, 1955, he could not thereafter deduct it from the rent falling due. As a matter of

fact, he did not deduct it from rent at any time. Instead of making any deduction he filed a suit for its recovery. The overpayments cannot now be deducted from or adjusted against the rent falling due since August 4, 1954. It follows that the rent was in arrear.

10. In these circumstances, the defendant could not claim protection of Section 12 (1) of the Rent Act. During the pendency of the suit he did not pay the standard rent due from him from August 4, 1954 nor was he ready or willing to pay it. Instead of showing his readiness and willingness to pay the rent due he claimed that he was not liable to pay any amount at all.

11. Likewise he could not claim the protection under Section 12 (3) (b). Before the first hearing of the suit on December 26, 1957 or any other date fixed by the trial court he did not pay or tender in court the standard rent then due from him. Nor did he thereafter continue to pay or deposit in court such rent till the suit was finally decided. It follows that the defendant cannot claim protection from eviction under the Rent Act. The High Court therefore rightly decreed the suit for eviction.

12. In the result, the appeal is dismissed. We direct that execution of the decree for eviction be stayed for a period of one year from to-day. In all the circumstances of the case, we make no order as to costs.

SSG/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 40
(V 56 C 13)

(From: Bombay)*

V. RAMASWAMI AND C. A. VAIDIALINGAM, JJ.

Ishwarlal Girdharilal Parekh, Appellant v. State of Maharashtra and others, Respondents.

Criminal Appeal No. 109 of 1966, D/-15-1968.

(A) Penal Code (1860), Ss. 420 and 22 — 'Property' does not necessarily mean a thing which must have a market value — Income-tax assessment order is a 'property'.

The word 'property' occurring in S. 420 I. P. C. does not necessarily mean that

* (Cri. Revn. Appln. No. 232 of 1965, D/-24-11-1965 — Bom.).

IL/JL/C584/68

the thing of which a delivery is dishonestly desired by the person who cheats, must have a money value or a market value, in the hand of the person cheated. Even if the thing has no money value, in the hand of the person cheated, but becomes a thing of value, in the hand of the person, who may get possession of it, as a result of the cheating practised by him, it would still fall within the connotation of the term property in S. 420 I. P. C. The communicated order of assessment determining the total income of the assessee and the tax payable on the basis of such assessment is property since it is of great importance to assessee as containing a computation of his total income and as a determination of his tax liability. There can also be delivery of the said assessment order, and as such an offence under S. 420 can be committed in respect of such an assessment order by dishonestly inducing the Income Tax Officer, to deliver the particular property, viz., the assessment order, as passed by him, in and by which a considerably low amount has been determined, as the total income of the assessee, on the basis of which the amount of tax has been fixed.

(Paras 12 and 13)

(B) Penal Code (1860), Ss. 420, 29 and 30 — Valuable security — Income-tax assessment order is a valuable security.

The assessment order is a document, under S. 29 I. P. C. The order of assessment does create a right in the assessee, in the sense that he has a right to pay tax only on the total amount assessed therein and his liability to pay tax is also restricted to that extent. Therefore an order of assessment is a valuable security under S. 420 I. P. C. Therefore, if the cheating, employed by the accused, resulted in inducing the Income Tax Officer to make a wrong assessment order, it would amount to inducing the Income Tax Officer, to make a valuable security.

(Para 14)

Mr. A. S. R. Chari, Senior Advocate, (M/s. N. C. Maniar and P. C. Bhartari, Advocates and Mr. J. B. Dadachanji Advocate of M/s. J. B. Dadachanji and Co. with him), for Appellant; M/s. G. L. Sanghi and S. P. Nayyar, Advocates, for Respondent No. 1; Mr. N. C. Maniar, Advocate and M/s. K. L. Hathi and Atiqur Rehman, Advocates of M/s. Hathi and Co., for Respondent No. 2.

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.: In this appeal, by special leave, on behalf of the appellant, the fifth accused in Special Case No. 9 of 1963, in the Court of the Special Judge for Greater Bombay, Mr. A. S. R. Chari, learned counsel, challenges the order, dated November 24, 1965, passed by the High Court of Bombay, in Criminal Revision Application No. 232 of 1965.

2. There are five accused, in Special Case No. 9 of 1963. The appellant, and accused No. 4, are partners of an industrial concern, known as 'Premier Industries'. Accused No. 1 is an Income-tax Consultant, and accused Nos. 2 and 3, are clerks, in the Income-tax Department. The substance of the prosecution case, against these five accused, is that they formed a conspiracy, to cheat the income-tax authorities, in respect of the income-tax assessments, of the Premier Industries, for the assessment year 1960-61, and, in pursuance of the said conspiracy, committed offences, under S. 420 I. P. C., and S. 5 (1) (d) read with S. 5(2) of the Prevention of Corruption Act, 1947 (Act II of 1947), (hereinafter called the Act). They have also been charged with an offence, under S. 468 I. P. C., alleged to have been committed, by them, in furtherance of the said conspiracy.

3. The allegations, relating to the commission of the offence, under S. 420 I. P. C., is comprised in charge No. 2. That charge ends up by saying that, by the various acts mentioned therein, the appellant, along with accused No. 1, who is the Income-tax Practitioner, and accused No. 4, dishonestly or fraudulently induced the income-tax authorities and obtained assessment order for less income-tax than due by accused Nos. 4 and 5, and that, all the three of them, have committed an offence, under S. 420, I. P. C. It is not necessary to refer to the other charges.

4. The appellant raised an objection, to the framing of a charge, under S. 420 I. P. C. According to him the charge should really have been framed under S. 417, on the ground that the assessment order, in this case, is not 'property'. He also raised an objection, that the assessment order, is not 'valuable security'.

5. The Special Judge, by his order, dated February 3, 1965, rejected the pre-

liminary objections, raised by the appellant. He held that the assessment order was 'property', and that it was also 'valuable security'. Therefore, he held that the charge, framed under S. 420 I. P. C., was correct. There were certain other objections, raised by the appellant, viz., that sanction had not been obtained, under S. 196-A Cr. P. C., that where the offence itself was alleged to have been committed, in pursuance of the conspiracy, and was the subject matter of charge, no charge of conspiracy could still be maintained, and that the period of conspiracy had been artificially fixed, in the charge. These objections have also been overruled by the Special Judge.

6. The appellant carried the matter, in revision, before the High Court of Bombay. The learned Judge, by his order, dated November 24, 1965, which is under attack, has confirmed the order of the Special Judge. Here again, the High Court has taken the view that the assessment order is 'property' and it is also 'valuable security', under S. 30, I. P. C. The High Court is further of the view that the allegations, contained in the material charge, do prima facie disclose an offence, under S. 420 I. P. C. Certain other objections, raised before the High Court, were also negatived.

7. Mr. A. S. R. Chari, learned counsel for the appellant, has again reiterated the same objections. Except for the question, relating to the charge framed under S. 420 I. P. C., we make it clear that we are not expressing any opinion, regarding the other points, raised by Mr. Chari. If any other objections are available to the appellant, or any other accused, he or they, will be perfectly entitled to raise the same, during the course of the trial.

8. The argument, regarding the invalidity of the charge, framed under S. 420, runs as follows. The essential ingredient of an offence, under S. 420 I. P. C., is that the person cheating, must thereby, dishonestly induce, the person deceived, to deliver any property, or to make the whole or any part of a valuable security. We are not referring to the other matters, contained in S. 420 I. P. C. The issue or delivery of an order of assessment, by an Income-tax Officer is not in consequence of the cheating, committed by a party, though it may be that the computation of income, as found in the assessment order, may be

the result of cheating, practised by the accused. Therefore, the accused cannot be considered to have, by cheating, dishonestly induced the Income-tax Officer, to deliver the assessment order, because that is issued, to a party, as a matter of routine. The assessment order cannot also be considered to be 'property', within the meaning of S. 420 I. P. C. It cannot also be stated, that the accused, by cheating, have dishonestly induced the Income-tax Officer, to make a valuable security, because an assessment order can, in no case, be considered to be a valuable security. No legal right is created by an assessment order. The liability to payment of income-tax is created by the charging section, S. 3 of the Indian Income-tax Act, 1922, and the demand, for payment of tax is made, on the basis of a notice of demand, issued by the Income-tax Officer, concerned. At the most, the accused will be guilty of 'cheating', as defined under S. 415, I. P. C. inasmuch as they may have intentionally induced the Income-tax Officer, who is deceived, to do or omit to do, anything which he would not do, or omit, if he were not so deceived, and they will be liable for punishment, under S. 417, I. P. C.

9. Mr. G. L. Sanghi, learned counsel for the State, has supported the views, expressed by the High Court.

10. We are not inclined to accept the contention of Mr. Chari, that there is any error, or illegality, in framing a charge, under S. 420, I. P. C. As to whether the prosecution is able to make out its case, or not, is a different point. We are only concerned, at this stage, to consider as to whether, under the circumstances, a charge, under S. 420, could have been framed.

11. It is well known, that, under the Indian Income-tax Act, liability to pay income-tax arises on the accrual of the income, and not from the computation, made by the taxing authorities, in the course of assessment proceedings, and that it arises, at a point of time, not later than the close of the year of account. It has also been laid down, by this Court, that assessments particularise the total income of an assessee and the amount of tax, payable. But it is not as if that the assessment order is valueless, as is sought to be made out. The question, that arises for consideration, in this case, is whether there is any 'delivery of pro-

property', or at any rate, whether the Income-tax Officer has been induced 'to make a valuable security.'

12. 'Movable property' is defined, in S. 22, I. P. C.; 'Document' and 'valuable security' are defined in Ss. 29 and 30, I. P. C., respectively. Under the scheme of the Income-tax Act, it is clear that the assessment order determines the total income of the assessee, and the tax payable, on the basis of such assessment. The assessment order has to be served, on the assessee. The tax is demanded, by the issue of a notice, under S. 29; but the tax demanded is on the basis of the assessment order communicated to an assessee. The communicated order of assessment, received by an assessee, is in our opinion, 'property', since it is of great importance, to an assessee, as containing a computation, of his total assessable income and, as a determination, of his tax liability. In our view, the word 'property', occurring in S. 420, I. P. C., does not necessarily mean that the thing, of which a delivery is dishonestly desired by the person who cheats, must have a money value or a market value, in the hand of the person cheated. Even if the thing has no money value, in the hand of the person cheated, but becomes a thing of value, in the hand of the person, who may get possession of it, as a result of the cheating practised by him, it would still fall within the connotation of the term 'property', in S. 420, I. P. C.

13. Once the assessment order is held to be 'property', the question arises as to whether there is a 'delivery' of the same, to the assessee, by the Income-tax Officer. It is argued that the order is communicated, in the usual course, and that irrespective of any 'cheating', the officer is bound to serve the assessment order. This argument, though attractive, has no merit. Communication, or service of an assessment order, is part of the procedure of the assessment itself. But it can be held that, if the necessary allegations are established, the accused have dishonestly induced the Income-tax Officer, to deliver the particular property, viz., the assessment order, as passed by him, in and by which a considerably low amount has been determined, as the total income of the assessee, on the basis of which the amount of tax, has been fixed. Nor are we impressed with the contention, that the deception, if at all, is practised, not when the assessment

order is delivered, but at the stage, when the computation, of the total income, is made, by the Income-tax Officer. The process of 'cheating', employed by an assessee, if successful, would have the result of dishonestly inducing the Income-tax Officer to make a wrong assessment order and communicate the same to an assessee.

14. An offence under S. 420, I. P. C. will also be made out, if it is established that the accused have created and, thereby, dishonestly induced the Income-tax Officer to make a 'valuable security.' This takes us to the question: "Is the assessment order, a 'valuable security'?" We have already referred to S. 30, I. P. C., defining 'valuable security.' The assessment order is certainly a 'document', under S. 29, I. P. C. The order of assessment does create a right, in the assessee, in the sense that he has a right to pay tax only on the total amount assessed therein and his liability to pay tax is also restricted to that extent. Therefore an 'order of assessment' is a 'valuable security' under S. 420, I. P. C. Therefore, if the cheating, employed by the accused, resulted in inducing the Income-tax Officer to make a wrong assessment order, it would amount to inducing the Income-tax Officer, to make a 'valuable security.'

15. Considering the question, from either point of view as indicated above, it follows that the framing of a charge, for an offence, under S. 420, I. P. C., is correct. The appeal, accordingly, fails, and is dismissed.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 43 (V 56 C 14)

(From Orissa: AIR 1968 Orissa 148)

J. C. SHAH, V. RAMASWAMI,
V. BHARGAVA, C. A. VAIDIALINGAM
AND A. N. GROVER, JJ.

Hadibandhu Das, Appellant v. District Magistrate, Cuttack, and another, Respondents.

Civil Appeal No. 1210 of 1968, D/- 2-5-1968.

(A) Public Safety — Preventive Detention Act (1950), Sections 3 (1) (a) (ii), 7 (1) — Grounds in support of order in English language served on detenu running into fourteen typed pages and referred to his activities over thirteen years be-
IL/IL/C592/68

side referring to large number of court proceedings concerning him and his associates — Mere oral explanation by the Authorities of such complicated order without supplying him translation in script and language which he understood — It amounts to denial of right of being communicated the grounds and of being afforded the opportunity of making representation against the order — Order made by District Magistrate, not having been followed up by service within five days, as provided by Section 7 (1), of communication to him of grounds must be deemed to have become invalid — Subsequent detention held to be unauthorised — Constitution of India, Articles 22 (5) and 226. AIR 1962 SC 911, Foll. (Para 6)

(B) Public Safety — Preventive Detention Act (1950), Ss. 13 (2), 3 (1) (a) (ii) — Scope of S. 13 (2) — Expression “revocation” in S. 13 (2) is not capable of restricted interpretation — Order under Section 3 (1) (a) (ii) revoked — Fresh order under Section 13 (2) based not on fresh facts — Order is not justified under Section 13 (2) — (Civil P. C. (1908), Pre. — Interpretation of Statutes — Meaning of words) — (Words and Phrases — “Revocation”).

In terms Section 13 (2) authorises the making of a fresh detention order against the same person against whom the previous order has been revoked or has expired, in any case where fresh facts have arisen after the date of revocation or expiry, on which the detaining authority is satisfied that such an order should be made. The clearest implication of Section 13 (2) is that after revocation or expiry of the previous order, no fresh order may issue on the grounds on which the order revoked or expired had been made. (Para 7)

The power of the detaining authority must be determined by reference to the language used in the statute and not by reference to any predilections about the legislative intent. There is nothing in Section 13 (2) which indicates that the expression “revocation” means only revocation of an order which is otherwise valid and operative: apparently it includes cancellation of all orders invalid as well as valid. The Act authorises the executive to put severe restrictions upon the personal liberty of citizens without even the semblance of a trial, and makes the subjective satisfaction of an executive authority in the first

instance the sole test of competent exercise of power. Courts are not concerned with the wisdom of the Parliament in enacting the Act, or to determine whether circumstances exist which necessitate the retention on the statute book of the Act which confers upon the executive extraordinary power of detention for long period without trial. But courts would be loath to attribute to the plain words used by the Parliament a restricted meaning so as to make the power more harsh and its operation more stringent. The word “revocation” is not capable of a restricted interpretation without any indication by the Parliament of such an intention. (Para 11)

The very fact that a defective order has been passed, or that an order has become invalid because of default in strictly complying with the mandatory provisions of the law bespeaks negligence on the part of the detaining authority, and the principle underlying Section 13 (2) is the outcome of insistence by the Parliament that the detaining authority shall fully apply its mind to and comply with the requirements of the statute and of insistence upon refusal to countenance slipshod exercise of power. (Para 12)

Where on 15-12-1967, the District Magistrate served an order under Section 3 (1) (a) (ii) on a detenu but the State Government revoked the same on 28-1-1968 and passed fresh order not based on any fresh facts, the order passed by State Government was not justified. It was incompetent by virtue of Section 13 (2). (Para 13)

Cases Referred: Chronological Paras

- (1962) AIR 1962 SC 911 (V 49) =
 (1962) Supp (2) SCR 918 =
 1962 (1) Cri LJ 797, Hari Kissan v. State of Maharashtra 5
 (1954) AIR 1954 SC 179 (V 41) =
 (1954) SCR 418 = 1954 Cri LJ 456, Shibban Lal v. State of U. P. 9, 10
 (1952) AIR 1952 SC 106 (V 39) =
 (1952) SCR 395, Naranjan Singh Nathawan v. State of Punjab (1) 9, 10
 (1945) AIR 1945 FC 18 (V 32) =
 (1945) FCR 81 = 46 Cri LJ 559, Basanta Chandra Ghose v. Emperor 9

Mr. A. S. R. Chari, Senior Advocate, (Mr. Vinoo Bhagat, Advocate and Mr. Ravinder Narain, Advocate of M/s. J. B. Dadachanji and Co., with him), for Ap-

pellant; Mr. Nirca De, Solicitor-General of India and Mr. G. R. Rajagopal, Senior Advocate (Mr. R. N. Sachthy, Advocate with him), for Respondents.

The following Judgment of the Court was delivered by

SHAH, J.: By order pronounced on April 22, 1968, we directed that the order passed by the State of Orissa detaining the appellant under the Preventive Detention Act be quashed. We proceed to record our reasons in support of our order.

2. On December 15, 1967, the District Magistrate, Cuttack, served an order made in exercise of power under Section 3 (1) (a) (ii) of the Preventive Detention Act (4 of 1950) directing that the appellant be detained on the grounds that he—the appellant—was acting in a manner prejudicial to the maintenance of public order by committing breaches of public peace, indulging in illicit business in Opium, Ganja, Bhang, country liquor, riotous conduct, criminal intimation and assault either by himself or through his relations, agents and associates as set out in the order. On December 19, 1967 the appellant filed a petition in the High Court of Orissa challenging the validity of the order of detention on the grounds, inter alia that the order and the grounds in support thereof served upon the appellant were written in the English language which the appellant did not understand. On January 18, 1968, the District Magistrate, Cuttack supplied to the appellant an Oriya translation of the order and the grounds. On January 28, 1968 the State of Orissa revoked the order and issued fresh order that:

"Whereas the order of detention dated the 15th December, 1967, made by the District Magistrate, Cuttack against Shri Hadibandhu Das son of late Ramchandra Das of Manglabag, town Cuttack has been revoked by the State Government on account of defects of formal nature by their order No. 396C dated the 28th January, 1968.

And whereas the State Government are satisfied with respect to the said Hadibandhu Das, that with a view to prevent him from acting in any manner prejudicial to the maintenance of public order, it is necessary to detain him.

Now, therefore, in exercise of the powers conferred by Section 3 (1) (a) (ii) read with Section 4 (a) of the Preventive Detention Act, 1950, the State Government do hereby direct that the said

Hadibandhu Das be detained in the District Jail at Cuttack until further orders."

A translation of that order in Oriya was supplied to the appellant.

3. On February 8, 1968, the appellant submitted a supplementary petition challenging the validity of the order dated January 28, 1968. The High Court of Orissa rejected the petition filed by the appellant. Against that order with certificate granted by the High Court, this appeal has been preferred by the appellant.

4. It is not necessary to set out and refer to large number of grounds which were urged at the Bar in support of the appeal by counsel for the appellant, since in the view we take the second order dated January 28, 1968, was not passed on any fresh facts which had arisen after the date of revocation of the first order, and is on that account invalid, and an order releasing the appellant from custody must be made.

5. The relevant provisions of the Preventive Detention Act 4 of 1950 may be set out:

S. 3 (1)—"The Central Government or the State Government may—

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to—

(i) the defence of India, the relations of India with foreign powers, or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community, or

(b)

it is necessary so to do, make an order directing that such person be detained."

S. 7—"(1) when a person is detained in pursuance of a detention order, the authority making the order shall as soon as may be, but not later than five days from the date of detention, communicate to him the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government.

(2)

Section 8 provides for the constitution of Advisory Boards, and by Section 9 the appropriate Government is enjoined to place within thirty days from the date of detention under the order before the Advisory Board constituted by it under

Section 8 the grounds on which the order has been made and the representation, if any, made by the person affected by the order. Section 10 deals with the procedure of the Advisory Boards and by Section 11 it is provided that in any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit, and in any case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith. Section 11A provides that a person whose detention has been confirmed in pursuance of the detention order shall not be detained for a period exceeding twelve months. By Section 13 power is conferred upon the State Government and the Central Government to vacate the order of a subordinate officer made under sub-sec. (2) of Section 3, and upon the Central Government to revoke the order of a State Government. Sub-section (2) of Sec. 13 provides:

"The revocation or expiry of a detention order shall not bar the making of a fresh detention order under Section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Central Government or a State Government or an officer, as the case may be, is satisfied that such an order should be made."

It is true that on January 18, 1968, the District Magistrate on further consideration served a translation in Oriya of the order and the grounds upon the appellant, but that was after expiry of five days as prescribed by Section 7 of the Act. This Court in *Harikisan v. State of Maharashtra*, 1962 Supp (2) SCR 918 = (AIR 1962 SC 911) held that where a "detenu is served with the order of detention and the grounds in English and the detenu does not know English and his request for translation of the grounds in a language which he understood was refused on the ground that the order and the grounds had been orally translated to him at the time when the order was served upon him," the guarantee under Article 22 (5) of the Constitution was violated and the deten-

tion of the detenu was illegal. It was observed by this Court at p. 924 (of SCR) = (at pp. 913-914 of AIR):

".....Cl. (5) of Article 22 requires that the grounds of his detention should be made available to the detenu as soon as may be, and that the earliest opportunity of making a representation against the Order should also be afforded to him. In order that the detenu should have that opportunity it is not sufficient that he has been physically delivered the means of knowledge with which to make his representation. In order that the detenu should be in a position effectively to make his representation against the Order, he should have knowledge of the grounds of detention, which are in the nature of the charge against him setting out the kinds of prejudicial acts which the authorities attribute to him. Communication, in this context, must, therefore, mean imparting to the detenu sufficient knowledge of all the grounds on which the Order of Detention is based. In this case the grounds are several, and are based on numerous speeches said to have been made by the appellant himself on different occasions and different dates. Naturally, therefore, any oral translation or explanation given by the police officer serving those on the detenu would not amount to communicating the grounds. Communication, in this context must mean bringing home to the detenu effective knowledge of the facts and circumstances on which the Order of Detention is based."

6. The grounds in support of the order served on the appellant ran into fourteen typed pages and referred to his activities over a period of thirteen years, beside referring to a large number of court proceedings concerning him and other persons who were alleged to be his associates. Mere oral explanation of a complicated order of the nature made against the appellant without supplying him the translation in script and language which he understood would in our judgment, amount to denial of the right of being communicated the grounds and of being afforded the opportunity of making a representation against the order. The order made by the District Magistrate, Cuttack not having been followed up by service within five days as provided by Section 7 (1) of the communication to him of the grounds on which the order was made must be deemed to have become invalid and any subsequent

detention of the appellant was unauthorised.

7. On January 28, 1968, the State of Orissa purported to revoke the first order and made a fresh order. The validity of the fresh order dated January 28, 1968, made by the State of Orissa is challenged on the ground that it violates the express provisions of Section 13 (2) of the Preventive Detention Act. In terms that sub-section authorises the making of a fresh detention order against the same person against whom the previous order has been revoked or has expired in any case where fresh facts have arisen after the date of revocation or expiry, on which the detaining authority is satisfied that such an order should be made. The clearest implication of Section 13, (2) is that after revocation or expiry of the previous order, no fresh order may issue on the grounds on which the order revoked or expired had been made. In the present case the order dated December 15, 1967, passed by the District Magistrate, Cuttack was revoked on January 28, 1968, and soon thereafter a fresh order was served upon the appellant. It is not the case of the State that any fresh facts which had arisen after the date of revocation on which the State Government was satisfied that an order under Section 3 (1) (a) (ii) may be made. There was a fresh order, but it was not based on any fresh facts.

8. Counsel for the State of Orissa contended that the detaining authority is prevented from making a fresh order on the same grounds on which the original order which had been revoked was made, provided the order revoked was a valid order initially and had not become illegal on account of failure to comply with statutory provisions like Section 7 or Section 9 of the Preventive Detention Act. Counsel says that the order which is illegal or has become illegal is not required to be revoked, for it has no legal existence, and a formal order of revocation of a previous order which has no legal existence does not fall within the terms of Section 13 (2). He strongly relies in support of this argument upon Section 13 (2) as it stood before it was amended by Act 61 of 1952:

"The revocation of a detention order shall not bar the making of a fresh detention order under Section 3 against the same person."

The phraseology of sub-section (2) of Section 13 before it was amended was explicit: there was no bar against a detaining authority making a fresh order of detention after revoking a previous order based on the same or other grounds. It contained no implication that a fresh order may be made only if it was founded on fresh grounds.

9. Counsel also relied in support of his argument upon the decision of the Federal Court in *Basanta Chandra Ghose v. Emperor*, 1945 FCR 81 = (AIR 1945 FC 18); *Naranjan Singh Nathawan v. State of Punjab* (1), 1952 SCR 395 = (AIR 1952 SC 106); *Shibban Lal v. State of Uttar Pradesh*, 1954 SCR 418 = (AIR 1954 SC 179). In *Basanta Chandra Ghose's* case, 1945 FCR 81 = (AIR 1945 FC 18) an order was made under R. 26 of the Defence of India Rules on March 19, 1942. The order was revoked on July 3, 1944, and a fresh order for detention of the detenu was passed on that very date under Ordinance III of 1944. It was urged on behalf of the detenu that the authority was debarred, except on fresh grounds, from passing a fresh order of detention after cancellation of an earlier order, and the High Court was not justified in presuming that fresh materials must have existed when the order of July 1944 was made. Spens, C. J., rejected the contention. He observed in dealing with that ground:

"It may be that in cases in which it is open to the Court to examine the validity of the grounds of detention a decision that certain alleged grounds did not warrant a detention will preclude further detention on the same grounds. But where the earlier order of detention is held defective merely on formal grounds there is nothing to preclude a proper order of detention being based on the pre-existing grounds themselves, especially in cases in which the sufficiency of the grounds is not examinable by the Courts."

That case arose from an order of detention under Ordinance III of 1944.

10. In two latter judgments of this Court in *Naranjan Singh Nathawan's* case, 1952 SCR 395 = (AIR 1952 SC 106) and *Shibban Lal Saksena's* case, 1954 SCR 418 = (AIR 1954 SC 179) decided under the Preventive Detention Act, 1950, it was ruled that where the previous order was revoked on grounds of irregularity in the order, the detaining authority was not debarred from making

a fresh order complying with the requirements of law in that behalf.

11. Relying upon these cases the Solicitor-General contended that it was settled law before Section 13 (2) was amended by Act 61 of 1952 that a detaining authority may issue a fresh order after revocation of an earlier order of detention if the previous order was defective in point of form or had become unenforceable in consequence of failure to comply with the statutory provisions of the Act, and that by the Amending Act it was intended merely to affirm the existing state of law, and not to enact by implication that revocation of a defective or invalid order attracts the bar imposed by Section 13 (2). There is, in our judgment, nothing in the language used by the Parliament which supports that contention. The power of the detaining authority must be determined by reference to the language used in the statute and not by reference to any predilections about the legislative intent. There is nothing in Section 13(2) which indicates that the expression "revocation" means only revocation of an order which is otherwise valid and operative: apparently it includes cancellation of all orders invalid as well as valid. The Act authorises the executive to put severe restrictions upon the personal liberty of citizens without even the semblance of a trial and makes the subjective satisfaction of an executive authority in the first instance the sole test of competent exercise of power. We are not concerned with the wisdom of the Parliament in enacting the Act, or to determine whether circumstances exist which necessitate the retention on the statute book of the Act which confers upon the executive extraordinary power of detention for long period without trial. But we would be loath to attribute to the plain words used by the Parliament a restricted meaning so as to make the power more harsh and its operation more stringent. The word "revocation" is, not, in our judgment, capable of a restricted interpretation without any indication by the Parliament of such an intention.

12. Negligence or inaptitude of the detaining authority in making a defective Order or in failing to comply with the mandatory provisions of the Act may in some cases enure for the benefit of the detenu to which he is not entitled. But it must be remembered that the Act confers power to make a serious invasion

upon the liberty of the citizen by the subjective determination of facts by an executive authority, and the Parliament has provided several safeguards against misuse of the power. The very fact that a defective order has been passed, or that an order has become invalid because of default in strictly complying with the mandatory provisions of the law bespeaks negligence on the part of the detaining authority, and the principle underlying Section 13 (2) is, in our view the outcome of insistence by the Parliament that the detaining authority shall fully apply its mind to and comply with the requirements of the statute and of insistence upon refusal to countenance slipshod exercise of power.

13. Without therefore, expressing any opinion on the question whether the order passed by the State Government on January 23, 1968, was justified, we are of the view that it was incompetent by virtue of sub-section (2) of Section 13 of the Preventive Detention Act, 1950.

SSG/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 48 (V 56 C 15)

(From New Delhi)*

J. M. SHELAT AND K. S. HEGDE, JJ.

Orient Paper Mills Ltd., Appellant v. Union of India, Respondent.

Civil Appeals Nos. 659 to 664 of 1965, D/- 3-5-1968.

Central Excises and Salt Act (1944), Section 35 and First Sch. Item 17 (3) and (4) — Collector while hearing appeal acts quasi judicially — Directions issued by Central Board of Revenue which are not under Rule 238, cannot be binding on him for purposes of deciding the appeal — Determination whether 'M. G. Poster paper' was 'packing and wrapping paper' chargeable under item 17 (4) or 'printing paper' chargeable under item 17 (3) of first Schedule — Direction of Board, held, could not be binding on the Collector. Civil Appeal No. 635 of 1964, D/- 22-9-1965 (SC) and AIR 1958 SC 667 and AIR 1964 SC 1573, Rel. on. (Paras 7 and 12)

* (Central Excise Revn. Applns. Nos. 720 to 725 of 1963, D/- 5-10-1963—New Delhi)

IL/JL/C613/68

Cases Referred: Chronological Paras
 (1965) Civil Appeal No. 635 of
 1964, D/- 22-9-1965 (SC), Alumi-
 nium Corporation of India Ltd.
 v. Union of India 7
 (1964) AIR 1964 SC 1573 (V 51) =
 (1964) 7 SCR 1, Rajagopala Naidu
 v. State Transport Appellate Tri-
 nal, Madras 10
 (1958) AIR 1958 SC 667 (V 45) =
 1959 SCR 551, Mahadaya
 Premchandra v. Commercial Tax
 Officer, Calcutta 9

Mr. S. Ray, Senior Advocate (M/s.
 R. K. Choudhury, A. N. Parikh and B. P.
 Maheshwari, Advocates, with him), for
 Appellant; Mr. Seiyed Mohammad,
 Senior Advocate (Mr. S. P. Nayyar, Adv-
 ocate with him), for Respondent.

The following Judgment of the Court
 was delivered by

HEGDE, J.: These appeals by special
 leave arise from the orders made by the
 Government of India, Ministry of
 Finance, Department of Revenue, New
 Delhi on October 5, 1963, in Central
 Excise Revision Applications Nos. 720
 to 725 of 1963. Herein a common ques-
 tion of law arises for decision and that
 is whether "M. G. Poster paper" manu-
 factured by the appellant-company is a
 "printing and writing paper" chargeable
 under item 17(3) of the First Schedule to
 the Central Excises and Salt Act, 1944 (No.
 1 of 1944), hereinafter referred to as the
 Act or whether it is "packing and wrap-
 ping paper" chargeable under item 17(4)
 of the aforementioned Schedule.

2. The appellant is a public limited
 company incorporated under the Indian
 Companies Act, 1913, and an "existing
 company" within the meaning of the
 Indian Companies Act, 1956. It is carry-
 ing on business, inter alia, of manufact-
 uring and sale of various kinds of paper
 at its factory at Birrajnagar in the dis-
 trict of Sambalpur in the State of Orissa.
 In particular, it manufactures "packing
 and wrapping paper", "printing and
 writing paper" and "machine glazed
 paper" popularly known as "M. G.
 Poster paper". Upto February 28, 1961,
 the date on which the Finance Bill of
 that year was introduced in Parliament,
 "printing and writing paper" and "pack-
 ing and wrapping paper" were subject to
 excise duty at the rate of 22 np per kilo-
 gram, though the former was chargeable
 under item 17 (3) and the latter under
 item 17 (4) of the First Schedule to the
 Act. The Finance Act of 1961 raised

the excise duty payable under item 17 (4)
 to 35 np per kilogram with effect from
 March 1, 1961. From March 1, 1961, to
 August 1, 1961, the excise officers levied
 duty on "M. G. Poster paper" under
 item 17 (3) i. e., at the rate of 22 np per
 Kilogram. In other words during that
 period the excise authorities treated
 "M. G. Poster paper" as "printing and
 writing paper". Subsequently, the ex-
 cise authorities began to treat this
 paper as "packing and wrapping paper"
 and insisted on the appellant paying
 duty thereon under item 17 (4). The
 appellant paid duty at that rate under
 protest and thereafter applied to the
 Assistant Collector for refund on the
 ground that the duty on that paper
 should have been levied under Item 17(3)
 and consequently the duty collected was
 in excess of that leviable under law. The
 Assistant Collector rejected that claim.
 Consequently, the appellant went up in
 appeal to the Collector of Central Ex-
 cise, who rejected its appeal. Then the
 matter was taken up in revision to the
 Government of India. The Government
 declined to interfere with the orders of
 the Collector.

3. The orders made by the Collector
 in the various appeals and those made
 by the Government in the revisional ap-
 plications are similar in all the cases.
 Therefore it would be sufficient if we
 refer only to those made in one of the
 cases, viz., in CA 659 of 1965.

4. The contention of the appellant
 before the Assistant Collector, the Col-
 lector as well as the Central Government
 was that "M. G. Poster paper" is a "print-
 ing and writing paper" and it was con-
 sidered as such, by the Indian Tariff
 Board, in the Tariff Commission
 Report published in 1959 and in
 the specifications published by the
 Indian Standards Institution. Further it
 was dealt as "printing and writing paper"
 in the annual rate contracts entered into
 between the appellant and the Govern-
 ment of India for supply of papers and
 paper-boards to the Government. This
 contention does not appear to have been
 examined either by the Collector or by
 the Central Government. The Collector
 rejected the appeals of the appellant with
 these observations:—

"The crucial point in appeal is whe-
 ther the paper declared as 'M. G. Poster
 paper' should be assessed as 'packing
 and wrapping paper, other sorts' under
 tariff item No. 17 (4) or as 'printing and

writing paper, other sorts' under tariff item 17 (3).

"The Central Board of Revenue have already made it clear that all types of poster paper of whatever colour including white should not be treated as 'printing and writing paper' but as 'packing and wrapping paper'. As such, the Poster paper has not been wrongly assessed.

"I have carefully gone through the available records of the case. Considering all the facts and circumstances, I do not find any reason to interfere with the order passed by the A. C. appealed against. His order is therefore confirmed."

It is seen from his order that the only ground on which the Collector rejected the appeals of the appellant was that the question was covered by the direction issued by the Central Board of Revenue—hereinafter referred to as the Board.

5. During the pendency of the revision applications filed before the Central Government, the Collector, in response to the notice served on him, filed his objections in writing. In those objections he pleaded primarily two grounds in opposition to the appellant's claim. They are: (i) that on chemical examination it was found that "M. G. Poster paper" was "packing and wrapping paper" and (ii) the direction issued by the Board was binding on him. As per its order of October 5, 1963, the Government rejected the revision applications in question with these observations:—

"The Government of India have carefully considered all the points raised by the petitioners, but they regret that they do not find any justification for interfering with the order in appeal. The Revision Application is accordingly rejected."

The order in question is by no means a speaking order; it is not possible to spell out from that order the reasons that persuaded the Government to reject the revision applications. The best that can be said in favour of the Government is that it thought that the direction issued by the Board referred to earlier was decisive of the matter. That was what was stated in the counter-affidavit filed on behalf of the Government of India in these appeals. The only other reason that could have influenced the decision of the Government

was the statement of the Collector that on chemical examination it was found that "M. G. Poster paper" was "packing and wrapping paper". If the Government had taken into consideration any other facts in deciding the revision applications, they had clearly contravened the principles of natural justice as the appellant had not been given any opportunity to rebut those facts.

6. Now it is conceded that "M. G. Poster paper" was never chemically examined and the Collector's statement to the contrary was incorrect. It is not possible to determine whether the incorrect statement made by the Collector had or had not influenced the Government. It may be mentioned at this stage that the appellant had specifically complained to the Government that it had not been supplied with the copy of any report relating to chemical examination of 'M. G. Poster paper', nor was it given any opportunity to contest the correctness of the facts mentioned in that report. Undoubtedly during the hearing of the revision applications the appellant was not informed that the statement made by the Collector regarding the alleged chemical examination was incorrect, and that statement would not be taken into consideration in deciding the revision applications.

7. This leaves us with the question of the directions issued by the Board. The question whether "M. G. Poster paper" is "printing and writing paper" or "packing and wrapping paper" is essentially a question of fact. That had to be decided by the authorities under the Act. It was not denied before us that the Collector and the Central Government while deciding the appeals and the revision applications respectively functioned as quasi judicial authorities. So far as the nature of power exercised by the Central Government under S. 36 of the Act (revisional powers) is concerned, the matter is concluded by the decision of this Court in *Aluminium Corporation of India Ltd. v. Union of India*, Civil Appeal No. 635 of 1964, D/-22-9-1965 (SC). Therein this Court held that the said power is a quasi judicial power. There is hardly any doubt that the power exercised by the appellate authority, i. e., the Collector, under Section 35 is also a quasi judicial power. He is designated as an appellate authority; before him there was a lis between the appellant which had paid the duty and the Revenue; and his order is sub-

ject to revision by the Central Government. Therefore, it is obvious that the power exercised by him is a quasi judicial power. Dr. Syed Mohammed, appearing for the respondent, did not contend—and we think rightly—that the power exercised by the Collector was not a quasi judicial power.

8. If the power exercised by the Collector was a quasi judicial power—as we hold it to be—that power cannot be controlled by the directions issued by the Board. No authority however high placed can control the decision of a judicial or a quasi judicial authority. That is the essence of our judicial system. There is no provision in the Act empowering the Board to issue directions to the assessing authorities or the appellate authorities in the matter of deciding disputes between the persons who are called upon to pay duty and the department. It is true that the assessing authorities as well as the appellate authorities are judges in their own cause; yet when they are called upon to decide disputes arising under the Act they must act independently and impartially. They cannot be said to act independently if their judgment is controlled by the directions given by others. Then it is a misnomer to call their orders as their judgments; they would essentially be the judgments of the authority that gave the directions and which authority had given those judgments without hearing the aggrieved party. The only provision under which the Board can issue directions is Rule 233 of the Rules framed under the Act. That rule says that the Board and the Collectors may issue written instructions providing for any supplemental matters arising out of these Rules. Under this rule the only instruction that the Board can issue is that relating to administrative matters; otherwise that rule will have to be considered as *ultra vires* Section 35 of the Act.

9. In *Mahadaya. Premchandra v. Commercial Tax Officer, Calcutta*, 1959 SCR 551 = (AIR 1958 SC 667) this Court held that the Commercial Officer while assessing certain transactions should not have solicited instructions from the Assistant Commissioner, nor should he have acted on the basis of those instructions. It was further held that the instructions given by the Assistant Commissioner had vitiated the entire proceedings as “the procedure adopted was, to say the least, unfair and was calculated to undermine

the confidence of the public in the impartial and fair administration of the sales tax department”.

10. In *Rajagopal Naidu v. State Transport Appellate Tribunal*, 1964-7 SCR 1 = (AIR 1964 SC 1573), this Court was called upon to consider the validity of Madras Government Order No. 1298, dated April 28, 1956 issued under Section 43-A of the Motor Vehicles Act, 1939, whereunder certain directions were given to the Transport Authorities in the discharge of their quasi judicial functions. The G. O. in question was struck down by this Court. In the course of the judgment, Gajendragadkar, C. J., speaking for the Court, observed thus:—

“In reaching this conclusion, we have been influenced by certain other considerations which are both relevant and material. In interpreting Section 43-A we think, it would be legitimate to assume that the legislature intended to respect the basic and elementary postulate of the rule of law, that in exercising their authority and in discharging their quasi judicial function, the tribunals constituted under the Act must be left absolutely free to deal with the matter according to their best judgment. It is of the essence of fair and objective administration of law that the decision of the Judge or the Tribunal must be absolutely unfettered by any extraneous guidance by the executive or administrative wing of the State. If the exercise of discretion conferred on a quasi judicial tribunal is controlled by any such direction, that forges fetters on the exercise of quasi judicial authority and the presence of such fetters would make the exercise of such authority completely inconsistent with the well-accepted notion of judicial process. It is true that law can regulate the exercise of judicial powers. It may indicate by specific provisions on what matters the tribunals constituted by it should adjudicate. It may by specific provisions lay down the principles which have to be followed by the tribunals in dealing with the said matters. The scope of the jurisdiction of the tribunals constituted by statute can well be regulated by the statute and principles for guidance of the said tribunals may also be prescribed subject of course to the inevitable requirement that these provisions do not contravene the fundamental rights guaranteed by the Constitution. But what law and the provisions of law may legiti-

mately do cannot be permitted to be done by administrative or executive orders. This position is so well established that we are reluctant to hold that in enacting Section 43-A the Madras Legislature intended to confer power on the State Government to invade the domain of the exercise of judicial power. In fact, if such had been the intention of the Madras Legislature and had been the true effect of the provisions of Section 43-A, Section 43-A itself would amount to an unreasonable contravention of fundamental rights of citizens and may have to be struck down as unconstitutional. That is why the Madras High Court dealing with the validity of Section 43-A had expressly observed that what Section 43-A purported to do was to clothe the Government with authority to issue directions of an administrative character and nothing more. It is somewhat unfortunate that though judicial decisions have always emphasised this aspect of the matter, occasion did not arise so long to consider the validity of the Government order which on the construction suggested by the respondent would clearly invade the domain of quasi judicial administration."

11. The rule laid down in the above decisions is fully applicable to the facts of this case. It is obvious as well as admitted that both the Collector and the Central Government proceeded on the basis that the direction given by the Board was decisive of the matter. The revision applications filed before the Government were heard and decided by one of the members of the Board. He appears to have proceeded on the basis that in view of the directions given by the Board nothing more need be said as to the point in dispute. It is regrettable that when administrative officers are entrusted with quasi judicial functions, oftentimes they are unable to keep aside administrative considerations while discharging quasi judicial functions. This Court as well as the High Courts have repeatedly tried to impress upon them that their two functions are separate; while functioning as quasi judicial officers they should not allow their judgments to be influenced by administrative considerations or by the instructions or directions given by their superiors. In this case both the Collector as well as the Central Government have ignored the line that demarcates their administrative duties and their judicial functions.

12. Dr. Syed Mohammed did not try to justify the directions given by the Board nor did he contend that that direction has any force of law. On the other hand, his main contention was that the grounds urged before this Court were not at all taken before the Collector and the Central Government and therefore the appellant should not be permitted to take those grounds in this Court. We do not think that Dr. Syed Mohammed is right in his contention. Before the Central Government the appellant had definitely contended that no copy of the report relating to chemical examination of "M. G. Poster paper" had been given to the appellant and therefore the same could not have been taken into consideration. At that stage the appellant could not have known that the statement of the Collector relating to chemical examination of "M. G. Poster paper" was incorrect. As regards the validity of the direction given by the Board, it is clear from the notes of argument maintained by the member of the Board who heard the revision applications that that contention had been taken before him, though not in the form in which it was presented before this Court. This, what we get from the notes maintained by him:—

"The matter (as to whether 'M. G. Poster paper' is 'printing and writing paper' or 'packing and wrapping paper') was re-examined in detail, in consultation with all the concerned authorities, viz., the Ministry of Commerce and Industries, the Indian Standards Institution and the Chief Chemist. The views of Collectors of Central Excise as well as those of Collectors were also invited. Ultimately it was re-affirmed vide the Board's letter No. F. No. 21/36/61/CXIV dated November 6, 1961, that poster paper was correctly assessable as 'packing and wrapping paper' and should continue to be assessed as such. F.M.'s approval was also secured before confirming this position. This therefore should settle the main issue regarding the classification of the poster paper." From these notes it is clear that at any rate the correctness of the direction issued by the Board was put in issue during the hearing of the revision applications. That apart, we are clearly of the opinion that even if the question of the legality of the directions issued by the Board had not been taken before the authorities under the Act, as that direction completely vitiates the proceedings and

makes a mockery of the judicial process, we think we ought to consider the legality of that direction. For the reasons already mentioned, we hold that that direction was invalid and the same has vitiated the proceedings before the Collector as well as the Government.

13. Both the appellant as well as the Revenue invited us to decide the case on the basis of the material on record. Ordinarily this Court does not go into questions of fact. That is the duty of the authorities under the Act. We see no exceptional circumstances in this case requiring us to deviate from the ordinary rule.

14. For the reasons mentioned above these appeals are allowed and the orders of the Central Government as well as that of the Collector are set aside, and the proceedings remitted to the Collector for deciding the question whether "M. G. Poster paper" should be assessed as "printing and writing paper" or as "packing and wrapping paper" afresh. The respondents shall pay the costs of the appellant in all these appeals; hearing fee one set.

GGM/D.V.C.

Appeals allowed.

AIR 1969 SUPREME COURT 53
(V 56 C 16)

(From Patna)*

**S. M. SIKRI, J. M. SHELAT AND
V. BHARGAVA, JJ.**

1. The State of Bihar (In CrI. A. No. 141/65); 2. Ramujagar Singh (In CrI. A. No. 142/65); 3. Deo Singh alias Suraj Deo Singh (In CrI. A. No. 78/68), Appellants v. 1. Kapil Singh (In CrI. A. No. 141/65); 2. The State of Bihar (In CrI. As. Nos. 142/65 and 78/68), Respondents.

Criminal Appeals Nos. 141 and 142 of 1965 and 78 of 1968, D/- 18-4-1968.

Criminal P. C. (1898), Section 367 — Appreciation of evidence — Murder — Child witness — Evidentiary value — Corroboration. Criminal Appeal No. 545 of 1962, D/- 9-2-1965 (Pat), Partly Reversed.

While a child witness of about 12 years can often be expected to give out a true version because of its innocence, there is always the danger in accepting the evidence of such a witness that,

* (CrI. Appeal No. 545 of 1962, D/- 9-2-1965—Pat.)

under influence, she might have been coached to give out a version by persons who may have influence on her. Thus where a girl who was sleeping with the deceased stated that she was lying on a cot close to the cot on which her deceased aunt was sleeping; that she actually saw her aunt being killed and, according to her, there was a threat to her life also when one of the accused said that she should also be killed, though she was saved when another accused asked that she should be spared because she was a child. Further she refused to give out the names of accused and gave them only after being kept in police custody for two days. Corroboration of the evidence was sought from the recovery of bloodstained quilt and some articles from some of the accused and failure of the accused to give reasonable explanation.

Held that there were a number of circumstances which indicated that it was unsafe to rely on the girl's evidence. The girl whose statement implicating the accused persons was obtained under the circumstances could not, therefore, be held to be a reliable witness, particularly in view of the circumstance that she did not disclose their names even at the earlier stage when she had not been put in fear of her life. Further the recoveries could not be held to corroborate the girl's version. Failure of the accused to give an adequate explanation would not lead to an inference that the bloodstains must be those of the blood of the deceased. The circumstances seemed to indicate that there was no connection at all between the bloodstains and the murder. CrI. Appeal 545 of 1962 D/- 9-2-65 (Pat.), Partly Reversed.

(Paras 6, 7 and 10)

M/s. D. P. Singh, K. M. K. Nair and Dr. N. M. Ghatatate, Advocates, for Appellant (In CrI. A. No. 141/65) and Respondent (In CrI. A. No. 142/65); Mr. R. C. Prasad, Advocate, for Appellant (In CrI. A. No. 142/65); Mr. R. C. Prasad, Advocate (Amicus Curiae), for Appellant (In CrI. A. No. 78/68); Mr. U. P. Singh, Advocate, for Respondent (In CrI. A. No. 141/65).

The following Judgment of the Court was delivered by

BHARGAVA, J.: These three appeals all arise out of a trial held by the Additional Sessions Judge of Patna in respect of a charge of murder of an old lady Rohini Kuer, wife of Munshi Chau-

dhary, residing in village Lohra, Police Station Bakhtiarpur, District Patna. The prosecution case was that, on the night between 17th and 18th June, 1961, Rohini Kuer, who was aged about 60 years, was sleeping on a cot in the courtyard of her house and, nearby on a smaller cot was sleeping her niece, Manti who was about 11 years of age. Munshi Chaudhary himself, his sons and daughters-in-law were at Ranchi where one of his sons had been posted as a Block Development Officer. During the night, Rohini Kuer had closed all the doors and had put a lock from inside on the connecting door between the female apartment and the male apartment of the house. Some time during the night, three miscreants entered the female apartment by cutting a hole in the wall on the western side of the connecting door and began to ransack different rooms of the house. Rohini Kuer woke up on hearing the sounds, while the miscreants were breaking open the boxes and removing the Articles. She got up from her bed, accosted the thieves and also called out to Manti. Two of those persons rushed at her, threw her down on the verandah and inflicted several injuries on her body. One of them brought out a sword which was kept in the southern room adjacent to the verandah and cut her neck in the light of the electric torch which had been lighted by the third person. Thereafter, they took away cash, clothes and ornaments having broken open several boxes. They also took away an iron safe. Manti pretended to be asleep and did not cry out due to fear. At one stage, one of the thieves suggested that she should also be killed, but another one intervened and suggested that it was unnecessary to commit her murder. Manti continued lying on her cot till dawn when she came out of the house through the hole which had been cut by the thieves and started weeping. While she was in the Baithak of Munshi Chaudhary, one Bhagwat Prasad, who was passing by, enquired what the matter was. She told him that Daiya had been cut. 'Daiya' was the term by which she used to address Rohini Kuer who was her father's sister. Bhagwat Prasad then entered the female apartment through the same hole and found the dead body of Rohini Kuer lying in the verandah. As he came out after seeing the dead body, Ramkishun Chukidar also arrived. Both of them then went to Harnaut Police outpost four miles away where

Bhagwat Prasad lodged a First Information Report which was recorded by Assistant Sub-Inspector Jagdish Singh at about 8 A.M., the date being 18th June, 1961. He sent a copy of the Report to Bhaktiarpur Police Station for institution of a case and himself proceeded to the scene of occurrence at 10.30 A. M. It is said that, in the meantime, Manti's mother had arrived and she told Manti not to disclose the names of the offenders lest she should also be killed. Jagdish Singh, A.S.I., inspected the place of occurrence, noticed the hole that had been cut in the wall and actually went inside through the same opening. He found the dead body lying in the verandah and also noticed some footprints on the floor near the dead body. A blood-stained sword kept in a sheath was also found by him in a room adjacent to the verandah where he also found another footprint in bloodstains. He prepared the inquest report and sent the dead body of Rohini Kuer for post mortem examination. The investigation was then taken over by Inspector of Police, Lakshmi Narain Pathak, who took statements of various witnesses. According to him, though he was able to record a detailed statement of Manti covering about two pages, Manti refused to disclose the names of the culprits and started weeping when she was asked to give out the names. He sent a requisition to Patna for a police dog and a photographer. Three days later, on 21st June, the police dog and the photographer arrived in village Lohra, and the Investigating Officer, Pathak, on reaching the spot let loose the dog. The dog went to the house of Ramujagar appellant and entered a room from which one Dasuti Chadar and one quilt stained with blood were seized by the Investigating Officer Pathak. Thereafter, the dog went to the house of Kapil Singh who, in the meantime, had left his house on seeing the police arriving. He was, however, arrested by the Dafadar. Subsequently, the dog led the police to the house of Deo Singh and his brother Singheshwar where, on a search having been made, a pair of gold ear-tops were recovered from a niche situated in a room facing east. The ear-tops were kept in a cardboard case which bore the inscription "Malti Singh, Women's College Ranchi, P. N. U. N. C. H. 2". In the inner cover of the case "M. Singh" had been written in English and the names of the dealers

were also printed on it. The gold ear-tops and its covering box were seized by the investigating officer. On 22nd June, 1961, Jagdish Singh, A. S. I., Harnaut Police outpost, on searching a well situated about three quarters of a mile away from village Lohra, recovered a Godrej Iron Safe which was taken out and was found to contain articles including Insurance Policies in the name of Nandkishore Singh son of Munshi Chaudhary.

2. The girl Manti was taken to the Police Station by the Investigating Officer on the 19th June, 1961, apparently because she had failed to disclose the names of the thieves whom she had seen inside the house and who had committed the murder of Rohini Kuer in her presence. Manti was kept at the Police Station and was repeatedly questioned. According to the Investigating Officer, Lakshmi Narain Pathak, she was allowed to visit her sister's place in between, but she was always provided with a police escort. At about midnight on the night between 21st and 22nd June, 1961, she is alleged to have disclosed the names of the three culprits. The names that she gave were those of Kapil Singh alias Kapildeo Singh, Ramujagar Singh and Deo Singh alias Surajdeo Singh. She then amplified the statement by stating that it was Kapil Singh who had actually cut the neck of Rohini Kuer and that Ramujagar Singh and Kapil Singh were the two persons who had attacked her. Deo Singh, according to her, was the person who was flashing the torch to give light to his two companions. She added that Deo Singh had said that she also should be killed, whereupon Kapil Singh said that she was a child and they should leave her.

3. Subsequently, on 28th June, 1961, Manti and her mother were both produced before a Magistrate who recorded their statements under Section 164. Criminal Procedure Code. Manti was allowed to go home after this statement of hers had been recorded by the Magistrate. Samples of the footprints of the three suspects were compared with the footprints in blood found at the scene of occurrence by the police Expert on Footprints and evidence was sought to be given by him to prove that one of the footprints tallied with the footprint of Deo Singh.

4. The Additional Sessions Judge accepted as true the evidence of Manti. He further held that there was corroboration of her evidence at least against

two of the persons Ramujagar Singh and Deo Singh. His finding was that the quilt and the chadar, which were proved stained with human blood, having been recovered from the house of Ramujagar Singh, provided very good corroboration of the case against him of participation in this murder. Similarly, the Additional Sessions Judge held that the recovery of the ear-tops with the cardboard box containing on it the name of the daughter-in-law of Rohini Kuer as well as the circumstance that the blood-stained footprint found on the spot tallied with that of Deo Singh appellant furnished very good corroboration of the case against Deo Singh. These circumstances indicated that Manti had given truthful evidence and, consequently, he convicted all the three persons for the offence under Section 302, I. P. C. read with Section 34, I. P. C. All the three persons were sentenced to imprisonment for life for this offence. Kapildeo was, in addition, found guilty of the substantive offence under Section 302, I. P. C. for committing the murder of Rohini Kuer and he was sentenced to imprisonment for life for that offence. Deo Singh was further found guilty of an offence punishable under Section 411, I. P. C., and sentenced to undergo rigorous imprisonment for one year. All the sentences were directed to run concurrently. Singheshwar, the brother of Deo Singh, who was also tried with the other three persons, was acquitted of all the charges.

5. The three convicted persons, Kapil Singh, Ramujagar Singh and Deo Singh appealed to the High Court at Patna. The appeal came up before a Division Bench. Both the learned Judges constituting the Bench held that it was not safe to base any conviction on the solitary testimony of Manti and, consequently, they gave Kapil Singh the benefit of doubt, set aside his conviction and sentences, and acquitted him. One of the learned Judges was of the opinion that the conviction of the other two persons Ramujagar Singh and Deo Singh should be upheld on the basis of the evidence of Manti as corroborated by recoveries, in the case of Ramujagar Singh, of the bloodstained chadar and quilt and, in the case of Deo Singh, of the ear-tops and the cardboard box. Reliance was also placed on the circumstance that the footprint of Deo Singh in blood was found close to the scene of occurrence. The

other learned Judge was, however, of the opinion that, in the circumstances of this case, it was not safe to rely on the evidence of Manti at all against any of the persons charged with the offence and, consequently, he expressed the opinion that Ramujagar Singh and Deo Singh should also be given the benefit of doubt and acquitted. Thereupon, the appeal of these two appellants was referred to a third Judge who agreed with the former and held that the conviction and sentences of these two persons must be upheld. As a result, the appeal of Ramujagar Singh and Deo Singh was dismissed. Criminal Appeal No. 141 of 1965 has been brought by special leave by the State of Bihar against the acquittal of Kapil Singh, while Criminal Appeal No. 142/1965, also by special leave, has been brought up by Ramujagar Singh against the judgment of the High Court upholding his conviction. In addition, Deo Singh has also come up to this Court by special leave. Special leave to him was granted at the time of hearing of the two Criminal Appeals Nos. 141 and 152 of 1965. All the three appeals are, therefore, being dealt with together in this one judgment.

6. The facts enumerated above make it clear that the crucial question that has to be determined in this case is whether the evidence of Manti can be relied upon for the purpose of convicting Kapil Singh, or upholding the conviction of Ramujagar Singh and Deo Singh. She is the only witness who, according to the prosecution, actually witnessed the murder and saw the assailants. It is, of course, clear that the fact that Rohini Kuer was murdered on the night between the 17th and 18th June, 1961 in her house by some thieves, who entered the house by breaking open a hole in a wall, is amply proved by the prosecution evidence. The point that needs to be examined is whether these three persons were amongst the thieves who committed the crime. Manti is a young girl whose age was recorded as 12 years at the time when she was examined in the Court of Session in July, 1962, so that, at the time of the incident, she was only 11 years of age. While such a child witness can often be expected to give out a true version because of her innocence, there is always the danger in accepting the evidence of such a witness that, under influence, she might have been coached to give out a version by persons who may have influence on her. In this case,

there are a number of circumstances which, in our opinion, indicate that it will not be quite safe to rely on her evidence. She stated that she was lying on a cot close to the cot on which her aunt Rohini Kuer was sleeping. She actually saw her aunt being killed and, according to her there was a threat to her life also when Deo Singh said that she should also be killed, though she was saved when Kapil Singh asked that she should be spared because she was a child. It does not seem to be very likely that a child in such circumstances could have continued to pretend that she was asleep. In the morning, according to her, when she came out, she met Bhagwat Prasad before meeting her mother and she told Bhagwat Prasad that 'Daiya' had been killed. It is surprising that she did not at that stage disclose the names of any of these persons to Bhagwat Prasad. In fact, the conduct of Bhagwat Prasad in not trying to find out the names of the persons who had committed the murder from Manti when she told him about it appears to be quite unnatural. It cannot be expected that, on hearing of the murder, he would quietly enter the house to discover the dead body without at all asking Manti whether she had seen the culprits and who they were. She even met others like the Chaukidar Ramkishun, and witnesses Shyam Ram and Gursahay before she met her mother. In her evidence, she tried to explain her failure to disclose the names by stating that her mother had warned her not to disclose the names lest she should also be killed by the persons named by her. This explanation sought to be advanced on behalf of the prosecution will not at all explain why there was no disclosure of names by Manti to the persons mentioned above whom she met before this warning was given to her by her mother. At no stage has any suggestion been put forward by the prosecution that the thieves themselves had put her in fear of life by threatening to kill her if she disclosed their names. She could not, therefore, be under any fear at the time when she met Bhagwat Prasad, the Chaukidar and others and there was no explanation at all why their names were not ascertained from her or voluntarily disclosed by her at that stage.

7. The subsequent story put forward by the prosecution to explain the belated disclosure of the names is highly suspicious and, in fact, indicates that, in

this case, the investigation by the Police has not been honest. The Investigating Officer, Lakshmi Narain Pathak himself states that he arranged that the girl be taken to the Police Station on 19th June, 1961 and she was then kept confined there up to the 28th June, 1961, until her statement was recorded by a Magistrate under Section 164, Cr. P. C. We fail to understand under what law the police was authorised to keep this girl confined in the police station for so many days. Pathak, of course, tried to convert this confinement into protective custody, adding that she was allowed to go to her sister's house in between; but Manti herself contradicts Pathak. According to her, she was not allowed to leave the police Station at all until the 28th June. Her statement is that she was kept in a room in the Police Station along with a constable and the room was only opened when it was necessary for her to go out to ease herself. In the day-time, she was allowed to come up to the door of the room, but was not allowed to move away from the door. Each night she was shut inside the room and was kept shut like that for five or six nights. It is true that her mother was allowed to visit her, but this illegal confinement by the Police was reprehensive and very adversely affects the value of the evidence obtained by the police under these circumstances. In this connection, it is significant to note that, even according to Pathak, the names were disclosed to him for the first time by Manti at midnight on the night between 21st and 22nd June, 1961. The very fact that she was questioned at the odd hour of midnight makes it obvious that compulsion was being used on her to make her state the names of these persons. If it was true, as alleged by Pathak, that she was being kept there for her personal protection only, there was no reason at all why she should have been questioned during the night when a child of her age should certainly have been allowed to take undisturbed rest. Pathak has tried to justify the course adopted by him by saying that he thought it to be proper to keep a girl of tender age in police station even for weeks for taking a statement, because he wanted to know the truth. It is surprising that a police officer should hold such views. Clearly, he was acting against law in keeping that girl confined in the police station with a police constable posted all the time as her companion. The excuse that she

needed protection is belied by the circumstance that at least for one day from 18th June to 19th June she was allowed to remain out of police custody and there is no suggestion that any protection was afforded to her during that time. It was only on 19th June that she was taken to the Police Station obviously because she had refused to give the names as desired by the Police. The Inspector of Police, Pathak, purported to give evidence as if, in Bihar, it is nothing extraordinary to keep such a witness in police custody. We hope that there is no such practice in that State. Manti, whose statement implicating these three persons was obtained in these circumstances, cannot, therefore, be held to be a reliable witness particularly in view of the circumstance that she did not disclose their names even at the earlier stage when she had not been put in fear of her life by her mother.

8. In this connection, importance must attach to the circumstance that her mother, who is said to have put the fear of life in her, did not enter the witness-box at all when the case was tried in the Court of Session. She was, no doubt examined by the Police and her statement was also obtained under Sec. 164, Cr. P. C., by producing her before the Magistrate. She was present in the Court of Session when Manti was being examined, but, when her turn for examination came, she disappeared. The Public Prosecutor naturally came out with the explanation that she had been got at by the accused. We are unable to accept this explanation for her non-appearance. It seems that, if she had come in the witness-box she would not have supported the prosecution and consequently, the excuse was put forward that she disappeared on the day fixed for her evidence, even though she was staying at the same place as her daughter Manti and was looking after her during the trial of the case. In this connection it is significant that, according to Manti herself, her mother had told the Inspector of Police that she had not forbidden her to disclose the names of the culprits. This seems to be another example of the unsatisfactory or unreliable conduct of the investigation in the present case.

9. Apart from these circumstances, which throw considerable doubt on the evidence of Manti even the corroborative evidence sought to be adduced by the prosecution appears to us to be of a very doubtful character. As against

Rmaujagar Singh, the corroborative evidence put forward is that a quilt and a Dasuti Chadar stained with human blood were recovered from his house; but no reasonable explanation is sought to be given by the prosecution as to how the blood came to be on these two articles, if it was the blood of the deceased Rohini Kuer. It is to be noted that the murder took place in June, 1961 and at least a quilt will not be in use at all during that season in the plains of Bihar. A suggestion seems to have been put forward that Ramujagar Singh had taken both these articles to wrap himself in them in order to conceal his identity. This suggestion is, however, clearly nullified by the evidence of Manti who does not state that any one of the persons, whom she saw in the house at the time of murder, was carrying a quilt or a chadar or was trying to conceal his features by wrapping himself in them. Even the alternative explanation that they may have become bloodstained when Ramujagar Singh came home with Rohini Kuer's blood on his body is, on the face of it, highly improbable. Manti herself says that all the culprits washed their hands in the house where the murder was committed before leaving that house. The quilt and the Dasuti Chadar had sprinkling of blood and not mere blood-smudges. Obviously such sprinkling of blood could not appear on the quilt and the Dasuti Chadar by their coming merely in contact with Ramujagar Singh after his return to his house, even if some bloodstains remained on his body when he came home. It is true that the explanation for these bloodstains put forward on behalf of Ramujagar Singh that they were from some skin sores of one of the children of his family has not been accepted and is not very satisfactory, but the failure of an accused to give an adequate explanation does not lead to an inference that these bloodstains must be those of the blood of the deceased. The circumstances seem to indicate that there is no connection at all between these bloodstains and the murder of Rohini Kuer.

10. Similarly, the recovery of the gold eartops and the cardboard box, which contained them, is highly suspicious. For one thing, the prosecution have failed to establish that the room, from which they were recovered, was that of Deo Singh appellant. Deo Singh even according to the prosecution wit-

nesses, was employed outside this village and had only come on a visit from his duty. The room, from which they were recovered, is described as a room for keeping cow-dung cakes. The Investigating Officer naturally could not know who in the family of Deo Singh was in actual occupation of this room, while the only recovery witness, Narsing Mahto, had to admit that he did not see Deo Singh eating or sleeping in that room, or keeping things in that room, or taking them out of that room. In fact, when further cross-examined, he admitted that he never saw how that room was used. Obviously, he was not in a position to establish that this room was in the occupation of Deo Singh appellant. The circumstances of the recovery are also doubtful. According to Inspector of Police, Pathak, he observed all the formalities required to be observed when searching the house of Deo Singh. One of the formalities that has to be observed is that the searching officer should give his personal search to the witnesses before entering the premises to be searched and should similarly search the witnesses also in the presence of one another. If the Inspector means that this was done by stating that all formalities were observed he is contradicted by Narsing Mahto who says that on his arrival, he found the Inspector in the inner courtyard of the house, which means that he had already entered the house without observing the formalities. At the time of recovery, it is said that the cardboard box containing the eartops was kept in a corner of the room covered by a number of tiles. The prosecution story thus purports to make out that Deo Singh was foolish enough to keep in his room an article connected with the murder about which there could be no difficulty of identification, because the cardboard box had on it the name of the daughter-in-law of Rohini Kuer and he kept that box in such a manner under the tiles in the cow-dung room that the attention of the Police would straightway be attracted towards it. The whole story of recovery of this cardboard box with the eartops thus sounds highly improbable.

11. The only other circumstance, which has been relied upon by the prosecution is the identity of the bloodstained footprint with that of the sample footprint of Deo Singh appellant. We do not think that it is necessary to discuss it in detail, because that evidence

is in its very nature, a very weak type of evidence and, in fact in the High Court even the third Judge, to whom the case was referred on difference of opinion, held that it would not be safe to rely on this evidence and discarded it.

12. In these circumstances, it is clear that it is not at all possible to hold that the prosecution succeeds in proving the charge against any of these three persons. As a result, Cr. Appeal No. 141/1965 filed by the State is dismissed, while the appeals of Ramujagar Singh and Deo Singh are allowed, their conviction and sentences are set aside and they are acquitted of the offences with which they were charged. They shall be released forthwith.

GGM/D.V.C. Order accordingly.

AIR 1969 SUPREME COURT 59

(V 56 C 17)

J. C. SHAH, V. RAMASWAMI,
V. BHARGAVA, G. K. MITTER AND
C. A. VAIDIALINGAM, JJ.

Sudhir Chandra Nawn, Petitioner v. Wealth-tax Officer, Calcutta and others, Respondents.

Interveners: 1. The State of Assam; 2. The State of Kerala; 3. The State of Uttar Pradesh.

Writ Petitions Nos. 153 to 155 of 1967, D/- 23-4-1968.

(A) Wealth-tax Act (1957), Section 3 — Levy of tax during successive years on same subject-matter is valid — Tax not chargeable on accretion to wealth since last valuation.

The charge imposed under Section 3 is on the "net wealth on the corresponding valuation date" and not on the increase in the wealth of the assessee, or accretion to the wealth of the assessee since the last valuation date. There is no constitutional prohibition against the Parliament levying tax in respect of the same subject-matter or taxing event in successive assessment periods. The plea that wealth-tax is chargeable only on the accretion of wealth during the financial year is contrary to the plain words of the charging section. (Paras 1, 2)

(B) Constitution of India, Article 246, Sch. 7, List I, Entry 86 and List II, Entry 49 — Levy of tax on capital value of non-agricultural lands and buildings — Parliament can legislate therefor under List I, Entry 86 — Imposition of

IL/JL/C297/68

Wealth-tax on non-agricultural lands and buildings under Wealth Tax Act (1957) is constitutional — Not conflicting with Entry 49 of List II. Observations made in AIR 1960 All 136 (FB) held were obiter and did not correctly interpret Entry 86 of List I.

The power to levy tax on lands and buildings under Entry 49 List II does not trench upon the power conferred upon the Parliament by Entry 86, List I and therefore, the enactment of the Wealth-tax Act by the Parliament is not ultra vires. (Para 8)

The tax which is imposed by Entry 86, List I of Seventh Schedule is not directly a tax on lands and buildings. It is a tax imposed on the capital value of the assets of individuals and companies, on the valuation date. The tax is not imposed on the components of the assets of the assessee: it is imposed on the total assets which the assessee owns, and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account. In certain exceptional cases, where a person owes no debts and is under no enforceable obligation to discharge any liability out of his assets, it may be possible to break up the tax which is leviable on the total assets into components and attribute a component to lands and buildings owned by an assessee. In such a case, the component out of the total tax attributable to lands and buildings may in the matter of computation bear similarity to a tax on lands and buildings levied on the capital or annual value under Entry 49, List II. But the legislative authority of Parliament is not determined by visualizing the possibility of exceptional cases of taxes under two different heads operating similarly on taxpayers. Again Entry 49, List II of the Seventh Schedule contemplates the levy of tax on lands and buildings or both as units. It is normally not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of power under Entry 86, List I tax

is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not make the fields of legislation under the two entries overlapping. (Para 3)

Secondly in view of Article 246, exclusive power of the State Legislature has to be exercised subject to Clause (1) i. e., the exclusive power which the Parliament has in respect of the matter enumerated in List I. Assuming that there is a conflict between Entry 86, List I and Entry 49, List II, which is not capable of reconciliation, the power of Parliament to legislate in respect of a matter which is exclusively entrusted to it must supersede pro tanto the exercise of power of the State Legislature.

Observations made in AIR 1960 All 136 (FB) held were obiter and did not correctly interpret Entry 86 of List I. AIR 1965 SC 1387 and AIR 1949 FC 81 and AIR 1939 FC 1, Rel. on; AIR 1962 Ker 110 and AIR 1964 Ori 128 and AIR 1963 Mys 111, Approved.

(Para 7)

Cases Referred: Chronological Paras

- (1965) AIR 1965 SC 1387 (V 52) =
1965-56 ITR 224, Banarsi Das
v. Wealth-tax Officer, Special
Circle, Meerut 3
- (1964) AIR 1964 Ori 128 (V 51) =
(1965) 56 ITR 298, Badri Nara-
yanamurthy v. Commr. of Wealth-
tax, Bihar and Orissa 8
- (1963) AIR 1963 Mys 111 (V 50) =
(1963) 43 ITR 472, Sri Krishna
Rao v. Third Wealth Tax Officer 8
- (1962) AIR 1962 Ker 110 (V 49) =
(1962) 44 ITR 277, C. K. Mam-
mad Kevi v. Wealth Tax Officer,
Calicut 8
- (1960) AIR 1960 All 136 (V 47) =
1959 All LJ 754 (FB), Oudh
Sugar Mills Ltd., Hargaon v. State
of U. P. 9
- (1949) AIR 1949 FC 81 (V 36) =
1948 FCR 207, Ralla Ram v.
Province of East Punjab 4
- (1939) AIR 1939 FC 1 (V 26) =
1939 FCR 18, In re, Central Pro-
vinces and Berar Sales of Motor
Spirit and Lubricants Taxation
Act, 1938 6
- M/s. Nirmal Mukherjee and P. K.
Mukherjee, Advocates, for Petitioner;

Mr. C. K. Daphtary, Attorney General for India, (M/s. T. A. Ramachandran and R. N. Sachthey, Advocates, with him), for Respondents (Nos. 1-3); Mr. Naunit Lal, Advocate, for Intervener No. 1; Mr. M. R. K. Pillai, Advocate, for Intervener No. 2; Mr. C. B. Agarwala Senior Advocate, (Mr. O. P. Rana, Advocate, with him), for Intervener No. 3.

The following Judgment of the Court was delivered by

SHAH, J.: For the years 1959-60, 1960-61 and 1961-62 the petitioner was assessed to tax under the Wealth-tax Act, 1957, by the Wealth-tax Officer, C-Ward, District II (1), Calcutta. The petitioner failed to pay the tax and proceedings for recovery of tax and penalty were taken against him. The petitioner then moved this Court for a writ quashing the order of assessment and penalty and notices of demand for recovery of tax. The petition was sought to be supported on numerous grounds, none of which has, in our judgment, any substance. The plea that wealth-tax is chargeable only on the accretion of wealth during the financial year is contrary to the plain words of the charging section. Section 3 of the Wealth-tax Act, as it stood in the relevant years, declared that there shall be charged for every financial year a tax in respect of the net wealth on the corresponding valuation date of every individual, Hindu undivided family and company at the rate or rates specified in the Schedule. The expression "net wealth" is defined in S. 2 (m) as meaning "the amount by which the aggregate value computed in accordance with the provisions of the Act of all the assets, wherever located, belonging to the assessee on the valuation date, including assets required to be included in this net wealth as on the date under the Act, is in excess of the aggregate value of all the debts owed by the assessee on the valuation date, other than * * *". The expression "assets" is defined in Section 2 (e) as inclusive of property of every description, movable or immovable but not including agricultural land and growing crops, grass or standing trees on such land. By Section 3 charge is imposed upon the net wealth of an assessee on the corresponding valuation date. The charge thereby imposed is on the "net wealth on the corresponding valuation date" and not on the increase in the wealth of the assessee, or accretion to the wealth of the assessee since the last valuation date.

2. It was urged that the Parliament could not have intended that the same assets should continue to be charged to tax year after year. But there is no constitutional prohibition against the Parliament levying tax in respect of the same subject-matter or taxing event in successive assessment periods.

3. The Parliament enacted the Wealth-tax Act in exercise of the power under List I of the Seventh Schedule Entry 86—"Taxes on the capital value of assets, exclusive of agricultural lands, or individuals and companies: taxes on the capital of companies". That was so assumed in the decision of this Court in *Banarsi Dass v. Wealth-tax Officer, Special Circle, Meerut*, (1965) 5 ITR 224 = (AIR 1965 SC 1387) and counsel for the petitioner accepts that the subject of Wealth-tax Act falls within the terms of Entry 86, List I of the Seventh Schedule. He says, however, that since the expression "net wealth" includes non-agricultural lands and buildings of an assessee, and power to levy tax on lands and buildings is reserved to the State Legislatures by Entry 49, List II of the Seventh Schedule, the Parliament is incompetent to legislate for the levy of Wealth-tax on the capital value of assets which include non-agricultural lands and buildings. The argument advanced by counsel for the petitioner is wholly misconceived. The tax which is imposed by entry 86, List I of the Seventh Schedule is not directly a tax on lands and buildings. It is a tax imposed on the capital value of the assets of individuals and companies on the valuation date. The tax is not imposed on the components of the assets of the assessee: it is imposed on the total assets which the assessee owns, and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account. In certain exceptional cases, where a person owes no debts and is under no enforceable obligation to discharge any liability out of his assets it may be possible to break up the tax which is leviable on the total assets into components and attribute a component to lands and buildings owned by an assessee. In such a case, the component out of the total tax attributable to lands and buildings may in the matter of computation bear similarity to a tax on lands and buildings levied on the capital or annual value under entry

49, List II. But the legislative authority of Parliament is not determined by visualizing the possibility of exceptional cases of taxes under two different heads operating similarly on taxpayers. Again entry 49, List II of the Seventh Schedule contemplates the levy of tax on lands and buildings or both as units. It is normally not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of power under Entry 86 List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49 List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not, in our judgment, make the fields of legislation under the two entries overlapping.

4. In *Ralla Ram v. Province of East Punjab*, 1948 FCR 207 = (AIR 1949 FC 81) the Federal Court held that the tax levied by Section 3 of the Punjab Urban Immoveable Property Tax Act, 17 of 1940, on buildings and lands situated in a specified area at such rate not exceeding twenty per centum of the annual value of such buildings and lands, as the Provincial Government may by notification in the Official Gazette direct in respect of each such rating area was not a tax on income, but was a tax on lands and buildings within the meaning of item No. 42 of List II of the Seventh Schedule of the Government of India Act, 1935. In that case it was contended that under the provisions of the Punjab Act the basis of the tax was the annual value of the buildings and since the same basis was used in the Income-tax Act for determining the income from property and generally speaking the annual value is the fairest standard for measuring income and, in many cases, is indistinguishable from it, the tax levied by the impugned Act was in substance a tax on income. The Court pointed out that the annual value is not necessarily actual income, but is only a standard by which income may be measured and merely be-

cause the Income-tax Act had adopted the annual value as the standard for determining the income, it did not follow that, if the same standard is employed as a measure for any other tax, that latter tax becomes also a tax on income.

5. In the case of a tax on lands and buildings, the value, capital or annual would be determined by taking the land or building or both as a unit and subjecting the value to a percentage of tax. In the case of wealth-tax the charge is on the valuation of the total assets (inclusive of lands and buildings) less the value of debts and other obligations which the assessee has to discharge. Merely because in determining the taxable quantum under taxing statutes made in exercise of power under Entries 86, List I and 49 List II, the basis of valuation of assets is adopted, trespass on the field of one legislative power over another may not be assumed.

6. Assuming that there is some overlapping between the two entries, it cannot on that account be said that the Parliament had no power to legislate in respect of levy of wealth-tax in respect of the lands and buildings which may form part of the assets of the assessee. As observed by Gwyer, C. J., in *In re, Central Provinces and Berar Act No. XIV of 1938*, (1939) FCR 18 at p. 49 = (AIR 1939 FC 1 at p. 10):

“...that a general power ought not to be so construed as to make a nullity of a particular power conferred by the same Act and operating in the same field when by reading the former in a more restricted sense effect can be given to the latter in its ordinary and natural meaning.”

Apparently an entry “taxes on lands and buildings” is a more general entry than the entry in respect of a tax on the annual value of assets of an individual or a company, and by conferring upon Parliament the power to legislate on capital value of the assets including lands and buildings, the power of the State Legislature was pro tanto excluded.

7. The scheme of Article 246 of the Constitution which distributes legislative powers between the Parliament and State Legislature must be remembered. Article 246 provides:

“(1) Notwithstanding anything in Clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule.

(2) Notwithstanding anything in Cl. (3) Parliament, and, subject to Clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule.

(3) Subject to Cls. (1) & (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the 7th Schedule.” Exclusive power to legislate conferred upon Parliament is exercisable, notwithstanding anything contained in Cls. (2) and (3), that is made more emphatic by providing in Clause (3) that the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule, but subject to Cls. (1) and (2). Exclusive power of the State Legislature has therefore to be exercised subject to Clause (1) i. e. the exclusive power which the Parliament has in respect of the matters enumerated in List I. Assuming that there is a conflict between entry 86, List I and entry 49, List II, which is not capable of reconciliation, the power of Parliament to legislate in respect of a matter which is exclusively entrusted to it must supersede pro tanto the exercise of power of the State Legislature. The problem viewed from any angle is incapable of a decision in favour of the assessee.

8. The High Courts have consistently taken the view in cases in which the question under discussion expressly fell to be determined, that the power to levy tax on lands and buildings under Entry 49, List II does not trench upon the power conferred upon the Parliament by entry 86, List I, and therefore the enactment of the Wealth-tax Act by the Parliament is not ultra vires. In *C. K. Mammad Kevi v. Wealth-tax Officer, Calicut*, 1962-44 ITR 277 = (AIR 1962 Ker 110) the High Court of Kerala held that wealth-tax is specifically and in substance covered by entry 86 of the Union List of the Seventh Schedule to the Constitution of India, and there is really no conflict and no overlapping between the jurisdiction of the Parliament under Entry 86 of the Union List to enact a law levying a tax on the capital value of assets, and of the State Legislature under Entry 49 of the State List, to enact a law levying a tax on lands and buildings. A similar view was expressed by the Orissa High Court in *Badri*

Narayanamurthy v. Commissioner of Wealth-tax, Bihar and Orissa, 1965-56 ITR 298 = (AIR 1964 Ori 128); and also in Sri Krishna Rao v. Third Wealth-tax Officer, AIR 1963 Mys 111.

9. Reliance was, however, placed by counsel for the petitioner upon certain observations made by Jagdish Sahai, J., in Oudh Sugar Mills Ltd. Hargaoon v. State of U. P., AIR 1960 All 136 (FB). In that case the validity of the U. P. Large Land Holdings Act 31 of 1957 was challenged on the ground that the power to tax covered by the Act was not conferred upon the State Legislature by List II, Entry 49. The Court in that case held that the tax under the Act was a tax on the holding and not on the annual value or the capitalised value of the land and the annual value was only the measure of the tax. Jagdish Sahai, J., proceeded, however, to observe that the meaning of the word "assets" in entry 86 of List I should exclude land, both agricultural as well as non-agricultural from its ambit in order to give full scope to the expression "Taxes on land" occurring in Entry 49 of List II. But it was not necessary for deciding the question falling to be determined in that case to enter upon the question whether a tax on the capitalised value of non-agricultural lands forming part of the assets of an assessee is covered by entry 86, List I, or entry 49, List II. That is so expressly stated by the learned Judge. The Court was concerned only to deal with the question whether the U. P. Large Land Holdings Act fell within entry 49 of List II. The observations made by the learned Judge were plainly obiter, and, in our judgment, do not correctly interpret Entry 86, List I.

10. The plea that Section 7 (1) of the Wealth-tax Act is ultra vires the Parliament is also wholly without substance. That clause provides:

"Subject to any rules made in this behalf, the value of any asset, other than cash, for the purposes of this Act, shall be estimated to be the price which in the opinion of the Wealth-tax Officer it would fetch if sold in the open market on the valuation date."

It was urged that no rules were framed in respect of the valuation of lands and buildings. But Section 7 only directs that the valuation of any asset other than cash has to be made subject to the rules. It does not contemplate that there shall be rules before an asset can

be valued. Failure to make rules for valuation of a type of asset cannot therefore affect the vires of Section 7. It was also said that Section 7 (1) which requires that the asset shall be valued at the price which it would fetch if sold in the open market on the valuation date, was expropriatory. This contention was not raised in the petition, and no ground is made out for holding that the rate at which wealth-tax is levied is expropriatory.

11. The petitions fail and are dismissed with costs. One hearing fee.
BNP/D.V.C. Petition dismissed.

AIR 1969 SUPREME COURT 63

(V 56 C 18)

(From Gujarat: 8 Guj LR 395)

V. RAMASWAMI AND C. A. VAIDIALINGAM, JJ.

Dr. Devendra M. Surti, Appellant v. The State of Gujarat, Respondent.

Criminal Appeal No. 102 of 1966, D/-2-5-1968.

Shops and Establishments — Bombay Shops and Establishments Act (79 of 1948), Sections 2 (4), 52 (e) read with Section 62 and Rule 23 (1) of the Rules framed under Act — Words "Commercial Establishment" in Section 2 (4) — Interpretation of — Profession carried on by individual by his personal skill and intelligence — When can fall under Section 2 (4) — Test — Private dispensary of doctor is not commercial establishment. 8 Guj LR 395, Reversed.

Private dispensary of a doctor is not a 'Commercial Establishment' within the meaning of the Act and the provisions of the Act do not apply to his dispensary. Therefore his conviction, for offence under Section 52 (e) read with Section 62 and Rule 23 (1) of the Rules made under the Act, is illegal.

It is true that Section 2 (4) of the Act has used words of very wide import and grammatically it may include even a Consulting room where a doctor examines his patients with the help of a solitary nurse or attendant. But, in the matter of construing the language of Section 2 (4) of the Act the principle of *noscitur a sociis* has to be adopted. The presence of the profit motive or the investment of capital tradition associated to the notion of trade and commerce cannot be given an undue importance

IL/JL/C593/68

in construing the definition of 'Commercial Establishment' under Section 2 (4) of the Act. The correct test of finding whether a professional activity falls within Section 2 (4) of the Act is whether the activity is systematically and habitually undertaken for production or distribution of goods or for rendering material services to the community or any part of the community with the help of employees in the manner of a trade or business in such an undertaking.

(Para 6)

A professional activity must be an activity carried on by an individual by his personal skill and intelligence. There is a fundamental distinction, therefore, between a professional activity and an activity of a commercial character and unless the profession carried on by a person also partakes of the character of a commercial nature, he cannot fall within the ambit of Section 2 (4) of the Act.

(Para 7)

Thus where professional activity is carried on in such a manner that the condition of the co-operation between the employer and the employees is necessary for its success and its object is to render material service to the community, then these can be regarded as some of the features which render the carrying on of a professional activity to fall within the ambit of Section 2 (4). A person following a liberal profession like that of a doctor does not carry on his profession in any intelligible sense with the active co-operation of his employees and the principal, if not the sole, capital which he brings into his profession is his special or peculiar intellectual and educational equipment. Hence the professional establishment of a doctor cannot come within the definition of Section 2(4) of the Act. 8 Guj LR 395, Reversed; AIR 1962 SC 1080, Rel. on.

(Para 7)

Cases Referred: Chronological Paras

- (1962) AIR 1962 SC 1080 (V 49) =
 (1962) Supp (3) SCR 157,
 National Union Commercial
 Employees v. M. R. Meher,
 Industrial Tribunal, Bombay 7
 (1960) AIR 1960 SC 610 (V 47) =
 (1960) 2 SCR 866, State of Bom-
 bay v. Hospital Mazdoor Sabha 7
 (1919) 1 KB 647 = 88 LJ KB 752,
 Commrs. of Inland Revenue v.
 Maxse 6
 (1919) 2 KB 731, William Esplen,
 Son and Swainston Ltd. v. Inland
 Revenue Commr. 6

- (1854) 3 E and B 889 = 118 ER
 1375, Reed v. Ingham 6
 (1848) 6 Moo PC 413 = 13 ER
 743, McKay v. Rutherford 6
 (1828) 4 Bing 448 = 130 ER 840,
 Scales v. Pickering 6

Mr. S. T. Desai, Senior Advocate (M/s. Arun H. Mehta and I. N. Shroff, Advocates, with him), for Appellant; M/s. R. H. Dhebar and M. S. K. Sastri, Advocates, for Respondent.

The following Judgment of the Court was delivered by

RAMASWAMI, J.: The question involved in this appeal is as to whether a Doctor's dispensary is a "Commercial Establishment" within the meaning of the Bombay Shops and Establishments Act, 1948 (Bombay Act LXXIX of 1948), hereinafter referred to as the 'Act'.

2. The case of the prosecution is that the appellant was a doctor having his dispensary situated near Jakaria Masjid at Ahmedabad. The dispensary is registered as a 'Commercial Establishment' under the provisions of the Act. The complainant Shri Patel visited the dispensary on June 13, 1963 at about 9.50 A. M. and found that though the dispensary was registered as 'Commercial Establishment' under the Act, the Register produced before him at the time of his visit was not maintained as required under Rule 23 (1) of the Rules framed under the Act. Necessary remarks were made by the complainant in the Visit Book of the dispensary. Thereafter, a complaint was filed against the appellant after obtaining sanction for his prosecution under Section 52 (e) of the Act read with Section 62 of the Act and Rule 23 (1) of the Rules. The case was contested by the appellant on the ground that the doctor's dispensary was not a "Commercial Establishment" within the meaning of the Act and the provisions of the Act did not therefore apply to his dispensary and the appellant had not committed any offence. The City Magistrate (First Court), (Municipal), Ahmedabad held that the appellant was not guilty and acquitted him. The State of Gujarat took the matter in appeal to the High Court of Gujarat in Criminal Appeal No. 208 of 1964. The appeal was allowed by the High Court by its judgment dated February 14, 1966 and the appellant was convicted for an offence under Section 52 (e) read with Sec. 62 of the Act and R. 23 (1) of the Rules and sentenced to pay a fine of Rs. 25,

in default to undergo simple imprisonment for a week.

3. This appeal is brought by certificate from the judgment of the High Court.

4. Before considering the rival contentions of the parties it is necessary to examine the scheme of the Act. The preamble to the Act states that it is an Act "to consolidate and amend the law relating to the regulation of conditions of work and employment in shops, commercial establishments, residential hotels, restaurants, eating houses, theatres, other places of public amusement or entertainment and other establishments". Section 2(4) of the Act defines "Commercial establishment" as follows:—

"'Commercial establishment' means an establishment which carries on, any business, trade or profession or any work in connection with, or incidental or ancillary to, any business, trade or profession and includes a society registered under the Societies Registration Act, 1860, and a charitable or other trust, whether registered or not, which carries on whether for purposes of gain or not, any business, trade or profession or work in connection with or incidental or ancillary thereto but does not include a factory, shop, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment." Section 2 (8) states:

"'Establishment' means a shop, commercial establishment, residential hotel, restaurant, eating house, theatre, or other place of public amusement or entertainment to which this Act applies and includes such other establishment as the State Government, may, by notification in the Official Gazette, declare to be an establishment for the purposes of this Act."

Section 2 (6) and Section 2 (7) read as follows:

"(6) 'Employee' means a person wholly or principally employed, whether directly or through any agency, and whether for wages or other consideration, in or in connection with any establishment; and includes an apprentice, but does not include a member of the employer's family."

"(7) 'Employer' means a person owning or having ultimate control over the affairs of an establishment."

Section 2 (3) and 2 (18) define the expression "closed" and "opened" as meaning "closed or opened for the service of

any customer, or for any business, of the establishment, or for work, by or with the help of any employee, of or connected with the establishment". Section 4 states:

"Notwithstanding anything contained in this Act, the provisions of this Act mentioned in the third column of Schedule II shall not apply to the establishments, employees and other persons mentioned against them in the second column of the said Schedule:

Provided that the State Government may, by notification published in the Official Gazette, add to, omit or alter any of the entries of the said Schedule subject to such conditions, if any, as may be specified in such notification and on the publication of such notification, the entries in either column of the said Schedule shall be deemed to be amended accordingly."

Section 5 provides as follows:

"(1) Notwithstanding anything contained in this Act, the State Government may by notification in the Official Gazette, declare any establishment or class of establishments to which, or any person or class of persons to whom, this Act or any of the provisions thereof does not for the time being apply, to be an establishment or class of establishments or a person or class of persons to which or whom this Act or any provisions thereof with such modifications or adaptations as may in the opinion of the State Government be necessary shall apply from such date as may be specified in the notification.

(2) On such declaration under subsection (1), any such establishment or class of establishments or such person or class of persons shall be deemed to be an establishment or class of establishments to which, or to be an employee or class of employees to whom, this Act applies and all or any of the provisions of this Act with such adaptation or modification as may be specified in such declaration, shall apply to such establishment or class of establishments or to such employee or class of employees." Chapter II deals with the registration of establishments. Under Section 7 (1) within the period specified the employer of every establishment is required to send to the Inspector of the local area concerned a statement in the prescribed form together with necessary fees, containing the name of the employer and of the establishment, the category of the

establishment, whether it was a shop, commercial establishment, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment and, such other particulars. Under S. 7 (2) a "registration certificate" is to be granted. Chapter III deals with shops and commercial establishments. Sections 10 and 11 provide for the opening and closing hours of the shop. Section 13 deals with the opening and closing hours of a commercial establishment. Section 14 provides for the maximum limit of the daily and weekly hours of work of the employees in shops and commercial establishments. Section 15 provides for rest interval, and Section 17 provides for spread-over of hours of work in commercial establishments. Section 18 provides for weekly holidays in shops and commercial establishments. Chapter VI deals with employment of children, young persons and women, and applies to all establishments. Section 32 provides that no child should be required or allowed to work in any establishment, notwithstanding that such child is a member of the family of the employer. Similarly, Section 33 provides that no young person or woman shall be required or allowed to work whether as an employee or otherwise in any establishment before 6 A. M. and after 7 P. M. notwithstanding that such young person or woman is a member of the family of the employer. Section 34 prescribes daily hours of work for young persons. The next Chapter, i. e., Chapter VII deals with leave pay and payment of wages for such leave. Section 38 provides for the extension of the Payment of Wages Act by the State Government by a notification in the Gazette to all or any class of establishments or to any class of employees to which the Act applies. Similarly, Section 38-A provides for the extension of the Workmen's Compensation Act, 1923. Chapter VIII enacts provisions for health and safety of the workers generally for all establishments. Chapter IX enacts provisions for setting up of the machinery for enforcement and inspection. Chapter X deals with offences and penalties. Section 52 deals with contravention of certain provisions and Clause (e) of that section provides for the penalty if the employer contravenes the provisions of Section 62 by not maintaining the prescribed register. Section 62 provides for maintenance of registers and records and display of notices prescribed by Rules, Sec-

tion 63 deals with wages for overtime work.

5. On behalf of the appellant Mr. Mehta put forward the argument that under Section 2 (4) of the Act which defines 'Commercial Establishment' as an establishment which carries on any business, trade or profession, the emphasis was not on the place from which the trading or professional activity was carried on but the emphasis was really on the nature of the activity which must be a commercial activity. In other words, the contention was that the intention of the legislature in enacting Section 2 (4) was to include only those professions which are carried on in a commercial manner. It was therefore contended that in the present case the dispensary of the appellant does not fall within the definition of 'Commercial Establishment' under Section 2 (4) of the Act. In our opinion, the argument addressed on behalf of the appellant is well founded and must prevail.

6. Under Section 2 (8) of the Act an 'establishment' is defined as meaning 'a shop, commercial establishment, residential hotel, restaurant, eating house, theatre, or other place of public amusement or entertainment to which this Act applies'. Section 2 (24) again defines a "Residential hotel", Section 2 (25) a "Restaurant or eating house" and Section 2 (27) similarly defines a "Shop". Section 2 (29) defines a "Theatre". It is clear therefore that the legislature has taken care separately to define each one of the categories of the establishments mentioned in Section 2 (8) of the Act. It is true that Section 2 (4) of the Act has used words of very wide import and grammatically it may include even a Consulting room where a doctor examines his patients with the help of a solitary nurse or attendant. But, in our opinion, in the matter of construing the language of Section 2 (4) of the Act we must adopt the principle of *noscitur a sociis*. This rule means that, when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. The words take as it were their colour from each other that is, the more general is restricted to a sense analogous to a less general. "Associated words take their meaning from one another under the doctrine of *noscitur a sociis* the philosophy of which is that the meaning of a doubtful word may be ascertained

by reference to the meaning of words associated with it; such doctrine is broader than the maxim *Ejusdem Generis*". (Words and Phrases, Vol. XIV, p. 207). For instance, in *Reed v. Ingham*, (1854) 3 E and B 889 it was held upon the principle of the maxim *noscitur a sociis*, that a steam tug of eighty-seven tons burden engaged in moving another vessel was not a craft within the meaning of the statute. Again, in *Scales v. Pickering*, (1828) 4 Bing 448 at pp. 452, 453 the question was what was the meaning of the word "footway" when used in a private Act which empowered a water company to break up the soil and pavement of roads, highways, footways, commons, streets, lanes, alleys, passages, and public places, provided they did not enter upon any private lands without the consent of the owner. It was contended that this authorised the company to break up the soil of a private field in which there was a public footway, but it was held otherwise. "Construing the word 'footway'," said Best, C. J. "from the company in which it is found..... the legislature appears to have meant those paved footways in large towns which are too narrow to admit of horses and carriages". And Park, J. added: "The word 'footway' here *noscitur a sociis*". In the present case, certain essential features or attributes are invariably associated with the words "business and trade" as understood in the popular and conventional sense, and it is the colour of these attributes which is taken by the other words used in the definition of Section 2 (4) of the Act, though their normal import may be much wider. We are therefore of opinion that the professional establishment of a doctor cannot come within the definition of Sec. 2 (4) of the Act unless the activity carried on was also commercial in character. As to what exactly is meant by "Commerce" it may be difficult to define but in an early case—*McKay v. Rutherford*, (1848) 6 Moo PC 413 at p. 425, Lord Campbell gave a useful definition: "Commerce is that activity where a capital is laid out on anywork and a risk run of profit or loss; it is a commercial venture". It is true that the definition of Lord Campbell is the conventional definition attributed to trade or commerce but it cannot be taken to be wholly valid for the purpose of construing industrial legislation in a modern welfare State. It is clear that the presence of the profit motive or the investment of capital tradition associated to

the notion of trade and commerce cannot be given an undue importance in construing the definition of 'Commercial establishment' under Section 2 (4) of the Act. In our opinion, the correct test of finding whether a professional activity falls within Section 2 (4) of the Act is whether the activity is systematically and habitually undertaken for production or distribution of goods or for rendering material services to the community or any part of the community with the help of employees in the manner of a trade or business in such an undertaking. It is also necessary in this connection to construe the word "profession" under Section 2 (4) of the Act. In *Commrs. of Inland Revenue v. Maxse*, 1919-1 KB 647 at p. 657, Scrutton, L. J. stated as follows:—

"I am very reluctant finally to propound a comprehensive definition. A set of facts not present to the mind of the judicial propounder, and not raised in the case before him, may immediately arise to confound his proposition. But it seems to me as at present advised that a 'profession' in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production of sale of commodities. The line of demarcation may vary from time to time. The word 'profession' used to be confined to the three learned professions, the Church, Medicine and Law. It has now, I think, a wider meaning."

The matter was again considered in another case where the question was whether a company doing the work of naval architect could be said to be carrying on a profession in a naval architecture. The case was *William Esplen, Son and Swainston, Ltd. v. Inland Revenue Commrs.*, 1919-2 KB 731 where Rowlatt, J. observed as follows:—

".....but in my opinion the company is not carrying on the profession of naval architects within the meaning of the section, because for this purpose it is of the essence of a profession that the profits should be dependent mainly upon the personal qualifications of the person by whom it is carried on, and that can only be an individual."

7. It is therefore clear that a professional activity must be an activity carried

on by an individual by his personal skill and intelligence. There is a fundamental distinction therefore between a professional activity and an activity of a commercial character and unless the profession carried on by the appellant also partakes of the character of a commercial nature, the appellant cannot fall within the ambit of Section 2 (4) of the Act. In *National Union of Commercial Employees v. M. R. Meher*, Industrial Tribunal, Bombay, 1962 Supp (3) SCR 157 = (AIR 1962 SC 1080) it was held by this Court that the work of solicitors is not an industry within the meaning of Section 2 (j) of the Industrial Disputes Act, 1947 and therefore any dispute raised by the employees of the solicitors against them cannot be made the subject of reference to the Industrial Tribunal. In dealing with this question, Gajendra-gadkar, J., speaking for the Court, observed as follows at p. 163 of the Report (SCR Supp) = (at p. 1083 of AIR):

"When in the *Hospital case*, (1960) 2 SCR 866 = (AIR 1960 SC 610) this Court referred to the organisation of the undertaking involving the co-operation of capital and labour or the employer and his employees, it obviously meant the co-operation essential and necessary for the purpose of rendering material service or for the purpose of production. It would be realised that the concept of industry postulates partnership between capital and labour or between the employer and his employees. It is under this partnership that the employer contributes his capital and the employees their labour and the joint contribution of capital and labour leads directly to the production which the industry has in view. In other words, the co-operation between capital and labour or between the employer and his employees which is treated as a working test in determining whether any activity amounts to an industry, is the co-operation which is directly involved in the production of goods or in the rendering of service. It cannot be suggested that every form or aspect of human activity in which capital and labour co-operate or employer and employees assist each other is an industry. The distinguishing feature of an industry is that for the production of goods or for the rendering of service, co-operation between capital and labour or between the employer and his employees must be direct and must be essential."

Again, at p. 166 of the Report (SCR Supp) = (at p. 1084 of AIR) Gajendra-gadkar, J. proceeds to state:

"Does a solicitors' firm satisfy that test? Superficially considered, the solicitors' firm is no doubt organised as an industrial concern would be organised. There are different categories of servants employed by a firm, each category being assigned separate duties and functions. But it must be remembered that the service rendered by a solicitor functioning either individually or working together with partners is service which is essentially individual; it depends upon the professional equipment, knowledge and efficiency of the solicitor concerned. Subsidiary work which is purely of an incidental type and which is intended to assist the solicitor in doing his job has no direct relation to the professional service ultimately rendered by the solicitor. For his own convenience, a solicitor may employ a clerk because a clerk would type his opinion; for his convenience, a solicitor may employ menial servant to keep his chamber clean and in order; and it is likely that the number of clerks may be large if the concern is prosperous and so would be the number of menial servants. But the work done either by the typist or the stenographer or by the menial servant or other employees in a solicitors' firm is not directly concerned with the service which the solicitor renders to his client and cannot, therefore, be said to satisfy the test of co-operation between the employer and the employees which is relevant to the purpose. There can be no doubt that for carrying on the work of a solicitor efficiently, accounts have to be kept and correspondence carried on and this work would need the employment of clerks and accountants. But has the work of the clerk who types correspondence or that of the accountant who keeps accounts any direct or essential nexus or connection with the advice which it is the duty of the solicitor to give to his client? The answer to this question must in our opinion, be in the negative. There is, no doubt, a kind of co-operation between the solicitor and his employees, but that co-operation has no direct or immediate relation to the professional service which the solicitor renders to his client.

..... Looking at this question in a broad and general way, it is not easy to conceive that a liberal profession like that of an attorney could have been intended

by the Legislature to fall within the definition of 'industry' under Section 2 (j). The very concept of the liberal professions has its own special and distinctive features which do not readily permit the inclusion of the liberal professions into the four corners of industrial law. The essential basis of an industrial dispute is that it is a dispute arising between capital and labour in enterprises where capital and labour combine to produce commodities or to render service. This essential basis would be absent in the case of liberal professions. A person following a liberal profession does not carry on his profession in any intelligible sense with the active co-operation of his employees and the principal, if not the sole, capital which he brings into his profession is his special or peculiar intellectual and educational equipment. That is why on broad and general considerations which cannot be ignored, a liberal profession like that of an attorney must, we think, be deemed to be outside the definition of 'industry' under Section 2 (j)."

Applying a similar line of reasoning, we are of opinion that the dispensary of the appellant would fall within the definition of S. 2 (4) of the Act if the activity of the appellant is organised in the manner in which a trade or business is generally organised or arranged and if the activity is systematically or habitually undertaken for rendering material services to the community at large or a part of such community with the help of the employees and if such an activity generally involves co-operation of the employer and the employees. To put it differently, the manner in which the activity in question is organised or arranged, the condition of the co-operation between the employer and the employees being necessary for its success and its object being to render material service to the community can be regarded as some of the features which render the carrying on of a professional activity to fall within the ambit of Section 2 (4) of the Act. Tested in the light of these principles, we hold that the case of the appellant does not fall within the purview of the Act and the conviction of the appellant of the offence under Section 52 (c) of the Act read with Section 62 of the Act and Rule 23 (1) of the Rules is illegal.

8. For these reasons we allow this appeal and set aside the judgment of the

Bombay (Gujarat) High Court dated February 14, 1966 convicting and sentencing the appellant.
BNP/D.V.C. Appeal allowed.

AIR 1969 SUPREME COURT 69
(V 56 C 19)

(From Gujarat)*

R. S. BACHAWAT AND K. S. HEGDE, JJ.

Dhanki Mahajan and others, Appellants v. Rana Chandubha Vakhatsing (dead) by his legal representatives and others, Respondents.

Civil Appeal No. 38 of 1965, D/- 11-4-1968.

(A) Debt Laws — Saurashtra Agricultural Debtors Relief Act (23 of 1954), Sections 2 (5), 2 (6) (i), 7 — Joint usufructuary mortgage debt — Each mortgagor is liable for entire debt — There is no provision for splitting up the debt — T. P. Act (1882), Section 60 — Contract Act (1872), Section 42 — C. R. Appln. No. 477 of 1960, D/- 12-2-1963 (Guj), Reversed.

The definition of debt in Saurashtra Agricultural Debtors Act takes in debts under usufructuary mortgages as well. Where the usufructuary mortgage in question was executed by all the respondents jointly and the debt borrowed under it was a joint debt, each one of the mortgagors was jointly liable for the entire debt. That being so, under the provisions of the Transfer of Property Act, each of the respondents must be held to be liable for the entire mortgage debt. There are no provisions in the Act which lend any support to the contention that the debt due from the respondents under the mortgage is liable to be split up under the Act. On the basis of the provisions of the Act, there is no justification for departing from the ordinary rule that in the case of a joint debt, each one of the debtors is liable for the entire debt. AIR 1957 Bom 6 and (1962) 3 Guj LR 1007, Approved and AIR 1951 SC 189, Distinguished. Civil Revn. Appln. No. 477 of 1960, D/- 12-2-1963 (Guj.), Reversed.

(Paras 4, 5)

(B) Precedents — A single Judge of a High Court is ordinarily bound to accept

*(Civil Revn. Appln. No. 477 of 1960, D/- 12-2-1963—Guj.)

IL/JL/B944/68

as correct judgments of courts of co-ordinate jurisdiction or Division Benches and Full Benches of his Court. AIR 1968 SC 372, Rel. on; Civ. Revn. Appln. No. 477 of 1960, D/- 12-2-1963 (Guj), Reversed. (Para 3)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 372 (V 55) =
1968-2 SCJ 92, Tribhovandas
Purshottamdas v. Ratilal Motilal 3
(1962) 1962-3 Guj LR 1007, Dave
Sadashiv Jayakrishna v. Rana
Govubha 7
(1957) AIR 1957 Bom 6 (V 44) =
ILR (1957) Bom 283, Ambu Rama
Mhatre v. Bhau Halya Patel 7
(1951) AIR 1951 SC 189 (V 38) =
1951 SCR 292, V. Ramaswami
Ayyangar v. Kailash Thevar 6

Mr. I. N. Shroff, Advocate, for Appellants; Mr. J. A. Baxi, Advocate and M/s. K. L. Hathi and Atiqur Rehman, Advocates of M/s. Hathi and Co., for Respondents 1 to 3.

The following Judgment of the Court was delivered by

HEGDE, J.: This appeal by special leave arises from the decision of Raju, J. of the Gujarat High Court in an application under Section 115 of the Code of Civil Procedure. That application was filed by respondents Nos. 1 to 3 herein. As they are the only contesting respondents in this appeal, they will hereinafter be referred to as the respondents.

2. The respondents are Bhayats and Girasdars of Dhanki village in Lakhtar Taluka of the Saurashtra region of the Gujarat State. On December 19, 1940, the respondents executed a joint usufructuary mortgage in favour of Thakker Jethalal Dosabha (the third appellant herein) and another for a sum of Rupees 17,725. The liability incurred under the mortgage was a joint liability and under the terms of the deed each of the mortgagors was liable for the entire debt due under the mortgage. Till January 25, 1950, Dhanki village was a part of the former State of Bombay. As from January 26, 1950, that village became a part of the State of Saurashtra in view of the provisions in the Provinces and States (Absorption of Enclaves) Order, 1950. Prior to that date, the Bombay Agricultural Debtors' Relief Act, 1939, (Bombay Act No. XXVIII of 1939) hereinafter referred to as the Bombay Act, was in force in Dhanki village. As long back as 1945, respondent No. 2 had filed

an application before the Civil Judge (Junior Division) Viramgam both on his behalf as well as on behalf of his minor cousin, the third respondent, for adjustment of their debts. At the same time, respondent No. 1 had also filed an application under the Bombay Act for adjustment of his debts. These applications were consolidated for the purpose of trial. Ultimately they were dismissed as the debts due from each of those persons were held to exceed Rs. 15,000 and that being so they could not be considered as "debtors" under the Bombay Act. In those proceedings it was further held that the debt due from the respondents under the mortgage is a joint debt and each one of them was liable for the entire debt. No appeal was preferred against that decision. At the time of the merger of Dhanki village in Saurashtra, in that State there was no statute similar to the Bombay Act. The Saurashtra Agricultural Debtors' Relief Act (Act No. XXIII of 1954) came to be enacted in 1954. This Act will hereinafter be referred to as "the Act". By and large the provisions of the Act are similar to those of the Bombay Act. In 1955 the respondents again made applications before the Debt Adjustment Board for scaling down their debts under the provisions of the Act. The appellants resisted those applications principally on two grounds, viz.:

(1) The respondents cannot be considered as "debtors" under the Act as the total debts due from each of them exceeded Rs. 25,000, the limit fixed under the Act, and

(2) their applications are barred by the principles of *res judicata* in view of the decision given earlier under the Bombay Act.

Both the Board as well as the appellate court upheld the contentions of the appellants that the respondents were not "debtors" as defined in the Act and that their present applications were barred by the principles of *res judicata*, in view of the earlier decision rendered under the Bombay Act. They held that the debt due under the mortgage is a joint debt and each of the mortgagors is liable for the entire debt. They repelled the plea of the respondents that the debt in question is liable to be split up under the provisions of the Act. But the High Court reversed the above findings. It held that in computing the total debts due from the respondents each one of the mortgagors should be held to be

liable only for one-third of the mortgage debt and in that event the total debt due from each of them does not exceed Rs. 25,000. It may be noted that under the Act, a person whose debts exceeded Rs. 25,000 cannot be considered as a "debtor". It is admitted that if each of the respondents is held liable for the entire mortgage debt, the debts due from each of them would exceed Rs. 25,000 and in that event, they are not entitled to any relief under the Act. But it is equally true that if each one of them is liable only for one-third of the mortgage debt, then the total debts due from each of them do not exceed Rs. 25,000 and in that event their debts are liable to be scaled down and adjusted under the provisions of the Act. Therefore, the main question for decision is whether each one of the respondents can be held liable for the entire debt due under the mortgage. If the answer is in the affirmative, as opined by the Board as well as the appellate court, the then decision of the High Court is incorrect. But on the other hand, if we agree with the High Court that each of the respondents is only liable for one-third of the mortgage debt then the respondents' applications should have been entertained by the Board and dealt with according to law. As, in our opinion, the decision of the Board and of the appellate court that each of the respondents is liable for the entire mortgage debt is correct in law, it is not necessary for us to consider the other question whether the applications from which this appeal arises are barred by the principles of *res judicata*. For the same reason we are also not going into the question whether on the facts of this case it was competent for the High Court to reverse the decision of the appellate Court by having recourse to its powers under Section 115 of the Code of Civil Procedure.

3. Before going into the question whether the respondents can be considered as "debtors" under the Act, it is necessary to dispose of a subsidiary controversy which appears to have troubled Raju, J. unnecessarily. Major portion of his judgment was devoted to the question whether a Single Judge of a High Court is bound by an earlier decision of another Judge of that High Court and whether the opinion expressed by a Full Bench of that Court is binding on Single Judges and Division Benches of that Court. We think that

matters so obvious as those should not have troubled any Judge of a High Court. His conclusions on those questions are rather startling. But there is no need to go into them in view of the decision of this Court in *Tribhovandas Purshotamdas v. Ratilal Motilal*, AIR 1968 SC 372. That case also arose from one of the decisions of Raju, J. wherein the learned Judge had reached conclusions similar to those reached by him in the present case. This Court overruled those conclusions and held that a Single Judge of a High Court is ordinarily bound to accept as correct judgments of courts of co-ordinate jurisdiction, of Division Benches and Full Benches of his Court.

4. Reverting back to the principal point in issue, i. e. whether each of the respondents is liable for the entire mortgage debt, it may be noted that the term "debt" is defined in Section 2 (5) of the Act as meaning any liability in cash or kind, whether secured or unsecured, due from a debtor, whether payable under a decree or order of any civil court or otherwise and includes mortgage money the payment of which is secured by the usufructuary mortgage, or by anomalous mortgage in the nature of 'pura chhoot' of immovable property, but does not include arrears of wages payable in respect of agricultural or manual labour. "Debtor" is defined in Section 2 (6) (i) and that definition to the extent material for this case says—

"6 'Debtor' means an agriculturist—

(i) whose debts do not exceed Rupees 25,000 on the date of filing an application to the Board under Section 4; and

The definition of "debt" takes in debts under usufructuary mortgages as well. As mentioned earlier, the usufructuary mortgage in question was executed by all the respondents jointly. The debt borrowed under it was a joint debt; each one of the mortgagors was jointly liable for the entire debt. That being so, under the provisions of the Transfer of Property Act, each of the respondents must be held to be liable for the entire mortgage debt. This position is not disputed. Therefore, we have to see whether there are any provisions in the Act which alter the position in law. As seen earlier, neither the definition of "debt" nor of "debtor" is of any assistance to the respondents in support of the contention that each of them is liable for one-third of the mortgage debt.

The learned counsel for the respondents invited our attention to Sections 7 (1), 16, 19, 20 (1) (a), 20 (1) (c), 20 (3), 21 and 29. Section 7 (1) provides that if the payment of debt due by a debtor is guaranteed by surety or if a debtor is otherwise jointly and severally liable for any debt along with other person, and if the surety or such other person is not a debtor, the debtor may make an application under Section 4 for relief in respect of such debt and the Board after consideration of the facts and circumstances of the case proceed with the adjustment of debts under the Act in so far as such applicant is concerned. We do not think that this provision lends support to the contention of the respondents that a joint mortgage debt gets split up. It is not necessary for us in this case to consider as to what would happen in a case where some of the co-mortgagors are "debtors" and the others not "debtors". In the present case, all the respondents are held to be not "debtors". Section 16 merely provides that the question whether an applicant is debtor or not should be decided as a preliminary issue. Section 19 provides for the examination of creditor and debtor. Section 20 provides for taking accounts. Section 21 prescribes that in certain cases rent may be charged in lieu of profits. Section 29 provides for scaling down debts of debtors. None of these provisions lends any support to the contention that the debt due from the respondents under the mortgage is liable to be split up under the Act.

5. It was next urged by Shri Baxi, learned counsel for the respondents, that Section 7 of the Act permits one of the joint debtors to apply for adjustment of his debts, and if he so does, the Board is bound to scale down his debts so far as he is concerned. That being so unless we hold that for the purpose of the Act joint debts are liable to be split up, complications would arise. He gave an illustration of a debt owned by three joint debtors, each of whom is a "debtor" within the meaning of the Act. According to him, in view of the provisions of the Act, if the total debt due from them is Rs. 30,000, the same may be scaled down in respect of one debtor to Rupees 18,000, another to Rs. 17,000 and the third to Rs. 16,000. As the awards against the several debtors are independent awards, each of those awards can be executed against the concerned debtors: in that event the creditor will

be entitled to realise, instead of Rupees 30,000 due to him, Rs. 51,000. We do not think that there is any basis for this apprehension. It is not necessary for our present purpose to find out the true scope of Section 7 or what would be the effect of scaling down a joint debt on the application of one of the debtors. One possibility is that the debt as a whole may be scaled down and the creditor not entitled to collect more than the scaled down debt from any of the debtors. Another possibility is that though the creditor cannot collect more than what is due to him jointly from all debtors, his right to proceed against an individual debtor and his property has to be determined on the basis of the provisions of the Act. We do not think that there is any need to go into these complications in the present case. It is likely that while applying the provisions of the Act along with the provisions of the Transfer of Property Act or the Contract Act, in certain cases, some difficulties may arise. All these difficulties will be solved by reasonably interpreting the relevant provisions of the Act. For our present purposes, all that we have to see is whether on the basis of the provisions of the Act, there is any justification for departing from the ordinary rule that in the case of a joint debt, each one of the debtors is liable for the entire debt. We see no such justification.

6. The learned Judge in support of his conclusion that the mortgage debt in this case is liable to be split up has placed reliance on the decision of this Court in *V. Ramaswami Ayyangar v. Kailash Thevar*, 1951 SCR 292 = (AIR 1951 SC 189). That was a case arising under the Madras Agriculturists' Relief Act, No. IV of 1938. The facts of that case were these: In a suit to enforce a mortgage executed by defendant No. 1 on his own behalf and on behalf of defendants Nos. 2 to 7, the defendant No. 1 remained ex parte and the others contested the suit. A decree for Rs. 1,08,098 was passed by the trial Court. The Madras Agriculturists' Relief Act was passed during the pendency of an appeal and cross appeal, and on the application of defendants Nos. 2 to 7 under the said Act the amount of the decree was scaled down to Rs. 49,255 so far as defendants Nos. 2 to 7 were concerned. So far as defendant No. 1 was concerned, the decree for the full amount remained as it was. Defendant No. 1 thereupon applied for scaling down, but his applica-

tion was rejected. Defendants Nos. 2 to 7 deposited certain amounts and got their properties released. Defendant No. 1 deposited the balance of the amount that remained due under the decree as scaled down on the application of defendants Nos. 2 to 7 and prayed that full satisfaction of the decree may be recorded. The Subordinate Judge rejected this application and the High Court, on appeal, held that defendant No. 1 was entitled to the benefit of the scaling down in favour of defendants Nos. 2 to 7 as the mortgage debt was one and indivisible. On further appeal, this Court reversed the judgment of the High Court and restored that of the Subordinate Judge. Mukherjea, J. (as he then was), speaking for the Court, observed in the course of judgment, "The learned Judges (of the High Court) appear to have overlooked the fact that they were sitting only as an executing court and their duty was to give effect to the terms of the decree that was already passed and beyond which they could not go. It is true that they were to interpret the decree but under the guise of interpretation they could not make a new decree for the parties." From this observation, it is clear that the main consideration which influenced this Court to reverse the decree of the High Court was that whether the decree passed in the suit was correct or not, the executing court could not have gone behind it. This Court also noticed yet another reason for departing from the normal rule that each one of the joint debtors is liable for the entire joint debt. Section 14 of the Madras Agriculturists' Relief Act provides for separation of debt incurred by a joint Hindu family, some of the members of which are agriculturists while others are not. Our attention has not been drawn to any such provision in the Act, nor is it the case of the respondents that they belong to a joint Hindu family. Hence the ratio of the decision in *V. Ramaswami Ayyangar's case*, 1951 SCR 292 = (AIR 1951 SC 189) is inapplicable to the facts of the present case.

7. The provisions of the Bombay Act in material particulars are similar to the provisions of the Act. Interpreting the provisions of the Bombay Act in *Ambu Rama Mhatre v. Bhau Halya Patel*, AIR 1957 Bom 6, the Bombay High Court, speaking through Shah, J. (as he then was) held that it cannot be disputed that when a mortgage is created jointly on

property in which several persons are interested each of the mortgagors is liable in the absence of contract to the contrary to pay the entire debt, and the liability of a mortgagor is not proportionate to the extent of his interest in the mortgaged property; and that position is not altered under the provisions of the Bombay Act. This decision was followed by Bhagwati, J. (as he then was) of the Gujarat High Court in *Dave Sadashiv Jayakrishna v. Rana Govubha*, (1962) 3 Guj LR 1007. We are in agreement with that conclusion.

8. For the reasons mentioned above, we allow the appeal, set aside the order of the High Court and restore that of the appellate court with costs throughout.

RGD

Appeal allowed.

AIR 1969 SUPREME COURT 73

(V 56 C 20)

(From Allahabad: AIR 1964 All 441)

J. M. SHELAT, K. S. HEGDE AND
A. N. GROVER, JJ.

Seth Loon Karan Sethiya, Appellant v.
Ivan E. John and others, Respondents.

Civil Appeal No. 644 of 1965, D/- 25-4-1968.

Contract Act (1872), Section 202 —
T. P. Act (1882), Sections 6 and 130 —
Civil P. C. (1908), Order 21, Rule 16 and
Sections 107 and 146 — Power of attorney
in favour of Bank to execute decree —
Execution by Bank — Objections to maintainability of application by Bank and to jurisdiction of court — Objections entertainable at appellate stage having been based on legal grounds: AIR 1964 All 441
Reversed—Power of attorney, whether revocable — Nature of assignment —
Power of bank to execute.

The appellant was indebted to a Bank. He executed a power of attorney in favour of the Bank authorising the Bank to execute a decree obtained by the debtor against a third person and credit the realisations to the debtor's account. The bank levied execution of the decree. The execution application was filed in the name of the appellant but it was signed by the manager of the Bank as his power of attorney holder. The appellant objected to the execution.

Held, on the tenor of the document as well as from its terms (i) that the power given to the Bank was a power coupled

IL/JL/E131/68

with interest and same was irrevocable in view of Section 202 of Contract Act. AIR 1964 All 441, Affirmed.

(Paras 4 and 5)

(ii) that the Bank was merely authorised to act as agent of the appellant and the appellant continued to be the owner of the amount due under the decree and therefore the Bank was not assignee of the decree in law. The power, however, constituted an equitable assignment of the amount due under the decree or so much of that amount as was necessary for discharging the debts due to it.: (1885) ILR 9 Bom 311 and AIR 1956 Pat 233, Approved; (1830) 39 ER 231 and (1839) 41 ER 265, Ref.

(Paras 4, 6 and 7)

(iii) that on the strength of the equitable assignment in its favour, the Bank could execute the decree, in view of provisions of Section 146 of C. P. Code. AIR 1955 SC 376, Foll. (Para 9)

(iv) that the contentions of the appellant that there being no assignment of decree in favour of bank, it had no locus standi to execute decree and the executing court had no jurisdiction to entertain the application and continue proceeding and that the decree being in his name his agent (Bank) could not proceed with its execution as he wanted to take proceedings in his own hands were legal contentions and High Court was not right in brushing them aside on the ground of not taking them in pleadings or for not urging them before Executing Court. AIR 1964 All 441, Reversed.

(Para 3)

Cases Referred: Chronological Paras
(1956) AIR 1956 Pat 233 (V 43),

Prahlad Pd. Modi v. Tikaitni

Faldani Kumari

8

(1955) AIR 1955 SC 376 (V 42) =

(1955) 1 SCR 1369, Jugal Kishore

Saraf v. Raw Cotton Co. Ltd.

4; 9

(1885) ILR 9 Bom 311, Jagabhai

Lallubhai v. Rustamji Nasarwanji

8

(1839) 41 ER 265 = 4 My and Cr

690, Burn v. Carvalho

7

(1830) 39 ER 231 = 1 Russ and

M. 602, Watson v. Duke of Wellington

7

Mr. M. C. Chagla, Senior Advocate, (Mr. B. Dutta, Advocate and Mr. O. C. Mathur, Advocate, of M/s. J. B. Dadachanji and Co., with him), for Appellant; Mr. C. B. Agarwala, Senior Advocate, (Mr. V. D. Mahajan, Advocate, with him), for Respondent No. 8—The State Bank of Jaipur and others.

The following Judgment of the Court was delivered by

HEGDE, J.: This appeal by special leave arises from the decision of the Allahabad High Court in execution first Appeal No. 26 of 1961 on its file. The appellant is the decree-holder. The contesting respondent is the State Bank of Jaipur—to be hereinafter referred to as the Bank—; other respondents are not interested in the decision in this appeal.

2. The material facts of the case are few. The appellant was indebted to the Bank. On March 27, 1959, he executed a power of attorney in favour of the Bank. That power of attorney inter alia recited:—

“AND WHEREAS I am very heavily indebted to the Bank of Jaipur Limited, Agra Branch and my liability is partly secured by the pledge of my goods and partly by the equitable mortgage of my and my mother's immovable properties with the said Bank;

AND WHEREAS a major part of my said liability is unsecured;

AND WHEREAS I have agreed to appoint the Bank of Jaipur Ltd. to be my true and lawful attorney to execute the said decree in suit No. 76 of 1949 (with which we are concerned in this appeal) which may ultimately be passed in my said appeal and to do the following acts, deeds, matters and things for me, on my behalf and in my name and to credit to my account the sum or sums which may be realised in execution of or under the said decrees;

NOW KNOW YE ALL men and these presents witness that I do hereby irrevocably constitute, nominate and appoint the said Bank of Jaipur Limited, and/or any principal officers and/or any other person or persons that may be appointed by the said Bank of Jaipur Ltd., or its assigns from time to time in this behalf to be my true and lawful attorney for me and on my behalf and in my name to represent me therein and do all acts, deeds, matters and things in connection with the execution of the said decree in the said Agra Suit No. 76 of 1949 and the decree that may be passed in the said appeal that is to say:

1. To proceed in execution of the said decree passed in the said Agra Suit No. 76 of 1949 and to proceed in execution of the decree which may be passed in the said appeal and to realise and recover the decretal amounts.

"8. To withdraw any amount that may be deposited in the courts at Agra and/or Allahabad or any court of justice in the said decree and/or in the decree in the said appeal and/or other proceedings in connection with the execution of the said decree or any other order passed or made therein and/or in any Insolvency Court or from the Official Receiver concerning Insolvency of any of the defendants.

It may be noted that on the day the power of attorney was executed the decree passed in favour of the appellant in Suit No. 76 of 1949 was under appeal. Subsequently in appeal the same was affirmed. Thereafter the bank levied execution of the decree in question on May 8, 1959. The execution application was filed in the name of the appellant but it was signed by the manager of the Bank as his power of attorney holder. The appellant objected to the execution. He contended that the power in question had been obtained "by false representation and assurance held out to the deponent (appellant) that they (the Bank) would advance large sum of money including for the purchase of John's Mill and improvement of the same and for conducting of the appeal and other business". He further averred in his counter statement "that no sum whatsoever at any time was advanced by the Bank against the security of the aforesaid decree and no sum whatsoever is payable to the Bank against the same. There is no lien of the Bank of any nature whatsoever in the aforesaid decree."

3. The objection of the appellant was overruled by the executing court and the execution was directed to proceed. Against that order the appellant unsuccessfully went up in appeal to the High Court. The only question considered by the High Court was whether the power executed in favour of the Bank was a power coupled with interest and hence the same could not be revoked in view of Section 202 of the Indian Contract Act, 1872 (9 of 1872). The High Court answered that question in favour of the Bank. It held that it was a power coupled with interest and therefore the same could not be revoked by the appellant. In the last paragraph of the High Court judgment it is observed:

"Mr. Kirti then tried to argue that the entire execution proceedings are ultra vires but we cannot allow him to argue

an entirely new point. Sethiya's application was founded on specific grounds which have been rejected by the court below and he cannot be permitted to travel outside them in this appeal."

We are unable to spell out the meaning of these observations. It is seen from the grounds of appeal filed before the High Court that the appellant had contended that "because there being no transfer or assignment of the decree in its (Bank's) favour, the Bank of Jaipur Limited, had no legal right or locus standi to execute the decree and the executing court had no jurisdiction to entertain the execution application and to continue the execution proceedings." He had also contended that the execution court cannot go behind the decree, and the execution case must proceed according to the provisions in the Code of Civil Procedure. Obviously the contention of the appellant was that as the decree stood in his name, his agent cannot proceed with its execution as he desired to take into his own hands the execution proceedings. The above contentions of the appellant were purely legal contentions; if they are valid, they go to the root of the matter and therefore the High Court was not right in brushing aside those contentions on the ground that those contentions had not been taken in the pleadings or urged before the executing court.

4. In this appeal we had the benefit of hearing the elaborate arguments of Shri M. C. Chagla for the appellant and of Shri C. B. Aggarwala for the respondent. From the arguments advanced the following questions arise for consideration:

(1) Whether the power of attorney in question is a power coupled with interest; if it is so, whether the same is revocable?

(2) Whether in view of the said power the Bank can be held to be an assignee of the interest in the decree; if so whether that assignment is a legal assignment or an equitable assignment?

(3) Whether the dispute between the appellant and the Bank could have been enquired under Section 47 of the Code of Civil Procedure?

(4) If it is held that the Bank is an assignee of the amount due under the decree or any portion thereof, can it because of that interest execute the decree, despite the objection of the appellant, either under Order XXI, Rule 16 or

under Section 146 of the Code of Civil Procedure? and

(5) The execution application having been filed in the name of the appellant, can the Bank now be permitted to continue the execution in its own right? Some of the questions presented for decision are not free from difficulty. But it is not necessary for us to pronounce on those questions as we are of the opinion that the power of attorney in question is a power coupled with interest, and hence the same is not revocable. Further, the transaction entered into under that document amounts to an equitable assignment of the decree in favour of the Bank to the extent necessary to discharge appellant's debts to the Bank and on the basis of the rule laid down by this Court in *Jugulkishore Saraf v. Raw Cotton Co. Ltd.*, (1955) 1 SCR 1369 = (AIR 1955 SC 376), it is open to the Bank to execute the decree in its own right. Lastly, we attach no importance to the form of the execution, which form was necessitated because of the terms of the power of attorney, looking to the substance of the matter and not being unduly weighed down by the form, we are of opinion that the Bank has been executing the decree in its own right. We shall elaborate our reasons in support of these conclusions presently. In view of our above conclusion we have not thought it necessary to go into the other questions of law raised at the hearing.

5. There is hardly any doubt that the power given by the appellant in favour of the Bank is a power coupled with interest. That is clear both from the tenor of the document as well as from its terms. Section 202 of the Contract Act provides that where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest. It is settled law that where the agency is created for valuable consideration and authority is given to effectuate a security or to secure interest of the agent, the authority cannot be revoked. The document itself says that the power given to the Bank is irrevocable. It must be said in fairness to Shri Chagla that he did not contest the finding of the High Court that the power in question was irrevocable.

6. The next question for decision is whether from the terms of the power of attorney we can conclude that the

appellant had transferred or assigned his rights in the decree or any portion thereof in favour of the Bank. From those terms it is not possible to come to the conclusion that there was any transfer of the interest of the appellant in the decree to the Bank. In that document there are no words of transfer. The document specifically says that the Bank should execute the decree on behalf of the appellant. As per the terms of the document the appellant continues to be the owner of the amount due under the decree, the Bank was merely authorised to act as his agent; and therefore it is not possible to hold that in law the Bank was an assignee of the decree. The interest of the appellant under the decree cannot be said to have been transferred to the Bank either in writing or by operation of law.

7. This takes us to the question whether the power given to the Bank amounts in equity to an assignment of the decree or any portion thereof, to the Bank. From the power of attorney it is clear that the amount under the decree was specifically earmarked for discharge of the debts due to the Bank. It was constituted as a special fund for the said purpose. The power to realise that fund was made over to the Bank with the further authority to set off the amount realised towards the debts due to it. In other words, the power of attorney is an engagement to pay out of the particular fund the debt due to the Bank and hence the same constitutes an equitable assignment of the amount due under the decree or so much of that amount as is necessary for discharging the debts due to it. That rule is recognised in *Watson v. Duke of Wellington*, (1830) 39 ER 231. Therein the plaintiffs, executors of Mr. Sims, had advanced a large sum of money to Marquis of Hastings on the joint bond of the Marquis and a surety. The sum due on the bond exceeded £ 9,000. Towards the end of 1825, the Marquis having returned from India to England, the plaintiffs made repeated applications to him for payment of the debt. The Marquis represented that he was about to receive a large share of the Deccan prize-money; promised that their demand should be paid out of that fund; and begged that, in the meantime, no proceedings might be taken against him or the assets of his surety. On February 6, 1826, Mr. Allen, the solicitor of the plaintiff, again waited on the Marquis, who then stated that he

had directed Col. Francis Doyle, whom he had empowered to receive his share of the prize-money, to pay the debt and costs due to the executors of Mr. Sims; and at the same time the Marquis wrote and delivered to Mr. Allen a letter addressed to Col. Doyle directing him that the executors of Mr. Sims were claimants on that fund for a bond debt with interest. From these facts the Court of Chancery came to the conclusion that there was an equitable assignment in favour of the executors of Mr. Sims of a portion of the prize-money sufficient to meet the debts due to the estate of Mr. Sims by the Duke of Wellington. To the same effect is the decision in *Burn v. Carvalho*, (1839) 41 ER 265. Therein the Court of Chancery held that in equity, an order given by a debtor to his creditor upon a third person having the assets of the debtor to pay the creditor out of such fund is a binding equitable assignment of so much of the fund.

8. The courts in India, which administer both law as well as equity, have followed the rule laid down in the above decisions. In this connection reference may be made to the decision of the Bombay High Court in *Jagabhai Lallubhai v. Rustamji Nasarwanji*, (1885) ILR 9 Bom 311, and of the Patna High Court in *Prahlad Pd. Modi v. Tikaitni Faldani Kumari*, AIR 1956 Pat 233. In the latter case, the Patna High Court held that a transaction similar to the one we are concerned in this case, in substance amounted to allocation of fund to be appropriated towards the debt and therefore it is an equitable assignment. No decision taking a contrary view has been brought to our notice. We think that the rule laid down in the above decisions is a sound rule as it advances the interest of justice. We accordingly adopt that rule.

9. There was great deal of controversy as to whether on the strength of the equitable assignment in its favour, the Bank could execute the decree, even when the decree-holder (appellant) does not want that it should be executed. Shri Chagla argued that an executing court cannot go behind the decree; it has to execute the decree as it stands; so far as that court is concerned, the only person who can execute the decree is he whose name is shown in the decree as the judgment-creditor; unless the decree has been transferred, and the transfer in question recognised under

Order 21, Rule 16 of the Code of Civil Procedure, the court has no power to execute the decree when the judgment creditor does not want it to be executed. He urged that as the decree was not transferred to the Bank either in writing or by operation of law, nor was there any recognition by court of such a transfer, the Bank was incompetent to execute the decree in its own right. He was emphatic that the only method by which an assignee of a decree can execute the decree is by having recourse to Order 21, Rule 16. As the Bank cannot avail of that provision the execution cannot be proceeded with. In support of those contentions Shri Chagla invited our attention to various decisions. It is not necessary for us to go into those controversies in view of the decision of this Court in *Jugulkishore Saraf*, (1955) 1 SCR 1369 = (AIR 1955 SC 376). Therein this Court held that an equitable assignee of a decree who cannot have the benefit of Order 21, Rule 16 can still execute the decree under Section 146 of the Code of Civil Procedure. Shri Chagla contested the correctness of that decision and desired that the question of law should be reconsidered by a larger Bench. We are bound by that decision and no compelling circumstances were made out for its reconsideration.

10. It is true that the execution application shows that the applicant is the appellant and the Bank is merely acting as his agent. In other words, the Bank did not purport to execute the decree in its own name or in exercise of its own right. When the execution application was filed, there was no dispute between the appellant and the Bank. Hence the Bank levied execution of the decree in the name of the appellant as provided in the power of attorney. The controversy between the parties arose during the pendency of the execution. It is only thereafter that it became necessary for the Bank to assert its own right. It serves no useful purpose to direct the present application to be closed merely because it was made in the name of the appellant. In view of our earlier conclusions it will be still open to the Bank to levy fresh execution of the decree. It will be in the interest of the appellant as well as the Bank to allow the present application to go on.

11. For the reasons mentioned above, this appeal is dismissed with costs.
AKJ/D.V.C. Appeal dismissed.

AIR 1969 SUPREME COURT 78

(V 56 C 21)

(From Madhya Pradesh)*

M. HIDAYATULLAH, C. J., R. S. BACHAWAT, C. A. VAIDIALINGAM, K. S. HEGDE AND A. N. GROVER, JJ.

Dhulabhai etc., Appellants v. State of Madhya Pradesh and another, Respondents (In all the appeals).

Civil Appeals Nos. 260 to 263 of 1967, D/- 5-4-1968.

Civil P. C. (1908), Section 9 — Exclusion of jurisdiction of Civil Court — Case law summarised — Held on facts and circumstances of case that suit in question for declaration that provisions of law relating to assessment were ultra vires and for refund of tax illegally collected was not barred by Section 17 of M. B. Sales Tax Act (30 of 1950): First Appeals Nos. 68, 69, 71 and 70 of 1961, respectively, D/- 5-1-1965 (M. P.), Reversed.

The following principles regarding exclusion of jurisdiction of Civil Court may be laid down:—

(1) Where the statute gives a finality to the orders of the special tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil court would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions

* (First Appeals Nos. 68, 69, 71 and 70 of 1961, D/- 5-1-1965, respectively— (M. P.))

about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply: Case law discussed.

Held on the facts and in the circumstances of the case that the suit in question for declaration that the provisions of the law relating to assessment under the M. B. Sales Tax Act (30 of 1950) were ultra vires and for refund of the amount of the tax illegally collected was not barred by Section 17 of the Act: First Appeals Nos. 68, 69, 71 and 70 of 1961, respectively D/- 5-1-1965 (MP), Reversed. (Paras 32, 35)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 271 (V 55) =
1968-2 SCJ 161, Pabbojan Tea
Co. Ltd. v. Dy. Commr., Lakhimpur 19, 21, 35

(1967) C. A. No. 1045 of 1966, D/-
20-7-1967 (SC), Senthilanthan
Chettiar v. State of Madras 18, 35
(1967) 1967-19 STC 66 (SC), Circo's
Coffee Co. v. State of Mysore 18, 35

- (1966) AIR 1966 SC 249 (V 53) = 1965-3 SCR 499, Bharat Kala Bhandar Ltd. (Private) v. Municipal Committee, Dhamangaon 19, 20
- (1966) AIR 1966 SC 1089 (V 53) = 1966-2 SCR 229 = 1966-60 ITR 112, K. S. Venkataraman and Co. v. State of Madras 18, 19, 22, 24, 29, 35
- (1966) AIR 1966 SC 1113 (V 53) = 1966-60 ITR 156, Commr. of Income Tax v. Straw Products 18
- (1966) AIR 1966 SC 1738 (V 53) = 1966-3 SCR 582, State of Kerala v. Ramaswami Iyer and Sons 17, 25
- (1966) 1966-17 STC 505 (SC), Deputy Commercial Tax Officer, Madras v. Rayalaseema Constructions 22
- (1965) AIR 1965 SC 1942 (V 52) = 1966-1 SCR 64, Kamla Mills Ltd. v. State of Bombay 19-21-26, 30, 32, 35
- (1964) AIR 1964 SC 322 (V 51) = (1964) 1 SCR 752, Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh 7, 17, 19, 24, 26, 29, 31, 32
- (1964) AIR 1964 SC 1006 (V 51) = 1964-6 SCR 261, State of M. P. v. Bhailal Bhai 4
- (1964) AIR 1964 SC 1873 (V 51) = 1964-5 SCR 517, Provincial Govt. Madras v. J. S. Basappa 23, 25, 31
- (1961) AIR 1961 Andh Pra 512 (V 48) = 1961 Andh LT 39 (FB), State of Andhra Pradesh v. Firm Subbayya and Sons 7
- (1960) 1960 MPLJ 601 = 1960 MPC 304, Bhailal v. State of M. P. 4, 5, 34
- (1960) 1960 AC 260 = 1959-3 All ER 1, Pyx Granite Co. Ltd. v. Ministry of Housing and Local Govt. 19
- (1958) AIR 1958 SC 560 (V 45) = 1959 SCR 379, State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd. 19
- (1955) AIR 1955 SC 661 (V 42) = 1955-2 SCR 603, Bengal Immunity Co. Ltd. v. State of Bihar 30
- (1951) AIR 1951 SC 23 (V 38) = 1951 SCR 1, State of Tripura v. Province of East Bengal 5, 19
- (1948) AIR 1948 PC 102 (V 35) = 74 Ind App 306, Commr. of I-T. West Punjab N. W. F. and Delhi Provinces Lahore v. Tribune Trust, Lahore 19
- (1947) AIR 1947 PC 78 (V 34) = 74 Ind App 50, Releigh Investment Co. Ltd v. Governor General in Council 7, 9, 10, 13, 17, 19, 20, 24, 28, 29, 30
- (1947) AIR 1947 FC 78 (V 34) = 1947 FCR 130, Kamakkshya Narain Singh v. Commr. of Income Tax, Bihar 19
- (1940) AIR 1940 PC 105 (V 27) = 67 Ind App 222, Secy. of State v. Mask and Co. 7, 9, 12, 17, 24, 28, 31
- (1919) 1919 AC 368 = 88 LJ KB 282, Neville v. London Express Newspaper Ltd. 8
- (1859) 6 CB (NS) 336 = 28 LJ CP 242, Wolverhamtos New Water-works Co. v. Hawkesford 8

Mr. M. C. Setalvad, Senior Advocate, (M/s. Rameshwar Nath and Mahinder Narain, Advocates of M/s. Rajinder Narain and Co. with him), for Appellants (In all the Appeals); Mr. B. Sen Senior Advocate, (Mr. I. N. Shroff, Advocate, with him), for Respondents (In all the Appeals).

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: These are four appeals by certificate against the common judgment of the High Court of Madhya Pradesh (Indore Bench), 16 December, 1964/5 January, 1965 dismissing the suits filed by the appellants to recover sales-tax alleged to be realized illegally from them by the State of Madhya Pradesh, the respondent in these appeals. The suits were earlier decreed by the District Judge, Ujjain. The facts in the suits are common and were as follows:

2. The appellants are dealers in tobacco and have their places of business at Ujjain. They purchase and sell tobacco used for eating, smoking and for preparing bidis. They get their tobacco locally or import it from extra-State places. The former Madhya Bharat State enacted in 1950 the Madhya Bharat Sales Tax Act (Act 30 of 1950) which came into force on May 1, 1950. Under S. 3 of the Act every dealer whose business in the previous year in respect of sales or supplies of goods exceeded in the case of an importer and manufacturer Rupees 5,000 and in other cases Rs. 12,000, had to pay tax in respect of sales or supplies of goods effected in Madhya Bharat

from 1st May 1950. Under Section 5, the tax was a single point tax and it was provided that the Government might by a notification specify the point of the sales at which the tax was payable. The section also fixed the minimum and maximum rates of tax leaving it to Government to notify the actual rate.

3. Government in pursuance of this power issued a number of notifications on April 30, 1950, May 22, 1950, October 24, 1953 and January 21, 1954. All these notifications imposed tax at different rates on tobacco above described on the importer, that is to say at the point of import. The tax was not levied on sale or purchase of tobacco of similar kind in Madhya Bharat. The tax was collected by the authorities in varying amounts from the appellants for different quarters. We are not concerned with the amounts. The appellants served notices under Section 80 of the Code of Civil Procedure and filed the present suits for refund of the tax on the ground that it was illegally collected from them being against the constitutional prohibition in Article 301 and not saved under Article 304 (a) of the Constitution.

4. The State of Madhya Pradesh was formed on November 1, 1956. In *Bhailal v. State of M. P.*, 1960 MPLJ 601 the High Court of Madhya Pradesh declared the notifications to be offensive to Article 301 of the Constitution on the ground that it was illegal to levy a tax on the importer when an equal tax was not levied on similar goods produced in the State. The decision was later confirmed on this point in *State of M. P. v. Bhailal Bhai*, 1964-6 SCR 261 = (AIR 1964 SC 1006). The appellants did not take recourse to the provisions of Article 226 of the Constitution but filed their suits on December 21, 1957.

5. The suits were opposed by the State on the main ground that such a suit was barred by the provisions of Section 17 of the Act which provides:

"17. Bar to certain proceedings.

Save as is provided in Section 17, no assessment made and no order passed under this Act or the rules made thereunder by the assessing authority, appellate authority or the Commissioner shall be called into question in any Court, and save as is provided in Sections 11 and 12 no appeal or application for revision shall lie against any such assessment or order."

The State also pleaded that as appeals against the assessment were pending be-

fore the Sales Tax Appeal Judge the plaintiffs were not entitled to file the suits. By his judgment the District Judge following *State of Tripura v. Province of East Bengal*, AIR 1951 SC 23 and 1960 MPLJ 601 held that such a suit lay when a declaration was sought that the provisions of law relating to an assessment were ultra vires and demand was made for refund of amounts illegally collected under it. On the second point the District Judge held that Section 21 of the Act which allows the Commissioner or the appellate authority to order refund of tax wrongly paid did not apply since no such appeal was proved to have been filed and the tax was not wrongfully paid but wrongfully realised.

6. On appeal by the State the High Court reversed the decision. Before the High Court it was conceded (as it is conceded even now) that the tax could not be imposed in view of the bar of Article 301. The short question thus was whether the suit was barred expressly by Section 17 of the Act or any implication arising from the Act. The contention on behalf of the appellants was that if it was a question of the correctness of the imposition within the valid framework of the statute, rules or notifications Section 17 might have operated but not when the imposition was under a void law. In the latter event the assessee was free to challenge the validity of the law in a civil suit and also to claim a refund.

7. The High Court considered the matter in the light of the decisions of the Judicial Committee in *Raleigh Investment Co. v. G. G. in Council*, AIR 1947 PC 78, *Secretary of State v. Mask and Co.*, AIR 1940 PC 105, *Firm I. S. Chetty and Sons v. State of Andhra Pradesh*, AIR 1964 SC 322, *State of Andhra Pradesh v. Firm Subbayya and Sons*, AIR 1961 Andh Pra 512, and others, and came to the conclusion that the suit was incompetent. The High Court conceded that both aspects of the case were well supported by authority. It is not necessary to enter into the reasons which weighed with the High Court because our discussion of the authorities in this judgment will clearly expose the rival views and the one preferred in the High Court.

8. The question that arises in these appeals has been before this Court in relation to other statutes and has been

answered in different ways. The appeals went before a Divisional Bench of this Court in view of the difficulty presented by the earlier rulings of this Court, they were referred to the Constitution Bench and that is how they are before us. At the very start we may observe that the jurisdiction of the civil courts is all embracing except to the extent it is excluded by an express provision of law or by clear intendment arising from such law. This is the purport of Section 9 of the Code of Civil Procedure. How Section 9 operates is perhaps best illustrated by referring to the categories of cases, mentioned by Willes, J. in *Wolverhampton New Waterworks Co. v. Hawkesford*, (1859) 6 CB (NS) 336. They are:

"One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy the party suing has his election to pursue either that or the statutory remedy. The second class of case is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed and it is not competent to the party to pursue the course applicable to cases of the second class."

The view of Willes, J. was accepted by the House of Lords in *Neville v. London 'Express' Newspaper Ltd.*, 1919 AC 368.

9. To which category do such cases belong in India? The controversy in India has revolved round the principles accepted in 67 Ind App 222 = (AIR 1940 PC 105) and in *Raleigh Investment Co. v. Governor General in Council*, 74 Ind App 50 = (AIR 1947 PC 78). In the first case it was laid down by the Judicial Committee that the ouster of the jurisdiction of a civil court is not to be lightly inferred and can only be established if there is an express provision of law or is clearly implied. In the second case it was held that where a liability to tax is created by statute which gives special and particular remedies against illegal exactions

the remedy contemplated by the statute must be followed and it is not open to the assessee to pursue the ordinary civil process of courts. To the latter case we shall refer in some detail presently. Opinion in this Court has, however, wavered as to how far to go with the dicta of the Privy Council in the two cases.

10. Before, however, we go into the question we may refer to 1964-15 STC 450 = (AIR 1964 SC 1006) (supra). Under that case the notifications were declared to be ultra vires Art. 301 of the Constitution and not saved by Article 304(a). It was therefore held that the portion of the tax already paid must in law be repaid by Government. The question then posed was:

"The question is whether the relief of repayment has to be sought by the taxpayer by an action in a civil court or whether such an order can be made by the High Court in the exercise of its jurisdiction conferred by Article 226 of the Constitution?"

This Court after examining the jurisdiction under Article 226 concluded that the High Court had the power to order refund in proceeding for a writ since complete relief could not be said to be given if only a declaration were given. The Court, however, observed:

"At the same time we cannot lose sight of the fact that the special remedy provided in Article 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defence legitimately open in such actions."

Pointing out that where a defence of limitation could be raised or other issues of fact had to be tried, it was held that the Court should leave the party aggrieved to seek his remedy by the ordinary mode of a civil suit. Therefore in those cases (there were 31 appeals before this Court) where the writ was asked for within three years, this Court upheld the order of refund by the High Court in its writ jurisdiction, but in those cases in which the parties had gone to the High Court after a lapse of 3 years, the order of refund was questioned and not approved observing that the petitioners would be at liberty to seek such relief as they might be entitled to in a civil court if it was not barred by limitation.

11. It will appear from this analysis of the case that this Court accepted the

proposition that a suit lay. This it did without adverting to the provisions of the Act there considered to see whether the jurisdiction of the civil court was barred or not, either expressly or by necessary implication. This Court was, of course, not invited to express its opinion on the matter but only on whether the High Court in its extraordinary jurisdiction could order refund of tax paid under a mistake. Having held that in some cases the High Court should not order refund, this Court merely pointed out that the civil suit would be the only other remedy open to the party. The case cannot, therefore, be treated as an authority to hold that the civil court has jurisdiction to entertain such suits.

12. We may now proceed to consider first the two cases of the Judicial Committee before examining the position under the rulings of this Court. In 67 Ind App 222 = (AIR 1940 PC 105) (supra) the sole question was the jurisdiction of the civil court to entertain a suit to recover an excess amount of customs duty collected from Mask and Co. The suit was filed after an appeal to the Collector of Customs and a revision taken to the Government of India under the Land Customs Act, 1924 was dismissed. The suit was dismissed by the trial Judge on the preliminary ground that the civil court had no jurisdiction. An appeal by Mask and Co. to the High Court succeeded and there was a remit. The appeal to the Judicial Committee followed. Section 188 of the Land Customs Act, 1924 provided *inter alia*:

"Every order passed in appeal under this section shall, subject to the power of revision conferred by Section 191, be final."

The Judicial Committee first made a general observation:

"It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

Then it proceeded to quote Section 188 (as above) and observed:

"By Sections 188 and 191 a precise and self-contained code of appeal is provided in regard to obligations which are created by the statute itself, and it enables the appeal to be carried to the supreme head of the executive Government. It is difficult to conceive what further challenge of the order was intended to be excluded other than a challenge in the Civil Courts."

and came to the conclusion that the jurisdiction of the civil courts was excluded. The decision of the High Court was reversed and that of the trial Judge restored.

13. The next case is 74 Ind App 50 = (AIR 1947 PC 78) (supra). This was an appeal to the Privy Council from a judgment of the Federal Court of India in civil appellate jurisdiction reversing a decree passed by a Special Bench of the Calcutta High Court in its original civil jurisdiction. It arose from a suit filed for recovery of a sum paid under protest pursuant to an assessment to income-tax of the Investment Company on the ground that the computation was under a provision of the Income-tax Act which was *ultra vires* the Indian Legislature. One of the defences in the suit was that whether the said provision was *ultra vires* or not, the civil court was excluded from exercising its jurisdiction by Section 226 of the Government of India Act, 1935 and S. 67 of the Indian Income-tax Act. The provision in question was held *ultra vires* by the High Court and it further held that neither of the two provisions was a bar to the civil court's jurisdiction. The Federal Court in disagreement held that Section 226 of the Government of India Act 1935 barred the jurisdiction and that the provision impugned was not *ultra vires*. The bar of Section 67 of the Income-tax Act was not pressed before the Federal Court.

14. When the case reached the Judicial Committee, the case was considered under Section 67 but not under S. 226. The Judicial Committee was of the opinion that Section 67 barred the jurisdiction. The Investment Company had raised the question before the Income-tax authorities that Explanation 3 to para 4 (1) of the Income-tax Act 1922 was *ultra vires*. This was not accepted and the assessment was made. The Investment Company filed an appeal but did not proceed with it and the assessment was confirmed. The Appellate authority also said in its order that the constitu-

tional question could not be raised before it. The suit was then instituted. Section 67 of the Indian Income-tax Act in specific terms stated:

"No suit shall be brought in any civil court to set aside or modify any assessment made under the Act....."

The result of the suit has already been stated. The Judicial Committee considered this section and observed that the suit in form did not profess to modify the assessment but in substance it did so. The declaration that a certain provision was ultra vires was but a step. According to the Judicial Committee the assessment made under an ultra vires statute was not a nullity and the assessment ought to be taken to proceed on a mistake of law in the course of assessment. Therefore, without going to the question whether the provision impugned was ultra vires or not the Judicial Committee considered the matter.

15. The argument was that the assessment was not one 'under the Act', if effect was given to an ultra vires provision since the provision would be a nullity and non-existent. To discover the force of the prohibition in Section 67 the following tests were applied:—

(a) Does the Act contain machinery by which the assessee can raise the question of the vires of the provision before the special authorities?

(b) This test was not conclusive but one to be considered.

(c) If there was no such machinery and yet the civil courts were barred the vires of Section 67 itself might come in for consideration.

The Judicial Committee, however, came to the conclusion that the Income-tax Act gave the assessee an opportunity to raise the question under the Income-tax Act. The provision for a case stated for the advisory opinion of the High Court was available and even if the authorities refused to state a case, the High Court could be directly approached. The decision of the High Court was also subject to further appeal. Thus there was adequate machinery in the Income-tax Act.

16. The words of Section 67 'under the Act' were construed as the activity of an assessing officer acting as such. That this activity took into consideration an ultra vires provision did not take the matter out of these words. That phrase meant the provenance of the assessment, and not the accuracy or correctness of the assessment or the machinery of the

Income-tax Act or the result of the activity. There was no difference between an incorrect apprehension of the provisions of the Income-tax Act and the invalidity of a provision. The Judicial Committee explained that if this were not so all questions of the correctness of the assessment under the Income-tax Act could be brought before the Court and the section rendered otiose. The section made no distinction between an inquiry into the merits of the assessment and jurisdiction to embark on an enquiry at all. The Civil Courts' jurisdiction in either case was invoked as to the correctness of the assessment and the language of the section precluded consideration of jurisdiction in such circumstances. The Income-tax Act having a suitable and adequate machinery, jurisdiction to question the assessment otherwise than by that machinery was, therefore, held barred. The Judicial Committee even doubted whether a provision such as section 67 was at all necessary in the circumstances.

17. Both these cases thus appear to be decided on the basis of provisions in the relevant Acts for the correction, modification and setting aside of assessments and the express bar of the jurisdiction of the civil courts. The presence of section barring the jurisdiction was the main reason and the existence of an adequate machinery for the same relief was the supplementary reason. The provision for a reference of a question to the High Court was considered adequate to raise the issue of the validity of any provision of law under which the taxing authorities acted. This follows from the *Raleigh Investment Co.'s case*, 74 Ind App 50 = (AIR 1947 PC 78). *Mask and Co.'s case*, 67 Ind App 222 = (AIR 1940 PC 105) was more concerned with the finality to the orders given by the Land Customs Act. Even so in the *Mask and Co.'s case*, 67 Ind App 222 = (AIR 1940 PC 105) room was left for interference by the Civil Court by observing that the civil courts have jurisdiction to examine into cases where the provisions of the Act 'have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure'. These observations were accepted by this Court in 1964-1 SCR 752 = (AIR 1965 SC 322) and in *State of Kerala v. Ramaswami Iyer and Sons*, 1966-3 SCR 582 = (AIR 1966 SC 1738). A passage from the latter case might be quoted here:

"It is true that even if the jurisdiction of the Civil Court is excluded, where the provisions of the statute have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure, the civil courts have jurisdiction to examine these cases."

The observations of the Judicial Committee were thus completely accepted.

18. We may examine how the matter was further viewed in this Court. In two cases this Court laid down that the validity of the provisions under which the authorities act is not a matter for those authorities to decide. In *Circo's Coffee Co. v. State of Mysore*, (1967) 19 STC 66 (SC) it was contended that Section 40 (2) of the Mysore Sales Tax Act 1957 was ultra vires and beyond the competence of the State Legislature. This Court observed:

"It is true that a question as to the vires of Section 40 (2) of the Sales Tax Act was raised, but it is now settled by decisions of this Court that the question as to the vires of a statute which a taxing officer has to administer cannot be raised before him."

The same was again reiterated in *C. T. Senthilanthan Chettiar v. State of Madras*, C. A. No. 1045 of 1966, D/- 20-7-1967 (SC) in the following words:

"...this Court has held in *Venkataraman and Co. v. State of Madras*, 1966-60 ITR 112 = (AIR 1966 SC 1089) that the authorities under a taxing statute are not concerned with the validity of the taxing provisions and the question of ultra vires is foreign to the scope of their jurisdiction. As no such point could be raised before the Income-tax authorities, neither the High Court nor the Supreme Court can go into these questions in a revision or reference from the decision of those authorities. This case was followed in *Commissioner of Income-tax v. Straw Products*, (1966) 60 ITR 156 = (AIR 1966 SC 1113)."

(emphasis supplied)

The party was left to 'appropriate proceedings' without specifying what they would be. Perhaps a suit was meant.

19. It follows that the question of ultra vires of the taxing laws is always open to the civil courts for it cannot be the implication of any provision making the decision final that even void or invalid laws must be enforced without any remedy. Therefore, in *Pabhojan Tea Co. Ltd. v. Dy. Commissioner, Lakhimpur*, AIR 1968 SC 271 after quoting the

observations in *Viscount Simonds Pyx, Granite Co. Ltd. v. Ministry of Housing and Local Govt.*, (1960 AC 260 at p. 286):

"It is a principle not by any means to be whittled down that the subjects' recourse to Her Majesty's Courts for determination of his rights is not to be excluded except by clear words"

our brother Mitter added that the extreme proposition in *Raleigh Investment Co.'s case*, 74 Ind App 50—(AIR 1947 PC 78) has not found favour with this Court. Our learned brother observed:

"This Court was not prepared to accept the dictum in the judgment (*Raleigh Investment Co.*, 74 Ind App 50 = (AIR 1947 PC 78) to the effect that even the constitutional validity of the taxing provisions would have to be challenged by adopting the procedure prescribed by the Income-tax Act—See (1964) 1 SCR 752 at p. 760 = (AIR 1964 SC 322 at p. 324)."

The position was rather strengthened in 1966-2 SCR 229 = (AIR 1966 SC 1089). The question then was whether a suit was not maintainable under Section 18-A of the Madras General Sales Tax Act 1939 (corresponding to Section 67 of the Indian Income-tax Act 1922). The suit followed the decision of this Court in *State of Madras v. Canon Dunkerley and Co. (Madras) Ltd.*, 1959 SCR 879 = (AIR 1959 SC 560) in which 'works contracts' of an indivisible nature were held not to fall within the taxing provisions of the Madras General Sales Tax Act 1939. Section 18-A was pleaded as a bar. It was held that since the provisions of the Madras General Sales Tax Act, 1939 were declared ultra vires in their application to 'indivisible works contracts' the action of the authorities was outside the said Act and not under the Act for the purposes of Section 18-A. The suit was held not barred. Subbarao, J. (as he then was) speaking for the majority distinguished both the *Raleigh Investment Co.'s case*, 74 Ind App 50 = (AIR 1947 PC 78) and the *Commissioner of I-T. Punjab, North West Frontier and Delhi Provinces, Lahore v. Tribune Trust Lahore*, 74 Ind App 306 = (AIR 1948 PC 102) on the ground that no question of the vires of the law was raised in them. Referring to *B. Kamakshya Narain Singh v. Commr. of Income Tax, Bihar*, 1947 FCR 130 = (AIR 1947 FC 48) and 1951 SCR 1 = (AIR 1951 SC 23) Subbarao J. pointed out that the suit was held maintainable in the latter and there was nothing in the former to support the

contention that the question of ultra vires of a statutory provision could be canvassed only through the machinery provided under the statute. Referring next to the case of Firm of Illuri Subbayya Chetty and Sons' case, 1964-1 SCR 752 = (AIR 1964 SC 322) the learned Judge said that the question whether Section 18-A of the Madras General Sales Tax Act 1939 could apply where a particular provision of the Sales Tax Act was ultra vires was left open (see p. 243). The learned Judge next quoted the opinion of the majority in Bharat Kala Bhandar Ltd. v. M. C. Dhamangaon, 1965-3 SCR 499 = (AIR 1966 SC 249) to the following effect:

"But, with respect, we find it difficult to appreciate how taking into account an ultra vires provision which in law must be regarded as not being a part of the Act at all, will make the assessment as one "under the Act". No doubt the power to make an assessment was conferred by the Act and, therefore, making an assessment would be within the jurisdiction of the assessing authority. But the jurisdiction can be exercised only according, as well as with reference, to the valid provisions of the Act. When, however, the authority travels beyond the valid provisions it must be regarded as acting in excess of its jurisdiction. To give too wide a construction to the expression "under the Act" may lead to the serious consequence of attributing to the legislature which owes its existence itself to the Constitution, the intention of affording protection to unconstitutional activities by limiting challenge to them only by resort to the special machinery provided by it in place of the normal remedies available under the Code of Civil Procedure, that is, to a machinery which cannot be as efficacious as the one provided by the general law. Such a construction might necessitate the consideration of the very constitutionality of the provision which contains the expression. This aspect of the matter does not appear to have been considered in Raleigh Investment Co's case".

The learned Judge next considered whether these observations, although obiter, were departed from in Kamla Mills Ltd. v. State of Bombay, 1966-1 SCR 64 = (AIR 1965 SC 1942) and came to the conclusion that that decision did not touch upon the question whether a suit would lie in a case where the assessment was made on the basis of a provision

which was ultra vires the Constitution (see p. 245).

20. Having considered these rulings the learned Judge examined the remedies provided by the Indian Income-tax Act and found that all authorities were creatures of the statute and functioned under it and could not ignore its provisions since the said Act conferred no such 'right' on them. Whether the provisions were good or bad was not their concern. Pointing out that the reference to the High Court under the Indian Income-tax Act was confined to questions arising from the order of the Appellate Tribunal, the learned Judge observed that "the question of ultra vires is foreign to the scope of the Tribunal's jurisdiction" and that if such a question were raised the Tribunal could only reject it on the ground that it had no jurisdiction to decide it, and the High Court and the Supreme Court would be equally incompetent on appeal to go into the question. The learned Judge next considered the decisions of the High Courts into which it is not necessary to go here and on the strength of some observations, which supported his view, stated his view in the following words:

"The legal position that emerges from the discussion may be summarized thus: If a statute imposes a liability and creates an effective machinery for deciding questions of law or fact arising in regard to that liability, it may, by necessary implication, bar the maintainability of a civil suit in respect of the said liability. A statute may also confer exclusive jurisdiction on the authorities constituting the said machinery to decide finally a jurisdictional fact thereby excluding by necessary implication the jurisdiction of a civil court in that regard. But an authority created by a statute cannot question the vires of that statute or any of the provisions thereof whereunder it functions. It must act under the Act and not outside it. If it acts on the basis of a provision of the statute, which is ultra vires, to that extent it would be acting outside the Act. In that event, a suit to question the validity of such an order made outside the Act would certainly lie in a civil court."

As the head-note correctly states the effect of the decision was that the foundation laid by the Judicial Committee in Raleigh Investment Co's case, 75 Ind App 50 = (AIR 1947 PC 78) for construing the expression 'under the Act' had no legal basis.

21. It may be mentioned that in *Bharat Kala Bhandar* case, 1965-3 SCR 499 = (AIR 1966 SC 249) also it was held that there was no machinery provided in the Central Provinces and Berar Municipal Act for refund of tax assessed and recovered in excess of constitutional limits and that the remedy furnished by that Act was inadequate for enabling the assessee to challenge effectively the constitutionality or legality of assessment or levy of tax by a municipality or to recover from it what was realised under an invalid law (see the judgment of Mitter, J. also in *Pabbojan* case, AIR 1968 SC 271 (supra) at p. 276). In *Bharat Kala Bhandar* case, 1965-3 SCR 499 = (AIR 1966 SC 249) (supra) it was pointed out that:

".....one of the corollaries flowing from the principle that the Constitution is the fundamental law of the land is that the normal remedy of a suit will be available for obtaining redress against the violation of a constitutional provision. The Court must, therefore, lean in favour of construing a law in such a way as not to take away this right and render illusory the protection afforded by the Constitution."

22. Again in *Deputy Commercial Tax Officer, Madras v. Rayalaseema Constructions*, (1966) 17 STC 505 (SC) the problem was the same as dealt with in *Venkataraman's Co., Ltd.* case, 1966-2 SCR 229 = (AIR 1966 SC 1089) (supra). The earlier case was followed and it was held that the sales tax authorities having given effect to an ultra vires provision Section 18-A of the Madras General Sales Tax Act, 1939 was no bar to the maintainability of the suit to recover tax paid under such an assessment since the authorities must be taken to have acted outside and not under the Madras General Sales Tax Act.

23. This brings us to the case of *Provincial Government, Madras v. J. S. Basappa*, 1964-5 SCR 517 = (AIR 1964 SC 1873). There too three suits were filed alleging that the goods had passed to extra state points while they were still in the possession and ownership of the seller. Since the property in the goods remained in the seller till the goods had entered into other provinces, the sales could not be subjected to a tax in Madras Presidency. Section 11 (4) of the Madras General Sales Tax Act, 1939 made orders of the taxing authorities final but the Act applied only to sales within the Presidency of Madras and not

outside it. There was at that time no provision to oust the jurisdiction of the civil courts.

24. Section 18-A of which we have spoken earlier and on which most of the cases turned, was added much later. Many of the remedies such as were considered in *Raleigh Investment Co.'s* case, 74 Ind App 50 = (AIR 1947 PC 78) (supra) and *Venkataraman's* case, 1966-2 SCR 229 = (AIR 1966 SC 1089) were also added at the same time as S. 18-A. The question thus had to be decided without an express provision ousting the jurisdiction of the civil court and without the adequate machinery for raising such an issue before the authorities. The only provision which had to be considered was Section 11 (4) which provided 'every order passed in appeal under this section, shall, subject to the powers of revision conferred by Section 12, be final.' The fundamental provision of the Madras General Sales Tax Act, 1939 (as it then stood) was that the sales must be within the Presidency of Madras. The authorities ignoring these provisions held that the outside sales were taxable. Relying upon the dictum of the Judicial Committee in *Mask and Co.'s* case, 67 Ind App 222 = (AIR 1940 PC 105) as applied in *Firm of Illuri Subayya Chetty's* case, 1964-1 SCR 752 = (AIR 1964 SC 322) this Court held that the suits were competent. In the case of this Court last cited the following observation was made:

"It is necessary to add that these observations, though made in somewhat wide terms do not justify the assumption that if a decision has been made by a taxing authority under the provisions of the relevant taxing statute, its validity can be challenged by a suit on the ground that it is incorrect on the merits and as such, it can be claimed that the provisions of the said statute have not been complied with. Non-compliance with the provisions of the statute to which reference is made by the Privy Council must, we think, be non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly, if an appropriate authority has acted in violation of the fundamental principles of judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question."

The Divisional Bench relying upon this observation pointed out:

"It was thus held that the civil court's jurisdiction may not be taken away by making the decision of a tribunal final because the civil court's jurisdiction to examine the order, with reference to fundamental provisions of the statute, non-compliance with which would make the proceedings illegal and without jurisdiction, still remains, unless the statute goes further and states either expressly or by necessary implication that the civil court's jurisdiction is completely taken away.

Applying these tests, it is clear that without a provision like Section 18A in the Act, the jurisdiction of the civil Court would not be taken away at least where the action of the authorities is wholly outside the law and is not a mere error in the exercise of jurisdiction. Mr. Sastri says that we must interpret the Act in the same way as if Section 18A was implicit in it and that Section 18A was added to make explicit what was already implied. We cannot agree. The finality that statute conferred upon orders of assessment subject, however, to appeal and revision, was a finality for the purposes of the Act. It did not make valid an action which was not warranted by the Act, as for example, the levy of tax on a commodity which was not taxed at all or was exempt. In the present case, the taxing of sales which did not take place within the State was a matter wholly outside the jurisdiction of the taxing authorities and in respect of such illegal action the jurisdiction of the civil court continued to subsist. In our judgment the suits were competent."

This case, was therefore stronger than any so far noticed because of the absence of Section 18-A and the elaborate machinery for adequate remedy was introduced later and the tax was illegally collected ignoring the fundamental provisions of the Madras General Sales Tax Act, 1939.

25. However, in 1966-3 SCR 582 = (AIR 1966 SC 1738) (although it was not pointed out what express provision or clear intendment in the Madras General Sales Tax Act, 1939 as it then stood, barred a civil suit) Basappa's case was declared to be wrongly decided. But in that very case the learned Judges considered a rule which gave exemption but held that it did not

give protection because it was enacted after the account period. What if it had been enacted before? The observations in Basappa's case, 1964-5 SCR 517 = (AIR 1964 SC 1873) that if a commodity was not taxable at all or was exempt the civil court would have jurisdiction were, however, not accepted. It was sufficient to have said in Ramaswami Iyer's case, 1966-3 SCR 582 = (AIR 1966 SC 1738) that exemption or no exemption that was for the authorities to decide and not a matter for the civil court. The argument of exemption was rejected by observing:

"There was in the Travancore-Cochin General Sales Tax Act at the material time no express provision which obliged the taxing authority to exclude from the computation of taxable turn-over the amount of sales-tax collected by the dealer." (emphasis supplied)

The reasoning shows that if it had been, the suit might have been held competent. It is not necessary for us to pursue this matter further than to say that the observation that Basappa's case was wrongly decided is open to serious question.

26. This leaves for consideration only the case of 1964-1 SCR 752 = (AIR 1964 SC 322) (supra) and 1966-1 SCR 64 = (AIR 1965 SC 1942). The case of Firm of Illuri Subayya Chetty, 1964-1 SCR 752 = (AIR 1964 SC 322) arose under the Madras General Sales Tax Act, 1939, and Section 18-A was pleaded to make the suit incompetent. The transactions in respect of which tax was recovered were said to be of sales and not purchases and the latter only were to be taxed. It was held that Section 18-A barred the suit because the attempt was to set aside or modify an assessment made under the said Act. It was pointed out that any challenge to the correctness of the assessment must be made before the appellate or revisional forums under the same Act since the character of the transaction was a matter into which the appellate and revisional authorities could go. A litigant who accepted the assessment when he could call it in question by other proceedings under the same Act could not begin a suit. The expression 'under the Act' was sufficient to cover even an incorrect assessment. The assessee firm succeeded in the suit but the High Court held it barred under Section 18-A and also held against the assessee firm on the nature of the transaction.

27. This Court first held that there was no provision in the said Act for bringing a civil suit to question the assessment. Therefore the matter must fall in Section 18-A. This Court analysed the provisions of the said Act which provided by Sections 12-A, 12-B, 12-C and 12-D for special appeals, including an appeal to the High Court, the highest civil court in the State, laying down further that the appeal should be heard by a Division Bench. In the light of this elaborate machinery the question of alternative remedy was approached. It was also pointed out that the assessee firm had itself included these transactions in its returns. Having conceded that tax was payable and not having raised the issue before the appellate authorities constituted under the said Act, it was held that the firm could not be allowed to raise the issue in a suit. This was enough to dispose of the appeal to this Court.

28. The Constitution Bench, however went on to examine the rulings of the Judicial Committee in *Mask and Co.'s* and *Raleigh Investment Co.'s* cases, 67 Ind App 222 = (AIR 1940 PC 105) and 74 Ind App 50 = (AIR 1947 PC 78). Dealing with the former case, this Court pointed out that non-compliance with the provisions of the statute meant non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. The defect of procedure must also be fundamental. In either case the defect must make the order invalid in law and void. The Court went on to observe:

".....In what cases such a plea would succeed it is unnecessary for us to decide in the present appeal because we have no doubt that the contention of the appellant that on the merits, the decision of the assessing authority was wrong, cannot be the subject-matter of a suit because Section 18-A clearly bars such a claim in the civil courts."

29. Referring next to the *Raleigh Investment Co.'s* case, 74 Ind App 50 = (AIR 1947 PC 78) this Court pointed out that under the scheme of the Income-tax Act, the Judicial Committee thought that a question of vires of the provisions could also be considered, but this court did not think it necessary to pronounce any opinion whether this assumption was well founded or not. This point was later considered in *Venkataraman's*

case, 1966-2 SCR 229 = (AIR 1966 SC 1089) by Subbarao, J. (as he then was) and we have sufficiently analysed the views of this Court. The case of *Firm of Illuri Subayya*, 1964-1 SCR 752 = (AIR 1964 SC 322) may be said to be decided on special facts with additional reference to the addition of Section 18-A excluding the jurisdiction of civil court and the special remedies provided in Sections 12-A to 12-D by which the matter could be taken to the highest civil court in the State.

30. This brings us to the last case on the subject. That is the *Kamla Mills' case*, 1966-1 SCR 64 = (AIR 1965 SC 1942). That case was heard by a Special Bench of 7 Judges and is of more binding value than the others. *Kamla Mills Ltd.*, was assessed to certain sales effected between 26 January 1950 and 31st March 1951 which the taxing authorities treated as 'inside sales' and the Company claimed to be 'outside sales' as determined under the *Bengal Immunity Co. Ltd. v. State of Bihar*, 1955-2 SCR 603 = (AIR 1955 SC 661). The judgment in the last cited case was delivered on September 6, 1955. The period for invoking remedies under the *Bombay Sales Tax Act, 1946* under which the assessment was made had expired. A suit was, therefore, filed to claim refund. The *Bombay Act* contained Section 20 which read:

"20. Save as is provided in Sec. 23, no assessment made and no order passed under this Act or the rules made thereunder by the Commissioner or any person appointed under Section 3 to assist him shall be called into question in any Civil Court, and save as is provided in Sections 21 and 22, no appeal or application for revision shall lie against any such assessment or order." The suit was dismissed on the preliminary point arising from this bar. A *Letters Patent Appeal* in the High Court of Bombay also failed. The case came before this Court on a Certificate. It was referred to a Special Bench because Section 20 was challenged as unconstitutional because it barred a suit even where the assessment was unconstitutional. This Court held that as there was adequate remedy to raise the question before the authorities by asking for rectification of the assessment, the section could not be said to deprive him of remedy in such a way as to render the section itself unconstitutional as was hinted in *Raleigh Investment Co.'s case*,

74 Ind App 50 = (AIR 1947 PC 78) about Section 67 of the Indian Income-tax Act. We are not concerned with that question.

31. The next question which was considered was whether the jurisdiction conferred on the taxing authorities included the jurisdiction to determine the nature of the transaction or was the decision about the character of the transaction, a decision on a collateral fact? This Court held that it was the former and not the latter. Therefore the decision was held to be merely an error in assessment which was capable of correction by the usual procedure of appeals etc. The bar of Section 20 was, therefore, held to apply. During the course of the arguments the Special Bench considered Basappa's case, 1964-5 SCR 517 = (AIR 1964 SC 1873) (supra) and distinguished it from the Firm of Illuri Subayya Chetty's case, 1964-1 SCR 752 = (AIR 1964 SC 322) on the ground that the former was not barred by Section 18-A as it did not exist. The Special Bench, however, made an observation to the following effect:

"In cases where the exclusion of the civil court's jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or the sufficiency of the remedies provided for by it may be relevant but cannot be decisive. But where exclusion is pleaded as a matter of necessary implication, such considerations would be very important and in conceivable circumstances, might even become decisive. If it appears that a statute creates a special right or a liability and provides for the determination of the right and liability to be dealt with by tribunals specially constituted in that behalf and it further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted it becomes pertinent to enquire whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

The Special Bench refrained from either accepting the dictum of Mask Co.'s case, 67 Ind App 222 = (AIR 1940 PC 105) or rejecting it, to the effect that even if jurisdiction is excluded by a provision making the decision of the authorities final, the civil courts have jurisdiction to examine into cases where the provisions of the particular Act are not complied with.

32. Neither of the two cases of Firm of Illuri Subayya, 1964-1 SCR 752 = (AIR 1964 SC 322) or Kamla Mills, 1966 1 SCR 64 = (AIR 1965 SC 1942) can be said to run counter to the series of cases earlier noticed. The result of this inquiry into the diverse views expressed in this Court may be stated as follows:

(1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intentment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.

33. In the light of these conclusions we have to see how the present case stands. Section 3 was the charging section. It spoke of the incidence of the tax. It consisted of several sub-sections. These sub-sections laid the tax on dealers according to their taxable turnover and in the case of a dealer who imported goods into Madhya Bharat the taxable turnover was Rs. 5000. Section 14 made certain exclusions and exemptions, and Section 5 prescribed the rate of tax. That Section read:

"5 (1) The tax payable by a dealer under this Act shall be at a single point and shall not be less than Rs. 1-9-0 per cent or more than 6¼ per cent of the taxable turnover, as notified from time to time by the Government by publication in the official gazette:

Provided that Government may in respect of special class of goods charge tax up to 12½ per cent of the taxable turnover.

(2) The Government while notifying the tax payable by a dealer may also notify the goods and the point of their sale at which the tax is payable."

34. In notifying the rate provision was made for rates in respect of importers, the point of time being the import. As the import itself postulated movement of goods, the matter fell within Article 301 and as trade and commerce is declared to be free throughout the territory of India, it became unfree by reason of the tax. The tax would therefore have ex facie offended Article 301. This could however be avoided if the tax was saved by Art. 304 (a). That required that similar goods manufactured or produced in Madhya Bharat had to bear an equal tax. Such equal tax was not imposed hence the notifications were struck down as making discrimination and rendering trade and commerce unfree. This was the effect of Bhailal's case, 1960 MPLJ 601.

35. No doubt the Madhya Bharat Sales Tax Act contained provisions for appeal, revision, rectification and reference to the High Court, the notifications being declared void the party could take advantage of the fact that tax was levied without a complete charging section. This affected the jurisdiction of the tax authorities because they could not even proceed to assess the party. The question was one falling in category No. 3 and 4 rather than in category No. 2 above. It was directly covered by the decision of this Court in Venkataraman's case, 1966-2 SCR 229 = (AIR 1966 SC 1089) read with Circo's Coffee Co., 1967-19 STC 66 (SC) and Senthilanthan Chettiar's case, C. A. No. 1045 of 1966, D/- 20-7-1967 (SC) already referred to. We would have considered this matter again if Venkataraman's case, 1966-2 SCR 229 = (AIR 1966 SC 1089) had been doubted before but it seems to have been followed in the last mentioned case and Pabbojan Tea Company's case, AIR 1968 SC 271. If Kamla Mills Ltd. case, 1966-1 SCR 64 = (AIR 1966 SC 249) had not expressly left the question open we would have applied the earlier case of the Special Bench but as it is we are bound not by the Special Bench decision but by Venkataraman's case, 1966-2 SCR 229 = (AIR 1966 SC 1089). We must therefore allow these appeals with cost. The judgment of the High Court is set aside and suits are decreed. The order for costs shall be as in the suit. The costs in the High Court shall be borne as incurred.

VGW/D.V.C.

Appeals allowed.

AIR 1969 SUPREME COURT 90 (V 56 C 22)

(From Special Industrial Tribunal, Orissa
Bhubaneswar)*

J. M. SHELAT, K. S. HEGDE AND
A. N. GROVER, JJ.

Kalinga Tubes Ltd., Appellant v.
Their Workmen, Respondent.

Civil Appeal No. 26 of 1968, D/- 3-5-1968.

(A) Industrial Disputes Act (1947),
Section 25-FFF — Closure of under-

* (Industrial Dispute Case No. 1 of 1967,
D/- 5-12-1967—Spl. Industrial Tribunal
Orissa)

IL/JL/C611/68

taking — Closure cannot be limited or restricted only to financial, economic or other considerations of like nature — Essence of matter is factum of closure by whatever reasons motivated — Question regarding closure of undertaking not considered by Tribunal in a proper manner — Decision of Tribunal set aside by Supreme Court: Industrial Dispute Case No. 1 of 1967, D/- 5-12-1967, (Orissa), Reversed.

Under Section 25-FFF of the Industrial Disputes Act, 1947, closure of an undertaking cannot be limited or restricted only to financial, economic or other considerations of a like nature. All that has been laid down is that in case of a closure the employer does not merely close down the place of business but he closes the business itself finally and irrevocably. The closure has to be genuine and bona fide in the sense that it should be a closure in fact and not a mere pretence of closure. The motive behind the closure is immaterial and what has to be seen is whether it was an effective one. (Para 8)

The entire set of circumstances and facts have to be taken into account while endeavouring to find out if, in fact there has been a closure and the Tribunal or the court is not confined to any particular fact or set of facts or circumstances. The essence of the matter, is the factum of closure by whatever reasons motivated. It is not necessary that the undertaking must be wound up or that there should have been a transfer of the machinery or the factory before it could be said that the undertaking had been closed down. (Paras 9, 12)

Where a large number of workers about 150 of them virtually staged a gherao in the administrative office building of the Company, during the several hours preceding the declaration of closure by the Management and on account of the gherao the magnitude of which was not inconsequential and which was likely to result in deterioration of relations between the Management and the workers as also the apprehension expressed by the staff of danger to personal safety; Held that the Management was faced with a situation in which it could well take a decision to close down the undertaking. (Paras 10, 11)

Ordinarily, Supreme Court does not interfere with findings of fact of a Tribunal, but where the question whether the undertaking was closed down or not by means of the notice was not consi-

dered in a proper manner by the Tribunal and its approach was erroneous and suffered from a number of infirmities the conclusion arrived at by it cannot be regarded as sacrosanct or final: Industrial Dispute Case No. 1 of 1967, D/- 5-12-1967 (Orissa), Reversed. (Para 15)

(B) Industrial Disputes Act (1947), Section 25-FFF — "On account of unavoidable circumstances" — Laying down of two pre-conditions in proviso to section is significant and must be given due effect — Held, closure of undertaking was not due to unavoidable circumstances beyond control of Management.

The explanation appearing in the proviso to Section 25-FFF of the Industrial Disputes Act, 1947, gives some indication of the anxiety of the legislature to expressly rule out certain contingencies which ordinarily could have been pleaded by the employer as unavoidable circumstances beyond his control. In the normal working of business of a commercial undertaking financial losses or accumulation of undisposed of stocks and the expiry of the period of the lease or the licence can ordinarily go a long way in establishing that it has virtually become impossible to carry on the business. Notwithstanding all this the legislature provided that in spite of the aforesaid difficulties or impediments or obstacles the conditions of the proviso would not be satisfied merely by the happening or existence of the circumstances embodied in the explanation. The reason for doing so seems to be that whenever such difficulties, as are mentioned in the explanation, arise the employer is not expected to sit idly and not to make an all out effort like a prudent man of business in the matter of tiding over these difficulties for saving his business. The legislature was apparently being very stringent and strict about the nature of the circumstances which would bring them within the proviso. The laying down of two pre-conditions therein in the language in which they are couched is significant and must be given due effect. (Para 21)

Where a large number of workers virtually staged a gherao in the Administrative Office of the Company during the several hours preceding the declaration of closure by the Management but there had been no incidents involving physical violence, nor a series of incidents of any kind for any length of period preceding the gherao and no speech had been delivered by any of the represen-

tatives of the workers threatening or inciting bodily injury, with the exception of the gherao, there was nothing to furnish justification for the Management for thinking that the working of the factory would involve unusual exertion or expense. Moreover, when neither any Director nor other principal officer of the company was produced by the Management before the Tribunal to give any other facts and circumstances from which it could be inferred that it appeared to the Management that it was not possible to carry on the business by acting in a business like way and without unusual exertion it could not be said that the closure of the undertaking was due to unavoidable circumstances beyond the control of the Management and hence compensation would be payable as if the undertaking was closed down "for any reason whatsoever" within Section 25-FFF (1) of the Act: AIR 1960 Cal 356 and (1829) 173 ER 1229, Ref.

(Paras 18, 19, 20, 22)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 1002 (V 55) =
Civil Appeal No. 1829 of 1967,
D/- 8-2-1968, Indian Hume Pipe
Co. Ltd. v. Their Workmen 8
(1967) AIR 1967 SC 1869 (V 54) =
(1967) 3 SCR 901, Andhra Prabha
Ltd. v. Secy. Madras Union of
Journalists 8
(1963) AIR 1963 SC 569 (V 50) =
1962-2 Lab LJ 227, Express
Newspapers Ltd. v. Their Work-
men and Staff 8
(1963) Civil Appeal No. 1005 of
1963 (SC), Workers of the Pudu-
kottah Textile Mill v. The
Management 8
(1960) AIR 1960 SC 815 (V 47) =
(1960) 3 SCR 207, Tea Districts
Labour Association Calcutta v.
Ex-Employees of Tea District
Labour Association 8
(1960) AIR 1960 Cal 356 (V 47) =
64 Cal WN 694, Bhattacharya
Rubber Works Private Ltd. v.
Bhattacharya Rubber Works
Workers' Union 17
(1829) 173 ER 1229, M and M 476,
Granger v. Dent 17
Mr. Sachin Choudhury, Senior Advoca-
case, (M/s. M. K. Banerjee and B.
Parthasarathi, Advocates, and M/s.
J. B. Dadachanji, O. C. Mathur and
Ravinder Narain, Advocates of M/s. J. B.
Dadachanji and Co., with him), for Ap-
pellant; M/s. Gobind Das and R. Gopala-
krishnan, Advocates, for Respondents.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave against the award of the Special Industrial Tribunal, Orissa, in which the principal question which has to be determined is whether there was a closure of its undertaking by the appellant Company pursuant to a notice issued on October 3, 1967, to its workmen on account of the Gherao, if it is permissible to use that expression, of the staff and Officers of the Company in its Administrative Office building from about 2 P. M., of October 1, 1967 till 5 A. M. of the morning of October 2, 1967, and if it was not a closure whether there was a refusal by the management of the Company to employ its workmen amounting to a lock out.

2. The material facts may be succinctly stated. The appellant is a public Company having its registered office at Choudwar in the district of Cuttack. It maintains some branch offices at Calcutta and Madras. It carried on the business primarily of manufacturing and selling iron pipes and poles and has been employing a large number of workmen, their number being 922 on the relevant date. According to findings of the Tribunal, which have not been questioned it is a prosperous concern and between the years 1959 and 1964 the appellant paid its employees bonus equivalent to four months' wages every year except in 1961-62. For the subsequent three years bonus was paid at the rate of four per cent under the Payment of Bonus Act, 1965 (Act XXI of 1965). The workmen were not satisfied with the payment at the rate of four per cent and raised a dispute. On August 22, 1965, they made a demand for bonus at the rate of 20 per cent of their annual salary or wages for the accounting year 1966-67. Certain correspondence started between the Assistant Labour Commissioner, the Management and the General Secretary of the Union (Kalinga Tubes Mazdoor Sangh). On September 21, 1967, the Manager (Administration) notified that bonus at the rate of 4 per cent for the year 1966-67 had been sanctioned by the Management. The General Secretary of the Union asked the Manager to review the above notice and to send a copy of the balance sheet for the accounting year in question. On September 25, 1967, the District Labour Officer informed the Mana-

ger that he had fixed October 2, 1967, (11 A. M.) for discussion in the matter of the payment of bonus. The Manager sent a copy of the balance sheet to the General Secretary of the Union on October 1, 1967. On that day the General Secretary asked the Assistant Labour Commissioner to examine the profit and loss account for the year 1966-67 and to apply the requisite formula under the Payment of Bonus Act. On October 1, 1967 about 150 workmen assembled after 2 P. M. at the gates of the Administrative Building in which about 40-47 members of the staff were present. They were not allowed to leave the Building till 5 A. M. next day. Meanwhile the Officer-in-charge Choudwar Police Station, Executive Officer, Notified Area Council, Choudwar (a First Class Magistrate), the Additional Superintendent of Police, Cuttack, the Sub-Divisional Officer Sadar Cuttack and the Assistant Labour Commissioner went to the place where all this was happening. The factory remained closed on October 2, 1967 on account of Gandhi Jayanti. On the morning of October 3, 1967 the Management issued a notice declaring a closure of the factory. It is common ground that uptill now the factory has remained closed. The Management offered to pay wages for one month in lieu of notice and reduced compensation under the proviso to sub-section (1) of Sec. 25-FFF of the Industrial Disputes Act, 1947 (hereinafter called the Act). It has not been disputed that out of 922 workers, 613 workers accepted compensation under the aforesaid provision. The remaining workmen, however, neither agreed to nor accepted any compensation. The reference under the Act was made on November 3, 1967 by the Government of Orissa primarily for adjudicating whether the appellants had declared a lock out by means of the notice dated October 3, 1967 or whether it was a closure.

8. The notice which was issued by the Management on the morning of October 3, 1967 may be reproduced:

"The Management hereby notified that as a direct consequence of the continued and sustained illegal activities of the workmen and their pre-concerted and pre-meditated acts since 1st October 1967 by illegally keeping confined and forcibly resisting the exit of the staff and some of the officers of the Company in the Administrative Office building, from

about 2 P. M. of the 1st October 1967 till they were forcibly rescued by the Police authorities at about 5 A. M. on the morning of 2nd October 1967 and thereafter continuing with their illegal trespass into the premises of the Company in the aforesaid Administrative Office, and refusal to allow entry of any of the staff and officers of the Company into the said building; and the consequent refusal by the officers and supervisory staff of the Company to carry on their normal work and discharge their functions being reasonably apprehensive of their safety, it has become impossible to continue to run the factory and its subsidiary Sections and Departments any further. The Company hereby notifies that there will be a complete closure of the Factory on and with effect from 6 A. M. of the 3rd October 1967."

Before the Tribunal the main controversy centred on the question whether there was a closure of its undertaking by the appellant or whether there was a refusal to employ the workmen which would fall within the expression 'Lock out' as defined by Section 2 (1) of the Act. The Tribunal found:—

(i) Since the morning of October 3, 1967 there had been no production by the factory of the appellant and the operatives had not been employed;

(ii) By September 30, 1967 there was absolutely no idea to close down the undertaking or business as the Annual General Meeting of the Company had taken place on that date and there was no evidence that there was any meeting of the Board of Directors or of the shareholders between the Annual General Meeting and the issue of notice of October 3, 1967 to workmen which would show that any decision had been taken to close down the undertaking.

(iii) The trade results of the business carried on by the Company during the year 1966-67 would never have induced any business man to close down the undertaking. The Company had earned a net profit of 2.27 lacs of rupees after making payment of 20 lacs of rupees of loan to the Industrial Financial Corporation of India and incurring a loss of Rs. 63, 720 in the disposal of certain loan bonds. Orders for manufacturing pipes had been received till October 2, 1967 for more quantities than were in stock. Similarly orders had been received for manufacturing poles. Therefore the Management could not have intended the clos-

ing down of the undertaking till the notice was issued.

(iv) The closure of the factory or place of work was a direct consequence of the alleged illegal activities of the workmen and of the refusal by the officers and supervisory staff to carry on their normal work and not due to shortage of raw materials, fuel or power. The Tribunal concluded that the action taken by the Management in issuing the notice on the morning of October 3, 1967 and in suspending the work in the factory amounted to a lock-out and was not a closure. The Tribunal proceeded, however, to state the other steps which were taken by the Management. A notice was given to the workers that they should hand over vacant possession of the quarters which had been allotted to them. A letter was written to the Chief Minister of Orissa on October 2, 1967 that the Management had no other alternative but to close down the factory. Information was similarly sent to the Superintendent of Police Cuttack in which a request was also made for posting a platoon of police force in the factory premises at the Company's cost. A copy of the notice of closure dated October 3, 1967 was sent to the Chief Inspector of Factories. It was pointed out to the Tribunal that the employees in the Branch Offices at Calcutta and Madras had already been discharged and the members of the staff at Choudwar had been notified that their services would be terminated within a period of three months after the closure by January 3, 1968. The Tribunal considered that all such action which had been mentioned was taken consistently with the notice of closure. It was held that the Management had in fact declared a lock-out in the guise of a closure. The Tribunal was considerably influenced by the absence of any evidence that the business of the Company was going to be wound up or the Company was going to be dissolved.

4. The Tribunal next proceeded to decide whether the declaration of a lock-out was legal. It was found that two cases relating to gratuity and retrenchment between the same periods were pending adjudication before the Tribunal and therefore a declaration of lock-out contravened the provisions of Section 23 of the Act; such contravention being illegal under Section 24. It was noted that the assertion of the Union that the workmen went to work in the

factory on the early morning of October 3, 1967 had not been challenged on behalf of the Management. According to the Tribunal the declaration of a lock-out had been made only because a portion of a large number of workmen had assembled at the Administrative building of the Company and demanded bonus at a higher rate during their off time. Further the Standing Orders of the Company made ample provision for taking disciplinary action for misconduct of the workmen. It was, therefore, improper on the part of the Management, so says the Tribunal, to remove all the operatives of the mill; even most of them were admittedly not present at the scene of occurrence. The following portion of the order of the Tribunal, however, deserves to be reproduced:

"But the immediate cause for declaration of the 3rd October 1967 though couched in exaggerated language in Ex. 44 was undoubtedly the action taken by some of the workmen at the Administrative building from about 2 P. M. of the 1st October 1967 till 5 A. M. of the 2nd October 1967. There cannot be any manner of doubt that about 40 members of the staff working in that building had at some stage been prevented from going out. Officers from the Labour Directorate, Police Officers and Magistrates admittedly went there. It was not a pleasure with them to keep vigil over the building for that entire night for nothing. The Secretary of the Mazdoor Sangh remained present there. It does not appear from the evidence that he requested the assembled workmen to leave the premises of the Administrative building when the chance of N. K. Mahapatra, the Manager (Administration) or any other Senior Officer going there became absolutely remote. Such a conduct on the part of the Secretary of the Union and some of the workmen can hardly be appreciated."

The Tribunal directed that the workmen should be given by the Management at least half of the wages respectively due to them normally for the period between October 3, 1967 and such subsequent date when they would be reinstated in their respective posts and allowed to work in the factory. It declined to determine what compensation would be payable to the workmen under the provisions of Section 25FFF of the Act if it was a case of closure.

5. Mr. Sachin Chaudhury for the appellant Company has contended that the

approach of the Tribunal to the determination of the dispute referred has not been altogether correct. According to him the essential and basic question was whether the undertaking of the appellant Company had been closed down on October 3, 1967. The question of a lock-out could only arise if the first question was answered in the negative. According to Mr. Chaudhury even if it were to be found that the undertaking had not been closed down it did not necessarily follow that there had been a lock-out. At any rate, the matter of closure had to be decided without mixing it with considerations relevant for a lock-out.

6. Now in the Act Section 25-FFF alone contains provisions which relate to closing down of an undertaking. The expression "closure" which has been frequently used by the Tribunal as also by us is nowhere defined and this expression can only be used for the sake of convenience. In Industrial law, apart from closure, the workers can be put out of action by lay off (defined by Sec. 2 kkk), lock-out [defined by Section 2 (1)] and retrenchment [defined by Sec. 2 (oo)].

7. Section 25-FFF so far as it is material for our purposes reads:—

"(1) Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure, shall, subject to the provisions of sub-section (2) be entitled to notice and compensation in accordance with the provisions of Section 25F, as if the workman had been retrenched:

Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under Cl. (b) of section 25F shall not exceed his average pay for three months.

Explanation.—An undertaking which is closed down by reason merely of financial difficulties (including financial losses) or accumulation of undisposed of stocks (or the expiry of the period of the lease or the licence granted to it where the period of the lease or the licence expires on or after the first day of April 1967) shall not be deemed to have been closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this sub-section.

(2)

It is obvious that if the appellant Company had closed down its undertaking on the morning of October 3, 1967, no other question will arise except in the matter of relief involving payment of compensation which has to be on different basis according as the case falls within the first sub-section or the proviso thereto.

8. The case of the Management itself was that the events which took place between the after-noon of October 1, 1967 and the early morning of October 2, which may compendiously be called a Cherao were solely responsible for the decision to close and the actual closure of the factory as also the undertaking with the exception of the continued working of the waterworks which was meant for supply of water to the colony which had developed around the factory. It was never claimed nor has it been claimed before us on behalf of the Management that it was due to any financial or economic reasons or other compelling circumstances of a similar nature that the closure was effected. So far as the present case is concerned the Tribunal travelled into an extraneous and irrelevant field when it took into account the profitable business which the company was doing and the profits which it was making or was expected to make. The Tribunal was apparently labouring under the impression that according to certain judicial decisions there can be a closure of an undertaking only when there are financial difficulties and the undertaking becomes a losing concern. It is difficult and indeed no such principle entrenched in Industrial law has been brought to our notice, to accept that the closure of an undertaking can be limited or restricted only to financial, economic or other considerations of a like nature. All that has been laid down is that in case of a closure the employer does not merely close down the place of business but he closes the business itself finally and irrevocably vide *Express Newspapers Ltd. v. Their Workers and Staff*, (1962) 2 Lab LJ 227 at p. 232 = (AIR 1963 SC 569 at p. 574). The closure has to be genuine and bona fide in the sense that it should be a closure in fact and not a mere pretence of closure. *Tea Districts Labour Association, Calcutta v. Ex-Employees of Tea District Labour Association*, (1960) 3 SCR 207 at p. 213 = (AIR 1960 SC 815 at p. 817). The motive behind the closure is immaterial and what has to be seen is whether it was an effective one.

Vide Andhra Prabha Ltd. v. Secy., Madras Union of Journalists, AIR 1967 SC 1869 at p. 1876. In Andhra Prabha's case the Board of Directors of the Company had passed a resolution to sell items of printing machinery and equipment to one private limited company followed by an agreement in writing on April 22, 1959 between the two companies. On April 23, the workers were informed that the company had sold the right of editing and publishing in regard to the publications. On the next day the workers adopted a resolution to go on strike. Some acts of sabotage and gross indiscipline were committed but the strike of the workers started on April 27, 1957. The publication of all the papers was consequently stopped. On April 29, 1959, a closure notice was published. It would seem that the closure was found, apart from other facts, on the evidence of Ram Nath Goenka, the Chairman of the Board of Directors that after the demonstration of the labourers before his office on April 28, 1959 and the prevention of ingress and egress of the members of the staff to and from the office building he decided to close down his undertaking at Madras. In Indian Hume Pipe Co. Ltd. v. Their Workmen, Civil Appeal No. 1829 of 1967, D/- 8-2-1968 = (reported in AIR 1968 SC 1002) decided on February 8, 1968, the question was whether the closure of the factory at Barakar in West Bengal by the appellant which was a big engineering concern having factories and establishments spread all over India and Ceylon, was illegal and unjustified. The whole area of the factory and its surroundings including the Grand Trunk Road was coal bearing land from which coal had been extracted from a very long time. There had been a subsidence of the earth on two occasions. As a result the approach road to the appellant's factory had been badly damaged, apart from the damage to a portion of the manager's quarters. The Chief Inspector of Mines wrote to the appellant that its factory was situated in a place which was dangerous for habitation. In December 1964, notice was given of closure and termination of service to all the workmen individually. The Tribunal while holding that the factory had been actually closed down with effect from January 1, 1965 went into the question as to whether the closure of the factory was bona fide and justified. The reason for closure was attributed to certain dis-

putes which had been taking place between the appellant and its workers from 1957 onwards. This is what Mitter J., speaking for the Court said, "In our opinion it was not open to the Tribunal to go into the question as to the motive of the appellant in closing down its factory at Barakar and to enquire whether it was bona fide or mala fide with some oblique purpose, namely to punish the workmen for the Union activities in fighting the appellant." It was emphasised that the expression 'bona fide' used in certain decisions of this Court did not refer to the motive behind the closure but to the fact of the closure. The decision in the Workers of the Pudukottah Textile Mills v. The Management, Civil Appeal No. 1005 of 1963 (SC) is quite apposite for the purposes of the present case. The Pudukottah Textile Mills had been working since 1948. By 1959 the financial position of the Mills was in a bad way. The Management had changed hands and the relations between the Union to which the workers belonged and the new Management were not very cordial. The new Management tried to bolster up the rival union which would be amenable to its control. In 1960 a fire broke out in the godown of the Mills which resulted in the destruction of a very large part of the cotton stored in the godown. The new Management gave notice on May 26, 1960 stating that the work would remain suspended until further notice because of the fire. On June 7, 1960, the new Management notified that the Directors had decided to close down the Mills with effect from June 8, 1960. Thereafter the Mills closed down and a dispute arose about closure. The reasons given by the Management for closing the Mills were (i) unsatisfactory financial position; (ii) difficulty in procuring cotton at reasonable prices; and (iii) the possible risk involved in storing cotton. Only a month later on August 11, 1960 the Directors decided to reopen the Mills. It was stated that this was done on account of the representations received from the workmen who had been thrown out of employment etc. A large number of old workmen were re-employed but a substantial number of them were not re-employed. This Court expressed the view that the past history of disputes between the new Management and the Union of the appellant would not be sufficient to draw the conclusion that the closure which took place on June 8, 1960 was not a

bona fide closure. It was held that the closure was genuine and there were three clinching circumstances. The first was that the closure was necessitated by the fact that a very large quantity of stock of cotton was burnt (by fire) which broke out in May 1960 and which resulted in a loss of cotton worth rupees five lacs to the Mills which were already in a difficult financial position. The second circumstance was that a large amount of money was paid as retrenchment compensation by the Mills. The third circumstance was, which was considered to be conclusive, that the new Management felt that the Union of the appellant might have been behind the fire. Moreover in a letter by the new Management to the Commissioner of Labour a suspicion was expressed about sabotage in the matter of fire. The Court felt that if the Management had closed down the Mills because of a suspicion that the fire was the result of sabotage and not mere accident and that it would not be safe to reopen the factory in the near future, it could not be said that the closure was not bona fide and was resorted to merely for smashing the Union.

9. The discussion of the above decisions yields the result that the entire set of circumstances and facts have to be taken into account while endeavouring to find out if, in fact, there has been a closure and the Tribunal or the court is not confined to any particular fact or set of facts or circumstances. In one case the Management may decide to close down an undertaking because of financial or purely business reasons. In another case it may decide in favour of closure when faced with a situation in which it is considered either dangerous or hazardous from the point of view of the safety of the Administrative staff or members of the Management or even the employees themselves to carry on the business. The essence of the matter therefore, is the factum of closure by whatever reasons motivated.

10. There can be no manner of doubt from what has been found by the Tribunal itself that a large number of workers about 150 of them virtually staged a gherao during the several hours preceding the declaration of closure. If their demand was purely one in respect of bonus there was no justification for keeping about 40 members of the Administrative staff virtually confined inside the building and stopping all ingress and egress as apparently was the case

till the police came to the rescue. It is in the evidence of Shri Harekrishna Mahapatra who was Officer Incharge of the Police Station Choudwar and whose evidence does not appear to have been fully read by the Tribunal that he arrived at the Administrative Office at 4 or 5 p. m. on October 1, 1967. He reported the incident to the Superintendent of Police and the Sub-Divisional Officer Cuttack. The latter directed the Executive Officer Choudwar to take charge of the situation. He came to the spot. Other officers also arrived. It was on a warning by the Sub-Divisional Officer that force would be used unless the workers left that they went away and allowed the officers to leave the building. During the period he was there some canteen boys brought tiffin at about 11.30 p. m. for the staff but it was not allowed to be taken to them. Some of the workers threw the same away and some partook of it.

11. A question immediately arises whether the Management could take a quick decision to close the undertaking of manufacturing iron pipes and poles on account of the gherao the magnitude of which was not inconsequential and which was likely to result in deterioration of relations between the Management and the workers as also the apprehension expressed by the staff of danger to personal safety. It is not possible to say in categorical terms that closure in the aforesaid background and circumstances would not be genuine or that a great deal of suspicion would attach to the action taken simply because the Company was a profitable and going concern. There are a number of supplemental facts which show that the Management was faced with a situation in which it could well take a decision to close down the undertaking. The Deputy Chief Accounts Officer wrote a letter to the Manager (Administration) on October 7, 1967 (Ex. 3) giving his version of what was experienced by him. It was pointed out that the staff had to pass through anxious hours under conditions of torture due to wrongful confinement. It was only at 5.30 a. m. on the morning of October 2, that they were rescued by the Sub-Divisional Officer with the help of a strong police cordon. The letter concluded by saying "considering the above circumstances, unless an assurance is given and adequate arrangements are made for the protection and safety of the staff in the

Administrative Office Building, I regret my inability to attend office from tomorrow." An application received from the staff of the Accounts Department on similar lines (Ex. 4) was also enclosed. As mentioned before, the Tribunal has itself noted and castigated the conduct of the workmen and the Secretary of their Union who was present during the material period and who did not make any effort to persuade the assembled workmen to leave the premises of the Administrative Building.

12. Mr. Govind Das for the respondent workmen has not seriously challenged what he calls the Management's prerogative to close down the undertaking, but according to him the Management is not at liberty to ignore all business reasons which must form the paramount consideration for taking such a decision. He has also emphasised that the closure should be of the entire business which means, according to him, that the Company should have been wound up. He has stressed the various matters which prevailed with the Tribunal about the absence of evidence to show that any decision was taken by the Board of Directors or the shareholders of the Company to close down the undertaking as a whole. It is maintained by him that it was only the manufacturing part of the undertaking which was stopped and this cannot possibly be equated with the closing down of the undertaking itself. It must be remembered that the notice which was served by the Management in the matter of closure contained an affirmative declaration not only about the closing down of the factory but also that compensation would be payable under the proviso to Section 25-FFF (1). It was open to the respondents to ask for production of any resolution passed by the Board of Directors or other formal decision taken by the Management and if any such attempt had been made and the necessary documents had not been produced all adverse inferences could have been legitimately drawn against the Company. There is no evidence that the action taken by the Manager (Administration) was not ratified or accepted by the Board of Directors or any other officer who was competent to accord approval. As a matter of fact, it appears that a large number of employees at Calcutta and Madras offices as also at the Choudwar Office had been discharged from service or notices of termination of ser-

vice had been served on them (vide Ex-29 and the statement of Management witness No. 4 G. C. Rath, page 164 of the printed record). It appears from Ex. 33 that only a very small staff of officers and workers had been retained in service out of the permanent cadre. There is no indication that after the closing down of the factory, any orders were being obtained or executed in the matter of sales. It is difficult to accede to the contention of Mr. Govind Das that the Company must be wound up or that there should have been a transfer of the machinery or the factory before it could be said that the undertaking had been closed down.

13. It is significant that in the case of the Workers of the Pudukottah Textile Mills, Civil Appeal No. 1005 of 1963 (SC) there had neither been winding up of the entire business nor had the machinery or the factory been disposed of and actually the Mills had been reopened only after an interval of a few months and yet it was held that there had been a closure.

14. Mr. Govind Das has sought to reinforce the view of the Tribunal that in the notice relating to closure all that was stated was that the factory would be closed. This, according to him, attracted the application of the rule laid down in the Express Newspaper Limited case, 1962-2 Lab LJ 227 = (AIR 1963 SC 569) decided in 1962, that in a case of closure the employer does not merely close down the place of business but he closes the business itself and so the closure indicates the final and irrevocable termination of the business itself. Lock-out, on the other hand, indicates the closure of the place of business and not the closure of business itself. The mere statement in the notice, however, cannot be conclusive in the present case and it is the totality of facts and circumstances on which a conclusion has to be reached whether the undertaking was closed down.

15. Ordinarily, as it is well known this Court does not interfere with findings of fact of a Tribunal, but the question whether the undertaking was closed down or not by means of the notice dated October 3, 1967 was not considered in a proper manner by the Tribunal and its approach was erroneous and suffered from a number of infirmities of such a nature that the conclusion arrived at by it cannot be regarded

as sacrosanct or final. The entire facts and circumstances established in this case impel us to hold that the Management of the appellant closed down its principal undertaking of manufacturing and selling iron pipes and poles on October 3, 1967. It may be mentioned that it was and is not the case of the respondent that the continuation of water supply meant continuation of the undertaking of the appellant.

16. The only question which now remains to be determined is whether the undertaking was closed for "any reason whatsoever" or it was "on account of unavoidable circumstances" beyond the control of the employer. The measure of compensation payable when an undertaking is closed down for any reason whatsoever is different as provided in sub-section (1) which refers to the provisions of Section 25F as if the workmen had been retrenched. In the notice served by the Management in the present case it was claimed that the undertaking had been closed down under the proviso to sub-section (1) and actually compensation has been paid to the 613 workers in accordance with the proviso.

17. Mr. Chaudhury has submitted that the main circumstances which were both unavoidable and beyond the control of the employer were (a) the gherao and (b) the apprehension of the staff of danger to personal safety. These circumstances were not the creation of the employer but of the workmen who indulged in the gherao. According to Mr. Chaudhury a decision had to be taken preceding the issuance of the notice by the Management whether the undertaking should be closed down. The aforesaid circumstances prompted the Management to take a decision in favour of closure and therefore the notice rightly mentioned that compensation would be payable under the proviso. He has drawn attention to a decision of a learned Single Judge of the Calcutta High Court in *Bhattacharya Rubber Works Private Ltd. v. Bhattacharya Rubber Works Workers' Union*, AIR 1960 Cal 356. In that case there had been lock-outs, strikes etc. followed by slow down of work. A prominent member of the Workers' Union declared over a loud-speaker that there was going to be bloodshed. A bomb was thrown into the canteen and there were several cases of stabbing. When some machinery was being removed for repairs, some workmen obstructed the transfer of the

machinery. There were further cases of stabbing followed by criminal prosecution. Ultimately the founder Director and the other Directors of the Company found it impossible to carry on the business and were forced to close down. Apart from the question of factum of closure it had to be decided whether the closing down of the undertaking in that case was for unavoidable circumstances beyond the control of the employer. D. N. Sinha J. (as he then was) expressed the view that where the circumstances amounted to vis major or acts of God or enemy action or an act of the State in exercise of its powers of Eminent Domain, that of course would be circumstances beyond the control of the employer. But the matter did not stop there. The closure must be bona fide and it must not be arbitrary. According to him circumstances could not be called unavoidable if the employer by acting in a business like way or as a prudent man of business could avoid it. He was not expected to take a negative attitude. But at the same time he was not called upon to make any unusual effort to avoid any particular circumstances necessitating a closure of his business. Reliance was placed on the observations of Tindal C. J., in *Granger v. Dent*, (1829) 173 ER 1229 in which a charter-party contained the expression "unavoidable impediment". It was found by the learned Judge that all the instances which had been mentioned showed that the matter had gone out of hand. Undoubtedly, if the Management had engaged an army of Darwans they could have restored peace but that was not what the employer could be compelled to do as he was entitled to run his business in a normal manner. The closure had been made bona fide and was real. The company went into liquidation and the excise licences had been surrendered. All this would not have been done unless the Management found that it was impossible to continue the work of the factory in the prevailing circumstances.

18. The circumstances which had been proved in the Calcutta case were much stronger than the present case in which there had certainly been a gherao for the period mentioned previously but there had been no incidents involving physical violence nor a series of incidents of any kind for any length of period preceding the gherao. No speech had been delivered by any of the representative of the workers threatening or inciting

bodily injury. With the exception of the gherao, therefore, there was nothing to furnish justification for the Management for thinking that the working of the factory would involve unusual exertion or expense.

19. Mr. Chaudhury had laid a good deal of stress on the apprehension expressed in some of the letters, already noticed, of the members of the staff which was conveyed to the Management by means of Exs. 3 and 4 dated October 2. But in those letters it was clearly stated that the staff would not be able to attend the office unless arrangements were made for their protection and safety. The evidence of the Station House Officer Harekrishna Mahapatra was that the police force which had been sent at the time of the happenings on the material dates had not been withdrawn even up to the time he gave his deposition before the Tribunal and that the factory and the surrounding premises were being watched and guarded by armed police force till Bali Jatra and thereafter by the Orissa Military Police. There is nothing to indicate that the police had refused to give protection even to the individual members of the staff or the expenditure cost of securing protection for them would have been so exorbitant that the company could not have afforded it.

20. Mr. Chaudhury quite properly and fairly accepts that the burden was on the company to bring the case within the proviso and to prove that the circumstances were unavoidable and were also beyond the control of the company for closing down the undertaking. Furthermore such a determination has to be objective on such evidence as may be placed on the record. It is significant that neither N. K. Mahapatra, the Manager (Administration) who had issued the notice dated October 3, 1967 nor any Director or other principal officer of the company was produced by the Management before the Tribunal to give any other facts and circumstances from which it could be inferred that it appeared to the Management that it was not possible to carry on the business by acting in a business-like way and without unusual exertion.

21. The explanation appearing in the proviso gives some indication of the anxiety of the legislature to expressly rule out certain contingencies which ordinarily could have been pleaded by the

employer as unavoidable circumstances beyond his control. In the normal working of business of a commercial undertaking financial losses or accumulation of undisposed of stocks and the expiry of the period of the lease or the licence can ordinarily go a long way in establishing that it has virtually become impossible to carry on the business. For instance, if a Company is heading towards liquidation its business will, in normal course, have to be closed down. Similarly if the period of lease of the site on which a factory has been set up has expired and there is no provision for its renewal or extension it would ordinarily present insurmountable difficulty in the way of the working of an undertaking by a Company or a commercial concern. Notwithstanding all this the legislature provided that in spite of the aforesaid difficulties or impediments or obstacles the conditions of the proviso would not be satisfied merely by the happening or existence of the circumstances embodied in the explanation. The reason for doing so seems to be that whenever such difficulties as are mentioned in the explanation arise, the employer is not expected to sit idly and not to make an all out effort like a prudent man of business in the matter of tiding over these difficulties for saving his business. The legislature was apparently being very stringent and strict about the nature of the circumstances which would bring them within the proviso. The laying down of two preconditions therein in the language in which they are couched is significant and must be given due effect.

22. After considering the entire facts and circumstances of the present case we are not satisfied that the closure of the undertaking was due to unavoidable circumstances beyond the control of the appellant. Thus compensation would be payable as if the undertaking was closed down "for any reason whatsoever" within Section 25FFF (1) of the Act.

23. In the result the appeal is allowed and the award of the tribunal is set aside. The appellant shall be liable to pay compensation under the principal part of sub-section (1) of Section 25FFF of the Act. In view of the entire circumstances the parties are left to bear their own costs.

MBR/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 101
(V 56 C 23)

J. C. SHAH AND V. BHARGAVA, JJ.

S. Rajagopal, Appellant v. C. M. Armugam and others, Respondents.

Civil Appeal No. 1553 of 1967, D/- 3-5-1968.

(A) Civil P. C. (1908), Order 41, R. 27 — Scope — Appeal before Supreme Court — Request for direction to produce certain register — Even if register is produced, oral evidence to prove that register and to meet inferences following from that register necessary — Held that in the circumstances request for summoning of that register could not be allowed. (Para 7)

(B) Constitution (Scheduled Castes) Order (1950), Para 3 — Professing Hindu Religion — Meaning of — Appellant who was converted to Christianity openly marrying Hindu wife — Marriage, though not celebrated according to strict Hindu rites prevalent among Adi Dravidas, not being also in Christian form — Subsequently in 1961 appellant getting his service cards corrected so as to show him as an Adi Dravida Hindu instead of Christian — Appellant contesting general elections in 1962 as member of Adi Dravida Hindu Caste — Appellant also giving out caste of his children as Adi Dravida Hindus — Held, these various steps taken by appellant clearly amounted to public declaration of his professing Hindu faith. AIR 1965 SC 1179 and AIR 1958 Bom 296, Rel. on. (Para 14)

(C) Hindu Law — Conversion — Effect on caste — Hindu belonging to Adi Dravida Caste converted to Christianity — He ceases to belong to Adi Dravida Caste — Burden lies on him to prove that on reconversion he again became member of Adi Dravida Caste.

The Christian religion does not recognise any caste classifications. All Christians are treated as equals and there is no distinction between one Christian and another of the type that is recognised between members of different castes belonging to Hindu religion. In fact, caste system prevails only amongst Hindus or possibly in some religions closely allied to Hindu religion like Sikhism. Christianity is prevalent not only in India, but almost all over the world and nowhere does Christianity recognise caste division. The tenets of

Christianity militate against person professing Christian faith being divided or discriminated on the basis of any such classification as the caste system. It must, therefore, be held that, when a person got converted to Christianity in 1949, he ceased to belong to the Adi Dravida caste and consequently, the burden lay on him to establish that, on his reverting to the Hindu religion by professing it again, he also became once again a member of the Adi Dravida Hindu Caste: AIR 1952 Mad 474, Rel. on; AIR 1960 Mys 27 and AIR 1954 SC 236, Disting. (Paras 6, 17)

(D) Hindu Law — Conversion — Ordinarily, membership of caste under Hindu religion is acquired by birth — (Quaere) whether membership of caste can be acquired by conversion to Hinduism or after reconversion to Hinduism. Case law Ref. (Para 22)

Cases Referred: Chronological Paras

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| (1967) Election Petn. No. 9 of 1967, D/- 28-8-1967 (Andh Pra), Kothapalli Narasayya v. Jammanna Jogi | 20 |
| (1967) Election Petn. No. 10 of 1967, D/- 5-9-1967 (Andh Pra), Allam Krishnaiah v. Orepalli Venkata Subbaiah | 20 |
| (1967) Election Petn. No. 18 of 1967, D/- 28-9-1967 (Andh Pra), K. Narasimha Reddy v. G. Bhupathi and Manik Rao | 20 |
| (1967) Election Petn. No. 9 of 1967, D/- 5-10-1967 (Mad), K. Paramalai v. M. Alangaran | 20 |
| (1965) AIR 1965 SC 1179 (V 52) = (1965) 1 SCR 849, Punjab Rao v. D. P. Meshram | 13 |
| (1960) AIR 1960 Mys 27 (V 47) = 21 Ele. LR 303, B. Shyamsunder v. Shankar Deo Vedalankar | 18 |
| (1958) AIR 1958 Bom 296 (V 45) = ILR (1959) Bom 229, Karwade v. Shambharkar | 13 |
| (1954) AIR 1954 SC 236 (V 41) = 1954 SCR 817, Chatturbhuj Vithaldas v. Moreshwar Parashram | 18 |
| (1952) AIR 1952 Mad 474 (V 39) = ILR (1953) Bom 106, G. Michael v. S. Venkateswaran | 17 |
| (1943) AIR 1943 Lah 51 (V 30) = 205 Ind Cas 290 (SB), Mrs. A. D. Vermani v. Mr. B. D. Vermani | 20 |
| (1940) AIR 1940 Mad 513 (V 27) = ILR (1940) Mad 653, Durga Prasad Rao v. Sudarsana-swami | 20, 21 |

(1934) AIR 1934 Mad 630 (V 21)=

67 Mad LJ 389, Guruswami

Nadar v. Irulappa Konar

(1886) ILR 9 Mad 466, Adminis-

trator-General of Madras v.

Anandachari

Mr. A. K. Sen, Senior Advocate (M/s. S. S. Javali and M. Veerappa, Advocates, with him), for Appellant; Mr. Sarjoo Prasad, Senior Advocate (M/s. Balakrishnan and S. S. Khanduja, Advocates with him), for Respondent No. 1.

The following Judgment of the Court was delivered by

BHARGAVA, J.: The appellant, S. Rajagopal, the first respondent C. M. Armugam, and the other three respondents all filed nominations for election to the Legislative Assembly of the State of Mysore in the last General Elections held in 1967. The nomination papers were scrutinised on 21st January 1967, when respondent No. 1 (hereinafter referred to as "the respondent") raised an objection against the nomination of the appellant on the ground that the nominations were in respect of a seat reserved for a member of a Scheduled Caste, and the appellant was not an Adi Dravida Hindu, but an Indian Christian, so that he was disqualified to stand as a candidate for this reserved seat. The Returning Officer rejected the objection and accepted nomination paper of the appellant. Respondents Nos. 2 to 4 withdrew their candidature, so that, when actual election took place, the two contesting candidates were the appellant and the respondent. The Constituency concerned was Kolar Gold Fields and polling in that constituency took place on 15th February, 1967. The appellant was declared as the successful candidate on the ground that he received a larger number of votes than the respondent. The respondent then filed an election petition under Section 81 of the Representation of the People Act, 1951, challenging the validity of the election of the appellant on the same ground that he had taken before the Returning Officer, viz., that the appellant was not qualified to be a candidate to fill the seat reserved for a member of the Scheduled Caste from the Kolar Gold Fields Constituency. The respondent admitted that the appellant was originally born as an Adi Dravida Hindu, but it was pleaded that he got himself converted as a Christian some time in the year 1949, shortly before he obtained admission in Woor-

hees High School at Vellore and to the Woorhees Christian Hostel attached to that School. The respondent's case was that, thereafter, the appellant continued to be a Christian and, consequently, he could not be held to be a member of the Scheduled Caste for his candidature for the reserved seat under the Constitution (Scheduled Castes) Order, 1950. The appellant resisted this plea taken in the election petition on various grounds, but we are only concerned in this appeal with two of those grounds which formed the subject-matter of issues 1 and 3 framed by the High Court of Mysore at the trial of the election petition. Those issues are as follows:—

"(1) Does the petitioner prove that on the date of election the respondent No. 1 was an Indian Christian (Protestant) by conversion and not a member of the Scheduled Caste (Adi Dravida), professing Christian Religion and therefore, not qualified to stand for election to the Mysore Legislative Assembly as a candidate for the seat reserved for Scheduled Castes from the Kolar Gold Fields Constituency and his election should be declared void under Section 100 (1) (a) of the Representation of the People Act, 1951?"

* * * * *

(3) Even if it is true that Respondent No. 1 got himself converted to Christianity, does the respondent prove the facts and the circumstances set out in Para 11 of the written statement and do they constitute in fact and in law conversion back to Hindu religion as alleged; and is it enough in law to give him the benefit of the Constitution (Scheduled Castes) Order 1950?"

2. The High Court took the evidence both documentary and oral, adduced by the parties on these issues and then decided both the issues against the appellant and in favour of the respondent. That Court, therefore, held that the election of the appellant was void, because he was not qualified to be a candidate for the seat reserved for a member of the Scheduled Caste and, consequently set aside the election of the appellant. The appellant has now come up in appeal against that judgment under Section 116A of the Representation of the People Act, 1951.

3. The Constitution (Scheduled Castes) Order, 1950 was made by the President in exercise of his powers conferred by clause (1) of Article 341 of the Constitution which is as follows:—

"341. (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory, as the case may be."

4. The relevant provisions of this Order, with which we are concerned, are contained in paragraphs 2 and 3 and item 1 (2) of Part VIII of the Schedule to the Order, which are as follows:—

"2. Subject to the provisions of this Order, the castes, races or tribes or parts of, or groups within castes or tribes specified in Part I to XIII of the Schedule to this Order shall, in relation to the States to which those Parts respectively relate, be deemed to be Scheduled Castes so far as regards members thereof resident in the localities specified in relation to them in those Parts of that Schedule.

3. Notwithstanding anything contained in Paragraph 2, no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of a Scheduled Caste.

THE SCHEDULE

PART VIII — Mysore

1. Throughout the State except Coorg, Belgaum, Bijapur, Dharwar, Kanara, South Kanara, Gulbarga, Raichur and Bidar districts and Kollegal taluk of Mysore District:—

1. * *
2. Adi Dravida.
3. * * *

5. These provisions make it quite clear that a person, who is an Adi Dravida, is qualified to be a candidate for the seat reserved for a member of the Scheduled Caste from this Kolar Gold Fields Constituency in the State of Mysore, provided he satisfies the additional requirement of paragraph 3 of the Order of not professing a religion different from the Hindu or the Sikh religion at the time when his qualification to be a candidate has to be determined. In the present case, therefore, the validity of the candidature of the appellant depended on the question whether, in January and February, 1967, when he was nominated as a candidate for the reserved seat and was declared elected, he was or was not a member of Adi

Dravida Caste and professing a religion different from the Hindu or the Sikh religion. The case of the respondent, as mentioned above, was that the appellant had become a Christian in 1949 and was still professing the Christian religion at the time of the elections in 1967. This plea was met by the appellant by pleading that he never became a convert to Christianity and that, in any case, even if it be held that he had once become a Christian in the year 1949, he was professing the Hindu religion at the relevant time in the year 1967. These are the pleas, that are reflected in issues 1 and 3 reproduced above.

6. The High Court, in deciding the first issue in favour of the respondent and against the appellant, relied primarily on the evidence of P. W. 9, I. J. Rajamanikyam, who, in the year 1949, was employed as an Assistant Master in Woorhees High School at Vellore and was the Assistant Manager of the Woorhees Christian Hostel. P. W. 9 stated that an application, Ext. P. 11, for admission of the appellant as an inmate of the Woorhees Christian Hostel was made by C. A. Joseph who was the Manager of the Hostel. This Hostel was meant for the residence exclusively of persons belonging to the Christian faith. In the application, Ext. P. 11, the appellant was shown as an Indian Christian and not as Adi Dravida or Hindu. At that time, it became necessary to ascertain whether the appellant was in fact a Christian. According to him, C. A. Joseph ascertained all the particulars of the appellant and it was on that basis that he showed the appellant in the application as an Indian Christian. C. A. Joseph, who was the Manager, interviewed the appellant and then asked P. W. 9 to admit him to the Hostel. P. W. 9 further stated that, in that connection the appellant showed to him his baptismal certificate which indicated that he had been baptised as a Christian at Ponnai Anicut Festival which is held by the Christians in the month of March or April every year. On being cross-examined, he indicated that the certificate had been issued by the Presbyter of Yehamur Church situated in North Arcot District 15 miles from Vellore. He also deposed that, during his stay in the Hostel, the appellant was observing the Christian Religion and was taking kindly towards the religious activities of the hostel, though it appeared that, being a recent convert to Christianity, he was not quite

conversant with the forms of worship or service. P. W. 9 was himself supervising the religious observances by the inmates of the hostel. This evidence given by P. W. 9 is further corroborated by the document, Ext. P. 12, which is the register of admissions and withdrawals of the Woorhees High School. In that admission register, against item No. 14—Religion of the student pertaining to the appellant the entry is Indian Christian. Thus, the oral evidence given by P. W. 9 showing that the appellant was a Christian when he was admitted to the Woorhees High School and the Woorhees Christian Hostel is corroborated by the entry made in Ext. P. 11 by C. A. Joseph as guardian of the appellant and the entry in the Register of Admissions and Withdrawals of the Woorhees High School Ext. P. 12. On this corroboration, the High Court believed the statement of this witness that the appellant had shown to him his Baptismal Certificate also. The High Court noted the fact that there was no reason at all for this witness to give false evidence against the appellant; and the only suggestion made that he bore a grievance to the appellant, as the appellant refused to make a recommendation for him for a particular appointment, has not been established and has no basis. The High Court also took notice of various other pieces of evidence which corroborated the statement given by P. W. 9. Learned counsel for the appellant has not been able to advance before us any cogent reason far disagreeing with this assessment of the evidence of this witness by the learned Judge of the High Court who had the benefit of watching this witness when his evidence was actually recorded before him.

7. The main argument for challenging the evidence of this witness on behalf of the appellant was that the respondent, in adducing evidence before the High Court to prove the conversion of the appellant to Christianity, did not summon the Baptismal Register of the Church which would have been the best evidence available for this purpose. This argument was considered and rejected by the High Court and we agree with the view taken by that Court. There was no clear evidence that every Church was maintaining a baptismal register. It was only in his cross-examination that it was elicited from P. W. 9 that the baptismal certificate shown to him by the appellant had been issued by the Presbyterian

of Yehamur Church. The respondent, when he came in the witness-box, stated that he had not been informed of this fact earlier by P. W. 9, so that he was not in a position to summon the baptismal register of that Church. No doubt, the appellant examined some witnesses of whom particular mention may be made of P. W. 9, Rev. Ashirvadam, who stated that as a general practice, in all Churches several registers are maintained and one of these registers is the Baptismal Register. Even if this evidence be accepted at its full value, the only conclusion to be drawn from it is that a baptismal register must have been maintained by the Presbyterian of Yehamur Church; but there is no evidence at all to indicate that in such a register entries were used to be made even of baptisms which took place not in the Church itself, but at a fair like the Ponnai Anicut Festival. It is significant that even the appellant himself who had better opportunity of summoning the baptismal register of Yehamur Church than the respondent, because the fact that the baptismal certificate had been issued by the Presbyterian of that Church was disclosed by P. W. 9 only in his cross-examination on 27th July, 1967 during the trial of the election petition and not earlier, did not care to have that register summoned. A request was put forward before us during the hearing of this appeal to direct the production of that register, but we do not think that there is any justification under Order 41, Rule 27 of the Code of Civil Procedure for summoning it at this stage, particularly because even if that register is brought, a lot of oral evidence would have to be recorded in order to have the register properly proved and to give an opportunity to the party, against whom inferences follow from it, to meet those inferences. In the circumstances, we have not entertained the request for summoning of that register at this stage. This is all the more so as we find that there is no evidence to show that an entry relating to the baptism of the appellant must necessarily find a place in the register in view of the fact that the appellant was baptised at the Ponnai Anicut Festival and not in the Church. Consequently, the non-summoning of that register by the respondent does not detract from the value to be attached to the statement of P. W. 9.

8. This evidence finds support from other documentary and oral evidence

which has been relied upon by the High Court. P. W. 10, S. A. Thomas, was also working as a Contractor, the appellant took service with his father. At that time also, the appellant was employed as a Christian and his service card was prepared showing him as a Christian. Then, there is evidence that, subsequently, the appellant entered Government service and even there in the service cards he was shown as a Christian. Some witnesses have come to prove that the appellant actually attended Church for prayers after his conversion in 1949. Evidence was also given to show that the appellant worked as the organiser of a body known as the Kavinjar Nataka Sabha where his name was shown as Victor Rajagopal indicating that he had adopted a personal name after conversion as a Christian which is not adopted by Hindus. We do not think that it is necessary for us to discuss that evidence in detail. We are inclined to agree with the High Court that all this oral and documentary evidence provides very strong corroboration of the statement of the principal witness P. W. 9 and establishes the fact that the appellant has been converted to Christianity in 1949 before he joined the Woorhees High School.

9. We were also taken through the evidence of the respondent's witnesses, some of whom tried to prove that the appellant had never attended any Christian Church. The principal witness on whose evidence reliance was placed in this behalf, was R. W. 9, the Presbyter of the Maskam Church. It was elicited from him that the appellant was not entered in the register of members of the congregation of the Church; but the cross-examination of the witness shows that it is not necessary that every one attending the Church for prayers must also be a member of the congregation and his name must find a place in that register. The evidence of some other witnesses, who have come to state that they never saw the appellant going for prayers to the Church, can hardly carry any weight, because it is not necessary that they should have been present on those occasions when the appellant actually attended the Church services. The learned Judge of the High Court, who had the benefit of watching the demeanour of all the witnesses examined before him, did not consider the evidence of these witnesses sufficient to rebut the proof given on behalf of the respondent.

10. Reference was also made by learned counsel to some documentary evidence before us, but none of those documents establishes that the appellant was not converted to Christianity in 1949. Some of these documents are of the period prior to 1949 and consist of papers relating to schools attended by the appellant in which the appellant is shown as an Adi Dravida Hindu. They are consistent even with the case of the respondent, because the plea put forward was that the appellant was converted to Christianity in 1949 and that he was a Hindu earlier. Particular reliance was placed on a transfer certificate issued by the K. G. F. High School which mentions the date of issue of the Transfer Certificate as 10th June, 1949. In that certificate there is an entry that the appellant was studying free, because he was Adi Dravida Hindu. It was urged that this document would indicate that right up to 10th June, 1949, the appellant was a Hindu. This is not correct. The certificate mentions the actual date of leaving the school as 1st March, 1949, and the capacity in which the appellant was allowed to study free can only refer to the period ending on that date. The case set up by the respondent and accepted by the High Court is that the appellant was converted to Christianity at the Ponnai Anicut Festival which took place in the end of March or beginning of April, 1949, so that this entry showing the appellant as a Hindu up to 1st March, 1949 does not militate against the finding that he was converted to Christianity at that Festival.

11. The remaining documents relied upon by the appellant relate to much later period and they also cannot, therefore, show that the appellant was not converted to Christianity in the year 1949. The earliest of these documents is of the year 1956. That document is the entry in the birth register in respect of the first child born to the appellant's wife. Then, there are entries relating to birth of other children in 1959 and 1961. In these documents also, however, the caste or the religion of the appellant is not mentioned. The community of the appellant's wife alone is shown as Adi Dravida. In this case, it is not disputed that when the appellant married in 1955, his wife was a Hindu, so that these entries showing her as Adi Dravida cannot prove that the appellant was a Hindu and not a Christian. There are subsequent entries in school

records where the appellant showed the caste of his children as Adi Dravida Hindus. These documents are of a very much later period and relate to a time when the appellant had already been elected from a reserved seat as a member of the Scheduled Caste in the election of 1962. It, however, appears that, before this election in 1962, the appellant decided to show himself as a Hindu and, consequently, he made applications and got entries altered in his service cards so as to show him as Adi Dravida Hindu instead of a Christian. It was thereafter that he contested the election to the Mysore Legislative Assembly in 1962 from the reserved constituency claiming himself to be a member of a Scheduled Caste. This evidence relating to this period cannot again be held to disprove the conversion of the appellant to Christianity in the year 1949 which has been amply established by the evidence given by the respondent discussed above. At best, it can only show that by this time the appellant started putting himself forward as a Hindu. Consequently, we affirm the finding of the High Court that the appellant was converted to Christianity in the year 1949, so that he lost the capacity of an Adi Dravida in which capacity alone he could have been held to be a member of a Scheduled Caste under the Constitution (Scheduled Castes) Order, 1950.

12. This brings us to the second question whether the appellant, at the time of election in the year 1967, was professing Hindu religion as alleged by him and whether on that account he could claim that he was a member of a Scheduled Caste, having again become an Adi Dravida Hindu. We are inclined to accept the evidence given on behalf of the appellant that, though he had been converted to Christianity in 1949, he did later on profess the Hindu religion. The circumstances which establish this fact are:

(i) that he married a Hindu Adi Dravida woman in the year 1955;

(ii) that against the entries of the children in birth registers of the Municipality, the caste of the mother was shown as Adi Dravida Hindu;

(iii) that his children were brought up as Hindus;

(iv) that, when his children were admitted in school, they were shown as Hindus in the school records;

(v) that, in 1961, the appellant made an application for correction of his ser-

vice cards and had the entry of his religion as Christianity altered, so that he was subsequently shown as Adi Dravida Hindu in those cards;

(vi) that, in 1962, in the general elections, he stood as a candidate from a Reserved Scheduled Caste Constituency and

(vii) that he again stood as a candidate in this general election of 1967 from the same Reserved Scheduled Caste Constituency.

13. We do not consider it necessary to discuss in detail the evidence which has been given on behalf of the appellant to prove all these facts enumerated above. Almost all of them are supported by documentary evidence. The only question that needs consideration is whether these facts establish that, at the time of the general election in 1967, the appellant was professing Hindu religion. The word "profess" used in paragraph of the Constitution (Scheduled Castes) Order, 1950 came up for interpretation by this Court in *Punjab Rao v. D. P. Meshram*, (1965) 1 SCR 849 at p. 859 = (AIR 1965 SC 1179 at p. 1184). After referring to the decision of the Bombay High Court in *Karwade v. Shambhakar*, ILR (1959) Bom 229 = (AIR 1958 Bom 296) and the meaning of the word "profess" given in Webster's New World Dictionary, and Shorter Oxford Dictionary, the Court held:—

"It seems to us that the meaning "to declare one's belief in, as to profess Christ" is one which we have to bear in mind while construing the aforesaid order, because it is this which bears upon religious belief and consequently also upon a change in religious belief. It would thus follow that a declaration of one's belief must necessarily mean a declaration in such a way that it would be known to those whom it may interest. Therefore, if a public declaration is made by a person that he has ceased to belong to his old religion and has accepted another religion he will be taken as professing the other religion. In the face of such an open declaration it would be idle to enquire further as to whether the conversion to another religion was efficacious. The word "profess" in the Presidential Order appears to have been used in the sense of an open declaration or practice by a person of the Hindu (or the Sikh) religion."

14. In our opinion, if this test is applied to the present case, it must be

held that at least by the year 1967, when the present election in question took place, the appellant had started professing the Hindu religion. He had openly married a Hindu wife. Even though the marriage was not celebrated according to the strict Hindu rites prevalent amongst Adi Dravidas, the marriage was not in Christian form and is alleged to have been in some reformed Hindu manner. Thereafter, the appellant in 1961 took the step of having his service cards corrected so as to show him as an Adi Dravida Hindu instead of a Christian. This was followed by his candidature as a member of the Adi Dravida Hindu Caste in the general elections in 1962; and, subsequently, he gave out the caste of his children as Adi Dravida Hindus. These various steps taken by the appellant clearly amount to a public declaration of his professing the Hindu faith. The first step of the marriage cannot of course, by itself be held to be a sufficient public declaration that the appellant believed in Hindu religion; but the subsequent correction of entries in service cards and his publicly standing as a candidate from the reserved Scheduled Caste Constituency representing himself as an Adi Dravida Hindu taken together with the later act of showing his children as Adi Dravida Hindus in the school records must be held to be a complete public declaration by the appellant that he was by this time professing Hindu religion. Finally in the general elections of 1967 also, the appellant, by contesting the seat reserved for a member of a Scheduled Caste on the basis that he was an Adi Dravida Hindu, again purported to make a public declaration of his faith in Hinduism. In these circumstances, we hold that, at the relevant time in 1967, the appellant was professing Hindu religion, so that paragraph 3 of the Constitution (Scheduled Castes) Order, 1950 did not apply to him.

15. This, however, does not finally settle the matter in favour of the appellant, because, even if it be held that paragraph 3 of the Constitution (Scheduled Castes) Order, 1950 did not disqualify the appellant, it is necessary for the appellant to show that he satisfied all the requirements of paragraph 2 of that Order. Under paragraph 2, a person to be eligible for a reserved seat must be a member of a caste specified by the President in the Order. The appellant claims that, when he started pro-

fessing Hindu religion again, he reverted to his original caste of birth, viz., Adi Dravida Hindu. It is the justification of this claim that is contested on behalf of the respondent. It has been urged that, when the appellant became a Christian, he ceased to be a member of the Adi Dravida caste as specified in the Presidential Order and, on again professing the Hindu religion, the appellant cannot claim that he automatically reverted to a membership of that caste.

16. We agree with the High Court that, when the appellant embraced Christianity in 1949, he lost the membership of the Adi Dravida Hindu caste. The Christian religion does not recognise any caste classifications. All Christians are treated as equals and there is no distinction between one Christian and another of the type that is recognised between members of different castes belonging to Hindu religion. In fact, caste system prevails only amongst Hindus or possibly in some religions closely allied to the Hindu religion like Sikhism. Christianity is prevalent not only in India, but almost all over the world and nowhere does Christianity recognise caste division. The tenets of Christianity militate against persons professing Christian faith being divided or discriminated on the basis of any such classification as the caste system. It must, therefore, be held that, when the appellant got converted to Christianity in 1949, he ceased to belong to the Adi Dravida caste.

17. In this connection, we may take notice of a decision of the Madras High Court in *G. Michael v. S. Venkateswaran*, AIR 1952 Mad 474 where that Court held:—

“Christianity and Islam are religions prevalent not only in India but also in other countries in the world. We know that in other countries these religions do not recognise a system of caste as an integral part of their creed or tenets.” Attention of that Court was drawn to the fact that there were several cases in which a member of one of the lower castes, who had been converted to Christianity, had continued not only to consider himself as still being a member of the caste, but had also been considered so by other members of the caste who had not been converted. Dealing with this aspect, the Court held:—

“This is somewhat analogous to cases in which even after conversion certain families and groups continue to be gov-

erned by the law by which they were governed before they became converts. But these are all cases of exception and the general rule is conversion operates as an expulsion from the caste; in other words, a convert ceases to have any caste."

In the present case, therefore, we agree with the finding of the High Court that the appellant on conversion to Christianity, ceased to belong to the Adi Dravida caste and, consequently, the burden lay on the appellant to establish that, on his reverting to the Hindu religion by professing it again, he also became once again a member of the Adi Dravida Hindu caste.

18. Reliance was also placed on behalf of the appellant on a decision of the Mysore High Court in *B. Shyamsunder v. Shankar Deo Vedalankar*, AIR 1960 Mys 27 to urge that, on change of religious belief, a person does not automatically cease to be a member of the caste in which he was born. For the same principle, reference was also made to a decision of this Court in *Chatturbhuj Vithaldas v. Moreshwar Parashram*, 1954 SCR 817 = (AIR 1954 SC 236). Neither of these two cases, in our opinion, is applicable to the present case, because in both those cases, though the person concerned had started professing religious beliefs different from those of orthodox Hindus, they still continued to be Hindus. The Mysore High Court in its decision took notice of this fact by holding:

"It is, therefore, plain that Arya Samaj unlike Christianity or Islam, is not a new religion entirely distinct from Hinduism and that the mere profession of Arya Samajism by a person does not make him cease to be a Hindu and cannot have the effect of excluding him from Hinduism although he was born in it. It is equally clear that such a person never becomes separated from the religious communion in which he was born. The contention urged to the contrary by Mr. Reddy must, therefore, fail."

In the case of *Chatturbhuj Vithaldas Jasani*, 1954 SCR 817 = (AIR 1954 SC 236) (supra), this Court was dealing with the status of a person who belonged to the Mahar caste, which was one of the Scheduled Castes under the Presidential Order, and the question arose whether, on his conversion to the tenets of the Mahanubhava Panth, he ceased to belong to that Scheduled Caste. It was held that, whatever the views of the

founder of this sect may have been about caste, it was evident that there had been no rigid adherence to them among his followers in later years. The Court, therefore, did not determine whether the Mahanubhava tenets encouraged a repudiation of caste only as a desirable ideal or make it a fundamental of the faith, because it was evident that present-day Mahanubhavas admitted to their fold persons who elect to retain their old caste customs. It was on this basis that the Court held that it was easy for the old caste to regard the converts as one of themselves despite the conversion which for all practical purposes was only ideological and involved no change of status. The final conclusion was expressed in the following words:—

"On this evidence and after considering the historical material placed before us we conclude that conversion to this sect imports little beyond an intellectual acceptance of certain ideological tenets and does not alter the convert's caste status, at any rate, so far as the household section of the Panth is concerned."

19. Thus, neither of these two cases is similar to the case before us where the appellant was converted to Christianity a religion which militates against the recognition of division of people on caste basis. Having gone out of the Hindu religion, the appellant could not claim thereafter that he still continued to be a member of the Adi Dravida Hindu caste.

20. In support of the claim that the appellant reverted to the Adi Dravida Hindu caste when he again started professing the Hindu religion, learned counsel relied on a number of decisions of various High Courts. The cases relied upon can be divided into two classes. The first set of cases are those where this question was examined for the purpose of determining the rules of succession, the validity of marriages, or the legitimacy of children. Such cases which have been brought to our notice are: *Administrator-General of Madras v. Anandachari*, (1886) ILR 9 Mad 466, *Gurusami Nadar v. Irulappa Konar*, 67 Mad LJ 389 = (AIR 1934 Mad 630), *Mrs. A. D. Vermani v. Mr. B. D. Vermani*, AIR 1943 Lah 51 (SB) and *Durga Prasad Rao v. Sudarsanaswami*, ILR (1940) Mad 653 = (AIR 1940 Mad 513). In addition, reliance was also placed on

the Report of Proceedings of the Appellate Side dated 8th November, 1866 printed at page vii of the Appendix in Vol. III of the Madras High Court Reports. The second set of cases consists of recent judgments of the High Courts of Andhra Pradesh and Madras in election petitions arising out of the general elections of the year 1967 itself. In order to rely on these judgments, learned counsel produced before us copies of the Gazettes in which those judgments have been published. The cases referred to are: Kothapalli Narasayya v. Jamma Jogi, Election Petn. No. 9 of 1967, K. Narasimha Reddy v. G. Bhupathi and Manick Rao, Election Petn. No. 18 of 1967, Allam Krishnaiah v. Ore-palli Venkata Subbaiah, Election Petn. No. 10 of 1967 decided by the High Court of Andhra Pradesh on 28-8-1967, 28-9-1967 and 5-9-1961 respectively, and K. Paramalai v. M. Alangaram, Election Petn. No. 9 of 1967 decided by the High Court of Madras on 5-10-1967.

21. Almost all these cases laid down the principle that, on reconversion to Hinduism, a person can become a member of the same caste in which he was born and to which he belonged before having been converted to another religion. The main basis of the decisions is that, if the members of the caste accept the reconversion of a person as a member, it should be held that he does become a member of that caste, even though he may have lost membership of that caste on conversion to another religion. In the present case, we do not consider it necessary to express any opinion on the general question whether, if a person is born in a particular caste and is converted to another religion as a result of which he loses the membership of that caste, he can again become a member of that caste on reconversion to Hinduism. That is a question which may have to be decided in any of the appeals that may be brought to this Court from the judgments of the Andhra Pradesh and the Madras High Courts referred to above. So far as the present case is concerned, we consider that, even if it be assumed that a reconvert can resume the membership of his previous caste the facts established in the present case do not show that the appellant succeeded in doing so. All these cases proceed on the basis that, in order to resume membership of his previous caste, the person must be reconverted to the

Hindu religion and must also be accepted by the caste in general as a member after reconversion. We do not think it necessary to refer to specific sentences where these principles have been relied upon in these various judgments. It is, in our opinion, enough to take notice of the decision in Durgaprasada Rao, ILR (1940) Mad 653=(AIR 1940 Mad 513) (supra), where these two aspects were emphasised by a Full Bench of the Madras High Court. In that case, the first question that arose was whether a person could become a convert to Hinduism without going through a formal ceremony of purification. It was held that no proof of any particular ceremonial having been observed was required. Varadachariar, J., held that when on the facts it appears that a man did change his religion and was accepted by his co-religionists as having changed his religion, and lived, died and was cremated in that religion, the absence of some formality should not negative what is an actual fact. Considering the question of entry into the caste, Krishnaswami Ayyangar, J., held that, in matters affecting the well-being or composition of a caste, the caste itself is the supreme judge. It was on this principle that a reconvert to Hinduism could become a member of the caste, if the caste itself as the supreme judge accepted him as a full member of it. In the appeal before us, we find that the appellant has not given evidence to satisfy these requirements in order to establish that he did become a member of Adi Dravida Hindu Caste by the time of general elections in 1967.

22. As we have already held earlier, there was no specific ceremony held for reconversion of the appellant to Hinduism. We have found that he started professing the Hindu religion because of his conduct at various stages. The first step in that conduct was the marriage with an Adi Dravida Hindu woman. Then there were other steps taken by him, such as correction of his service records, declaration of the religion of his sons as Hindu and his standing as a candidate for elections in 1962 and 1967 as a member of a Scheduled Caste. These have been held by us to amount to a public declaration of his belief in Hinduism. The question is whether, by merely professing the belief in Hinduism, the appellant can also claim that the members of the Adi Dravida Hindu Caste re-ad-

(From Madras)*

J. C. SHAH, V. RAMASWAMI AND
G. K. MITTER, JJ.

Boothalinga Agencies, Appellant v.
V. T. C. Poriaswami Nadar, Respondent.

Civil Appeal No. 479 of 1965, D/-
22-4-1968.

(A) Imports and Exports (Control)
Act (1947), Section 5 (before its amend-
ment in 1960) — Breach of condition of
licence — It is not tantamount to breach
of statutory order within meaning of Sec-
tion 5 — Section 5 as it stood cannot be
construed with aid of Amending Act (Act
4 of 1960): AIR 1962 SC 1893, Rel. on.
(Para 8)

(B) Contract Act (1872), Section 56 —
Doctrine of frustration of contract —
Comes within purview of Section 56 —
But provisions of section cannot apply to
case of 'self-induced frustration' — On
facts held contract to sale imported
goods became impossible or unlawful af-
ter coming into force of Imports (Con-
trol) Order, 1955, and so void under Sec-
tion 56 of Contract Act and this was not
a case of self-induced frustration: Ap-
peal No. 367 of 1958, D/- 16-3-1962
(Mad), Reversed.

The doctrine of frustration of contract
is really an aspect or part of the law of
discharge of contract by reason of super-
vening impossibility or illegality of the
act agreed to be done and hence comes
within the purview of Section 56 of the
Contract Act.
(Para 10)

In English law the question of frustra-
tion of contract has been treated by
courts as a question of construction
depending upon the true intention of the
parties. In contrast, the statutory provi-
sions contained in Section 56 of the Con-
tract Act lay down a positive rule of law
and English authorities cannot therefore
be of direct assistance though they have
persuasive value in showing how English
courts have approached and decided
cases under similar circumstances.

(Para 13)

The provisions of Section 56 of the
Contract Act cannot apply to a case of
"self-induced frustration". In other
words, the doctrine of frustration of con-
tract cannot apply where the event which

*(Appeal No. 367 of 1958, D/- 16-3-
1962—Mad.)

mitted him as a member of that caste and started recognising him as such. In various cases, importance has been attached to the fact of marriage in a particular caste. But, in the present case, the marriage was the first step taken by the appellant and, though he was married to an Adi Dravida woman, the marriage was not performed according to the rites observed by members of that caste. The marriage not being according to the system prevalent in the caste itself, it cannot be held that that Marriage can be proof of admission of the appellant in the caste by the members of the caste in general. No other evidence was given to show that at any subsequent stage any step was taken by members of the caste indicating that the appellant was being accepted as a member of this caste. It is true that his close relatives, like his father and brother-in-law, treated him again as a member of their own caste, but the mere recognition by a few such relatives cannot be held to be equivalent to a recognition by the members of the caste in general. The candidature from the reserved seat in 1962 cannot also be held to imply any recognition by the members of the Adi Dravida Hindu caste in general of the appellant as a member of that caste. Consequently, it has to be held that the appellant has failed to establish that he became a member of the Adi Dravida Hindu caste after he started professing the Hindu religion; and this conclusion follows even on the assumption that a convert to Hinduism can acquire the membership of a caste. Ordinarily, the membership of a caste under the Hindu religion is acquired by birth. Whether the membership of a caste can be acquired by conversion to Hinduism or after reconversion to Hinduism is a question on which we have refrained from expressing our opinion, because, even on the assumption that it can be acquired, we have arrived at the conclusion that the appellant must fail in this appeal.

23. The appeal is, consequently, dismissed with costs.

VGW/D.V.C.

Appeal dismissed.

is alleged to have frustrated the contract arises from the act or election of a party.
(Para 14)

The disposal of imported chicory which arrived at Madras port on December 13, 1955 was governed by the provisions of the Imports (Control) Order, 1955 which came into force on December 7, 1955. Clause 5 (4) of the 1955 Order expressly provided that the licensee shall comply with all the conditions imposed or deemed to be imposed under that clause one of which was that the goods will not be sold. Therefore the sale of the imported goods would be a direct contravention of Clause 5 (4) and under Section 5 of the Imports and Exports (Control) Act, 1947 any contravention of the Act or any order made or deemed to have been made under the Act was punishable with imprisonment up to one year or fine or both. In consequence, even though the contract was enforceable on November 26, 1955 when it was entered into, the performance of the contract became impossible or unlawful after December 7, 1955 and so the contract became void under Section 56 of the Contract Act after the coming into force of the Imports (Control) Order 1955. This was not a case of 'self-induced frustration'. There was no choice or election left to the party to supply chicory other than under the terms of the contract. On the other hand, there was a positive prohibition imposed by the licence upon the party not to sell the imported chicory to any other party but he was permitted to utilise it only for consumption as raw material in his own factory: Appeal No. 367 of 1958, D/- 16-3-1962 (Mad), Reversed.

(Paras 9, 15)

Cases Referred: Chronological Paras
(1962) AIR 1962 SC 1893 (V 49) =

(1963) 3 SCR 338, East India
Commercial Co. Ltd., Calcutta
v. Collector of Customs, Calcutta

(1952) 1952 AC 166

(1951) 1951-1 KB 190 = (1950) 2
All ER 390, British Movietonews
Ltd. v. London and District
Cinemas Ltd.

(1944) 1944 AC 265 = 113 LJ PC
37, Denny Mott and Dickson
Ltd. v. James B. Fraser and Co.
Ltd.

(1935) 1935 AC 524 = 104 LJ PC
88, Maritime National Fish Ltd.
v. Ocean Trawlers Ltd.

(1918) 1918 AC 119 = 87 LJ KB
370, Metropolitan Water Board v.
Dick Kerr and Co. Ltd.

11

Mr. H. R. Gokhale, Senior Advocate
(Mr. S. Balakrishnan, Advocate, with
him), for Appellant; M/s. R. Thiaga-
rajan and T. R. Sangameswaran, Adv-
ocates, for Respondent No. 2.

The following Judgment of the Court
was delivered by

RAMASWAMI, J.: This appeal is
brought, by certificate, from the judg-
ment of the Madras High Court dated
March 16, 1962 in A. S. No. 367 of 1958.

2. The appellant carries on business
in the manufacture and sale of coffee
powder. He was for this purpose im-
porting chicory under actual user's
licence issued by the Government. The
consignment of chicory in question was
a consignment of 24-3/4 tons—495 cases
which arrived at Madras port by "S.S.
Alwaki" in December, 1955. Exhibit
B-9 was the licence under which the
consignment was imported. The goods
were cleared by the appellant on Decem-
ber 20, 1955. The case of the respon-
dent was that the appellant agreed to
sell the consignment to him under Ex.
A-1 dated November 26, 1955 after taking
an advance of Rs. 7,500. The contract
was, however, entered into in the name
of the first defendant and P. W. 2 acted
as a broker in the transaction. The res-
pondent paid another sum of Rs. 20,000
on December 23, 1955 after the goods
arrived and were cleared on the repre-
sentation that the delivery would be
given in one month. Defendant No. 1
executed a letter, Ex. A-2 in this con-
nection but thereafter owing to rise in
prices the appellant committed a default.
The suit was contested by the first
defendant on the ground that the con-
tract was illegal and therefore void. The
case of the second defendant was that
he had nothing to do with the contract
entered into between the plaintiff and
the first defendant and, in any case, the
contract for sale of chicory was illegal
and void ab initio as contravening the
provisions of the licence granted to him
for the import of chicory. The trial
Court held, upon examination of the
evidence, that both defendants 1 and 2
undertook with the plaintiff to fulfil the
terms of the contract. On the question
of legality of the contract the trial Court
held that as the contravention of the
terms of the licence by the sale of the
imported goods would entail only an

administrative penalty, the sale cannot be held to be prohibited by law and the contract was therefore a legal contract binding on both the parties. The trial court found that the date of the breach of the contract was February 14, 1956 and granted a decree in favour of the plaintiff against both the defendants for a sum of Rs. 35,640. Two appeals were filed in the Madras High Court against the judgment of the trial court—A. S. No. 367 of 1958 by the second defendant and A. S. No. 363 of 1959 by the first defendant. The appeals were heard together by the High Court which by its judgment D/-16-3-1962 allowed the appeal of the first defendant A. S. No. 363 of 1959 and dismissed the suit as against him. As regards the appeal filed by the 2nd defendant the High Court reduced the amount of damages to the sum of Rs. 23,265. The High Court agreed with the finding of the trial Judge that the contract for the sale of imported chicory was entered into by the respondent directly with the second defendant and the second defendant was liable for its breach. As regards the legality of the contract, the High Court took the view that it could not be regarded as a contract prohibited by any law and so it was valid and binding between the parties and the plaintiff could properly sustain an action for damages for its breach. The High Court further held that the real contract which the plaintiff had entered into was with the second defendant and the first defendant was only a dummy in whose name the contract was entered into for ulterior reasons.

3. The first question to be considered in this appeal is whether the contract was in violation of the restrictions placed by the Imports and Exports (Control) Act, 1947 and the notifications issued thereunder and in consequence whether it was void and illegal and whether a claim for breach of such a contract is maintainable.

4. It is necessary at this stage to refer to the terms of the licence, Ex. B-9 and to the relevant provisions of the statutes and the notifications.

5. Exhibit B-9 was issued on September 29, 1955 and reads as follows:

"Messrs. Boothalinga Agencies of 2/21 Dr. Vasudevan Road, Madras-10, are hereby authorised to import the goods of which particulars are given below:—

1. Country from which consigned—Soft currency licensing.

2. Country of origin.—Area/Not valid for South Africa.

3. Description of goods—Chicory.

4. Serial number and part of the I. T. C. Schedule—79. V/IV.

5. Quantity—24-3/4 tons.

6. Approximate value c. i. f. (in words) rupees thirty-two thousand and two only (in figures) Rs. 32,002.

7. Period of shipment—Valid up to 31st March 1956 from the date of issue.

8. Limiting factor for purpose of clearance through Customs.

Quantity/value Both.

This licence is granted under Government of India, late Ministry of Commerce Notification No. 23-ITC/43, dated the 1st July 1943, as continued in force by the Imports and Exports (Control) Act 1947 (XVIII of 1947) and is without prejudice to the application of any other prohibition or regulation affecting the importation of the goods which may be in force at the time of their arrival.

This licence is issued subject to the condition that the goods will be utilised only for consumption as raw material or accessories in the licence holder's factory and that no portion thereof will be sold to any party.

Sd/-

For Chief Controller of Imports.

This licence was granted under Government of India, late Commerce Department Notification No. 23-ITC/43 dated July 1, 1943 made under Rule 84 (3) of the Defence of India Rules which was intended to "prohibit bringing into British India by sea, land or air from any place outside India of any goods of the description specified in the schedule (hereto annexed) except the following..

.....:

Sub-Clause XII:—Any goods of the description specified in Part IV of the Schedule which are covered by a special licence issued by an Import Trade Controller appointed in this behalf by the Central Government."

Imported chicory is one of the goods described in Part IV. The effect of the notification is that if there is a special licence for the importing of chicory there would be no prohibition against its import. Sections 3, 4 and 5 of the Imports and Exports (Control) Act, 1947 provided for the continuance of the notifications previously issued under the Defence of In-

dia Rules. Sections 3, 4 and 5 of that Act are to the following effect:

"3. Powers to prohibit or restrict imports and exports.—(1) The Central Government may, by order published in the Official Gazette, make provision for prohibiting, restricting or otherwise controlling, in all cases or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order:—

(a) the import, export, carriage coast-wise or shipment as ships' stores of goods of any specified description;

(b) the bringing into any port or place in British India of goods of any specified description intended to be taken out of British India without being removed from the ship or conveyance in which they are being carried.

(2) All goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited or restricted under section 19 of the Sea Customs Act, 1878, and all the provisions of that Act shall have effect accordingly, except that Section 183 thereof shall have effect as if for the word 'shall' therein the word 'may' were substituted.

(3) Notwithstanding anything contained in the aforesaid Act, the Central Government may, by order published in the Official Gazette, prohibit, restrict or impose conditions on the clearance, whether for home consumption or for shipment abroad, of any goods or class of goods imported into British India.

(4) All orders made under rule 84 of the Defence of India Rules or that rule as continued in force by the Emergency Provisions (Continuance) Ordinance, 1946 and in force immediately before the commencement of this Act shall, so far as they are not inconsistent with the provisions of this Act, continue in force and be deemed to have been made under this Act.

(5) If any person contravenes any order made or deemed to have been made under this Act, he shall without prejudice to any confiscation or penalty to which he may be liable under the provisions of the Sea Customs Act, 1878, as applied by sub-section (2) of Sec. 3, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both."

On March 6, 1948 the Central Government issued a notification under sub-rule (3) of Rule 84 of the Defence of India Rules which reads as follows:

"No. 2-ITC/48—In exercise of the powers conferred by sub-section (1) and sub-section (3) of Section 3 of the Imports and Exports (Control) Act, 1947 (XVIII of 1947) the Central Government is pleased to make the following order, namely,

(a) Any officer issuing a licence under clauses VIII to XIV of the Notification of the Government of India in the late Department of Commerce No. 23-ITC/43 dated the 1st July 1943, may issue the same subject to one or more of the conditions stated below:

(i) That goods covered by the licence shall not be disposed of or otherwise dealt with or without the written permission of the licensing authority or any person duly authorised by it.

(ii) That the goods covered by the licence on importation shall not be sold or distributed at a price more than that which may be specified in any directions attached to the licence.

(iii) That the applicant for a licence shall execute a bond for complying the terms subject to which a licence may be granted.

(iv) That the licence shall not be transferable except in accordance with the permission of the licensing authority or a person duly authorised by it.

(v) That such other conditions may be imposed which the licensing authority considers to be expedient from the administrative point of view and which are not inconsistent with the provisions of the said Act.

(b) Where a licensee is found to have contravened the order or the terms and conditions embodied in or accompanying a licence, the appropriate licensing authority or the Chief Controller of Imports may notify him that, without prejudice to any penalty to which he may be liable under the Imports and Exports (Control) Act 1947 (XVIII of 1947) or any other enactment for the time being in force, he shall either permanently or for a specified period, be refused any further licence for import of goods.

(c) Where an Importer is found guilty of contravention of the proviso to the said notification or of any orders or terms or conditions embodied in or accompanying a licence or an application for a licence or any other import trade control rules or regulations duly promulgated the appropriate licensing authority or the Chief Controller of Imports may notify him that, without prejudice to any penalty to which he may be liable

under the Imports and Exports (Control) Act 1947 (XVIII of 1947) or any other enactment for the time being in force, he shall either permanently or for a specified period be refused any licence for import of goods."

6. By Section 4 of Act 4 of 1960 there was an amendment of certain provisions of the Imports and Exports (Control) Act, 1947 (Act XVIII of 1947). By Sec. 4 of the Amending Act the words "Or any condition of a licence granted under any such order" were introduced after the clause "any order made or deemed to have been made under this Act."

7. On December 7, 1955, the Imports (Control) Order was promulgated by the Central Government in exercise of the powers conferred by Sections 3 and 4A of the Imports and Exports (Control) Act, 1947. Clause 3 of this Order prohibited import of goods except in accordance with a licence issued by specified authorities. Clause 5 authorised imposition of conditions under which goods could be imported. Clause 5 provides as follows:

"Conditions of Licence.—(1) The licensing authority issuing a licence under this Order may issue the same subject to one or more of the conditions stated below:

(i) that the goods covered by the licence shall not be disposed of, except in the manner prescribed by the licensing authority, or otherwise dealt with, without the written permission of the licensing authority or any person duly authorised by it;

(ii) that the goods covered by the licence on importation shall not be sold or distributed at a price exceeding that which may be specified in any directions attached to the licence;

(iii) that the applicant for a licence shall execute a bond for complying with the terms subject to which a licence may be granted.

(2) A licence granted under this Order may contain such other conditions, not inconsistent with the Act or this Order, as the licensing authority may deem fit.

(3) It shall be deemed to be a condition of every such licence, that:

(i) no person shall transfer and no person shall acquire by transfer any licence issued by the licensing authority except under and in accordance with the written permission of the authority which granted the licence or of any other per-

son empowered in this behalf by such authority;

(ii) that the goods for the import of which a licence is granted shall be the property of the licensee at the time of import and thereafter upto the time of clearance through Customs;

(iii) the goods for the import of which a licence is granted shall be new goods unless otherwise stated in the licence.

(4) The licensee shall comply with all conditions imposed or deemed to be imposed under this clause."

Notification No. 23-ITC/43 dated July 1, 1943 was repealed under clause 12 but the proviso to that clause saved the operation of all licences previously issued and stated that they must be deemed to be issued under the 1955 Order. Clause 12 reads as follows:

"12. Repeals.— The Orders contained in the notifications specified in Schedule IV are hereby repealed:

Provided that anything done or any action taken, including any appointment made or licence issued under any of the aforesaid Orders, shall be deemed to have been done or taken under the corresponding provision of this Order.

Schedule IV

Notifications repealed

1. Notification No. 23-ITC/43, dated the 1st July, 1943, issued by the late Department of Commerce, as amended.

2. Notification No. 2-ITC/48, dated 6th March, 1948, issued by the late Ministry of Commerce.

8. On the basis of these provisions it was contended by Mr. Gokhale on behalf of the appellant that the contract which is the subject-matter of the suit was unlawful and the respondent cannot claim damages for breach of such a contract. It was not disputed by Mr. Gokhale that the contract between the parties was entered into on November 26, 1955 before the coming into force of the Imports (Control) Order. It was nevertheless argued that a breach of the conditions of the licence was punishable under Section 5 of Act XVIII of 1947 as it stood at the relevant time and therefore the contract was illegal and no claim for the breach thereof was maintainable. The contention of the appellant was that the contravention of the terms of the licence issued under the notification dated March 6, 1948 was a contravention of the notification itself within the

meaning of Section 5 of Act XVIII of 1947 and was punishable. We are unable to accept this argument as correct. It is clear that Section 5 before its amendment only penalised the contravention of any order made or deemed to have been made under the Act. It is true that a licence was granted by virtue of a statutory notification dated March 6, 1948 issued under the Defence of India Rules and later deemed to have been issued under Act XVIII of 1947. Notification No. 23N-ITC/43 dated July 1, 1943 merely provides that no goods shall be imported except the goods covered by special licences issued by an authorised officer. Notification No. 2-ITC/48 dated March 6, 1948 authorises the licensing officer to impose one or more conditions prescribed by that order and the licensing officer has therefore power to impose conditions in the licence issued by him, but if the licensee contravenes the conditions imposed by the licence it is difficult to hold that it is not merely a contravention of the conditions of a licence but there is contravention of the terms of the notification and so the provisions of Section 5 of Act XVIII of 1947 are attracted. Reference was made on behalf of the appellant to the amendment made to S. 5 of Act XVIII of 1947 by the Amending Act 4 of 1960. By the Amending Act Section 5 of Act XVIII of 1947 was amended so as to include contravention of a condition of a licence granted under any order as an offence under Section 5 of the Act. It is not, however, permissible, in the circumstances of the present case, to construe the language of Section 5 of the parent Act with the aid of the Amending Act (Act 4 of 1960). It is not possible for us to accept the contention of Mr. Gokhale that the Amending Act of 1960 is something in the nature of a Parliamentary exposition of the meaning of Section 5 as it stood in the parent Act. It follows therefore that on the material date a breach of the condition of a licence was not tantamount to a breach of the statutory order within the meaning of Section 5 of Act XVIII of 1947. The view that we have expressed is borne out by the decision of this Court in *East India Commercial Co. Ltd. Calcutta v. Collector of Customs, Calcutta*, (1963) 3 SCR 338 = (AIR 1962 SC 1893) in which it was held by the majority judgment that an infringement of the condition of a licence was not equivalent to an infringement of the two orders

dated July 1, 1943 and March 6, 1948 i. e., Nos. 23 ITC/43 and 2-ITC/48 made under the Imports and Exports (Control) Act, 1947 and therefore the provisions of Section 167 (8) of the Sea Customs Act were not attracted. We accordingly reject the argument of Mr. Gokhale on this aspect of the case.

9. We pass on to consider the next contention put forward on behalf of the appellant, namely, that in any event the Imports (Control) Order, 1955 had come into force on December 7, 1955 and the performance of the contract became illegal after that date. It was pointed out that the goods arrived at the Madras port on December 13, 1955 and were cleared on December 20, 1955. Reference was made to the conditions imposed in the licence, Ex. B-9 that "the goods will be utilised only for consumption as raw material or accessories in the licence holder's factory and that no portion thereof will be sold to any party". It was contended that the appellant would be committing an offence under Sec. 5 of Act XVIII of 1947 if he sold the goods to the respondent in pursuance of the contract as the condition of the licence would be violated. In our opinion, the argument of the appellant is well founded and must be accepted as correct. It is manifest that the disposal of the imported chicory which arrived at Madras port on December 13, 1955 was governed by the provisions of the Imports (Control) Order, 1955 which came into force on December 7, 1955. Clause 5 (4) of the 1955 Order expressly provides that the licensee shall comply with all the conditions imposed or deemed to be imposed under that clause. Therefore the sale of the imported goods would be a direct contravention of Clause 5 (4) and under Section 5 of the Imports and Exports (Control) Act, 1947 any contravention of the Act or any order made or deemed to have been made under the Act is punishable with imprisonment up to one year or fine or both. In consequence, even though the contract was enforceable on November 26, 1955 when it was entered into, the performance of the contract became impossible or unlawful after December 7, 1955 and so the contract became void under Section 56 of the Indian Contract Act after the coming into force of the Imports (Control) Order, 1955. Section 56 of the Indian Contract Act states: "An agreement to do an act impossible in itself is void."

A contract to do an act which, after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

10. The doctrine of frustration of contract is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It should be noticed that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

11. In English Law a case of supervening illegality is treated as an instance of frustration of contract. In *Metropolitan Water Board v. Dick Kerr and Co. Ltd.*, 1918 AC 119, under a contract made in July 1914, a reservoir was to be constructed and to be completed in six years from 1914 subject to a proviso that if the contractors should be impeded or obstructed by any cause the engineer should have power to grant an extension of time. Under the powers conferred by the Defence of the Realm Acts and Regulations, the contractors were obliged to cease work on the reservoir by order of the Ministry of Munitions in 1916. The House of Lords held that the contract was frustrated by supervening impossibility and that the provision for extending the time did not apply to the prohibition by the Ministry. Lord Finlay L. C. said that the interruption was "of such a character and duration that it vitally and fundamentally changed the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made." In a subsequent case—*Denny, Mott and Dickson Ltd. v. James B. Fraser and Co. Ltd.*, 1944 AC 265 a contract for the sale and purchase of timber contained an option for the appellants to purchase a timber-yard (which was meanwhile let to them) if the contract was terminated on notice given by either party. By the Control

of Timber (No. 4) Order, 1939, further trading transactions under the contract became illegal, but in 1941 the appellants gave notice to terminate the contract, and also to exercise their option to purchase the timber-yard. The House of Lords held that the option to purchase was dependent on the trading agreement, that the 1939 Order had operated to frustrate the contract, and that, consequently, the option to purchase lapsed upon the frustration since it arose only if the contract was terminated by notice. At page 274 of the Report, Lord Wright made the following observations:

"It is now I think well settled that where there is frustration a dissolution of a contract occurs automatically. It does not depend, as does rescission of a contract on the ground of repudiation or breach, on the choice or election of either party. It depends on what actually has happened on its effect on the possibility of performing the contract. Where, as generally happens, and actually happened in the present case, one party claims that there has been frustration and the other party contests it, the court decides the issue and decides it *ex post facto* on the actual circumstances of the case. The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred. I find the theory of the basis of the rule in Lord Sumner's pregnant statement (*loc. cit.*) that the doctrine of frustration is really a device by which the rules as to absolute contracts are reconciled with the special exceptions which justice demands. Though it has been constantly said by high authority, including Lord Sumner, that the explanation of the rule is to be found in the theory that it depends on an implied condition of the contract, that is really no explanation. It only pushes back the problem a single stage. It leaves the question what is the reason for implying a term. Nor can I reconcile that theory with the view that the result does not depend on what the parties might, or would as hard bargainers have agreed. The doctrine is invented by the court in order to supplement the defects of the actual contract. The parties did not anticipate fully and completely, if at all, or provide for what actually happened."

12. In the recent case of *British Movietonews Ltd. v. London and Dis-*

strict Cinemas Ltd., 1951-1 KB 190, Denning L. J. in the Court of Appeal took the view that "the court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract—in order to do what is just and reasonable in the new situation." "The day is gone," the learned Judge went on to say "when we can excuse an unforeseen injustice by saying to the sufferer 'it is your own folly, you ought not to have passed that form of words. You ought to have put in a clause to protect yourself.' We no longer credit a party with the foresight of a Prophet or his lawyer with the draftsmanship of a Chalmers. We realise that they have their limitations and make allowances accordingly. It is better thus. The old maxim reminds us that he who clings to the letter clings to the dry and barren shell and misses the truth and substance of the matter. We have of late paid heed to this warning, and we must pay like heed now." The decision of the Court of Appeal was reversed by the House of Lords, 1952 AC 166 at p. 184 and Viscount Simon expressed disapproval of the view taken by Denning, L. J. At page 184 of the Report, Viscount Simon said:

"The principle remains the same. Particular applications of it may greatly vary and theoretical lawyers may debate whether the rule should be regarded as arising from implied term or because the basis of the contract no longer exists. In any view, it is a question of construction as Lord Wright pointed out in *Constantine's case* and as has been repeatedly asserted by other masters of law."

13. In English Law therefore the question of frustration of contract has been treated by courts as a question of construction depending upon the true intention of the parties. In contrast, the statutory provisions contained in S. 56 of the Indian Contract Act lay down a positive rule of law and English authorities cannot therefore be of direct assistance, though they have persuasive value in showing how English courts have approached and decided cases under similar circumstances.

14. Counsel on behalf of the respondent, however, contended that the contract was not impossible of performance and the appellant cannot take recourse to the provisions of Section 56 of the Indian Contract Act. It was contended that under Clause 1 of the Import Trade

Control Order No. 2-ITC/48 dated March 6, 1948 it was open to the appellant to apply for a written permission of the licensing authority to sell the chicory. It is not shown by the appellant that he applied for such permission and the licensing authority had refused such permission. It was therefore maintained on behalf of the respondent that the contract was not impossible of performance. We do not think there is any substance in this argument. It is true that the licensing authority could have given written permission for disposal of the chicory under Clause 1 of Order 2-ITC/48 dated March 6, 1948 but the condition imposed in Ex. B-9 in the present case is a special condition imposed under Clause (v) of Paragraph (a) of Order No. 2-ITC/48 dated March 6, 1948 and there was no option given under this clause for the licensing authority to modify the condition of licence that "the goods will be utilised only for consumption as raw material or accessories in the licence holder's factory and that no portion thereof will be sold to any party". It was further argued on behalf of the respondent that, in any event, the appellant could have purchased chicory from the open market and supplied it to the respondent in terms of the contract. There is no substance in this argument also. Under the contract the quality of chicory to be sold was chicory of specific description—"Egberts Chicory, packed in 495 wooden cases, each case containing 2 tins of 56 lb. nett". The delivery of the chicory was to be given by S. S. Alwaki in December, 1955. It is manifest that the contract, Ex. A-1 was for sale of certain specific goods as described therein and it was not open to the appellant to supply chicory of any other description. Reference was made on behalf of the respondent to the decision in *Maritime National Fish Ltd. v. Ocean Trawlers, Ltd.*, 1935 AC 524. In that case, the respondents chartered to the appellants a steam trawler fitted with an otter trawl. Both parties knew at the time of the contract that it was illegal to use an otter trawl without a licence from the Canadian Government. Some months later the appellants applied for licences for five trawlers which they were operating, including the respondents' trawler. They were informed that only three licences would be granted, and were requested to state for which of the three trawlers they desired to have licences. They named three trawlers

other than the respondents', and then claimed that they were no longer bound by the charter-party as its object had been frustrated. It was held by the Judicial Committee that the failure of the contract was the result of the appellants' own election, and that there was therefore no frustration of the contract. We think the principle of this case applies to the Indian law and the provisions of Section 56 of the Indian Contract Act cannot apply to a case of "self-induced frustration". In other words, the doctrine of frustration of contract cannot apply where the event which is alleged to have frustrated the contract arises from the act or election of a party. But for the reasons already given, we hold that this principle cannot be applied to the present case for there was no choice or election left to the appellant to supply chicory other than under the terms of the contract. On the other hand, there was a positive prohibition imposed by the licence upon the appellant not to sell the imported chicory to any other party but he was permitted to utilise it only for consumption as raw material in his own factory. We are accordingly of the opinion that Counsel for the respondent has been unable to make good his argument on this aspect of the case.

15. For the reasons expressed we hold that this appeal should be allowed and the decree of the Madras High Court in A. S. No. 367 of 1958 should be set aside and the suit brought by the respondent should be dismissed in its entirety. We do not propose to make any order as to costs in this appeal.

RSK/D.V.C. Appeal allowed.

AIR 1969 SUPREME COURT 118 (V 56 C 25)

M. HIDAYATULLAH, C. J., R. S. BACHAWAT, C. A. VAIDIALINGAM, K. S. HEGDE, AND A. N. GROVER, JJ.

1. B. S. Vadera (In W. P. No. 96 of 1967), 2. G. S. Chaggar (In W. P. No. 165 of 1967), Petitioners v. Union of India and others, Respondents.

Writ Petns. Nos. 96 and 165 of 1967, D/- 27-3-1968.

(A) Constitution of India, Article 309 Proviso — Words 'any rules so' made shall have effect, subject to provisions of any such Act' — Power to give retro-

spective operation to rules — Railway Establishment Code, Rule 157 — Railway Board acting under Rule 157 can make rule having retrospective effect — AIR 1963 Mys 265 and AIR 1965 Mys 25, Overruled.

The proviso to Article 309, clearly lays down that 'any rules so made shall have effect, subject to the provisions of any such Act'. Thus if the appropriate Legislature has passed an Act, under Article 309, the rules framed under the Proviso, will have effect, subject to that Act; but, in the absence of any Act, of the appropriate Legislature, on the matter, the rules, made by the President, or by such person as he may direct are to have full effect, both prospectively and, retrospectively. Apart from the limitations, pointed out above, there is none other, imposed by the proviso to Art. 309 regarding the ambit of the operation of such rules. In other words, the rules, unless they can be impeached on grounds such as breach of Part III, or any other Constitutional provision, must be enforced, if made by the appropriate authority. AIR 1963 Mys 265 and AIR 1965 Mys 25, Overruled; AIR 1962 All 328 (FB), Ref. (Para 24)

The Railway Establishment Code has been issued, by the President, in the exercise of his powers, under the proviso to Art. 309. Under Rule 157, the President has directed the Railway Board, to make rules of general application to non-gazetted railway servants, under their control. The rules, which are embodied in the Schemes, framed by the Board, are within the powers, conferred under Rule 157, and, in the absence of any Act, having been passed by the 'appropriate' Legislature, on the said matter, the rules, framed by the Railway Board, will have full effect and, if so indicated, retrospectively also. Such indication, about retrospective effect, is clearly there, in the provisions. (Para 25)

(B) Constitution of India, Preamble — Interpretation of Constitution — Clear and unambiguous expressions — They must be given their full and unrestricted meaning, unless hedged-in, by any limitations. (Para 24)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 602 (V 53) = (1966) 1 SCR 994, State v. Padmanabacharya 20, 26 (1966) AIR 1966 SC 1942 (V 53) = (1966) 3 SCR 682, Nagarajan v. State of Mysore 27

(1965) AIR 1965 Mys 25 (V 52),
Govindappa v. Inspector General
of Registration 27

(1963) AIR 1963 Mys 265 (V 50),
Govindaraju v. State of Mysore 27

(1962) AIR 1962 All 328 (V 49) =
ILR (1962) 1 All 793 (FB), Ram
Autar v. State of Uttar Pradesh 28

M/s. S. K. Mehta and K. L. Mehta,
Advocates of M/s. K. L. Mehta and Co.,
for Petitioner (In W. P. No. 96 of 1967);
Mr. A. K. Sen, Senior Advocate (Mr.
A. P. Chatterji, Advocate, and Mr. M. M.
Kshatriya, Advocate of M/s. Kshatriya
and Chatterjee, with him), for Petitioner
(In W. P. No. 165 of 1967); Mr. C. K.
Daphtary, Attorney-General for India
and Dr. V. A. Seyid Muhammad, Senior
Advocate (Mr. R. N. Sachthey, Advocate,
with them), for Respondents Nos. 1 and
2 (In both the Petitions), Mr. B. R. G. K.
Achar, Advocate (for Nos. 3, 6 to 9, 13,
15, 17, 18, 21, 26, 29, 30, 31, 36, 39 to
45, 47, 50, 53 to 55, 58, 61, 64, 66, 69,
76, 77, 81, 82, 87, 91, 94, 96, 97, 103 to
105, 108, 123, 136 and 150, for Respon-
dents (In W. P. No. 96 of 1967).

The following Judgment of the Court
was delivered by

VAIDIALINGAM, J.: In both these writ petitions, under Article 32 of the Constitution, the petitioners seek to have quashed, certain orders passed by the 2nd respondent and, in particular, the order dated June 16, 1967, reverting them, as Upper Division Clerks, with effect from June 9, 1967. The Union of India, through the Chairman, Railway Board, and the Secretary, Railway Board are respondents 1 and 2, respectively, in these proceedings. The other respondents are officers, working under the 2nd respondent, who, according to the petitioners, have been given preferential treatment, by way of promotion, under the orders, impugned, in these proceedings.

2. At the outset, it may be stated, that the various orders, passed by the 2nd respondent, referred to, by both the petitioners, are one and the same, and therefore, we shall refer to those proceedings, in accordance with the annexure number, given to them, in Writ Petition No. 96 of 1967. Wherever necessary, we shall advert to any separate order, that has been referred to by the petitioner, in Writ Petition No. 165 of 1967.

3. According to the petitioner in Writ Petition No. 96 of 1967, he joined ser-

vice, on July 16, 1955, as Lower Division Clerk, was promoted, with effect from February 2, 1957, as Upper Division Clerk and further promoted, as Assistant on February 3, 1958. His grievance is that while he was holding the post of such Assistant, from 1958, he has been illegally, and without any justification, reverted, as Upper Division Clerk, with effect from June 9, 1967, as per the impugned order, dated June 16, 1967 (Annexure 16). Similarly, according to the Petitioner, in Writ Petition No. 165 of 1967, he joined as a Lower Division Clerk on September 14, 1954, was promoted as Upper Division Clerk, with effect from February 2, 1957 and was further promoted, as Assistant, on February 3, 1958. His grievance is that while he was so holding the post of Assistant, from 1958, he has been illegally, and without any justification, reverted as Upper Division Clerk, with effect from June 9, 1967, as per Annexure 16.

4. According to the Railway Board, these promotions, made of the petitioners, either as Upper Division Clerks, in the first instance, or, later, as Assistants were purely on a temporary and ad hoc basis, pending the framing of the Railway Board's Secretariat Clerical Service (Re-organization) Scheme, which was in contemplation, at the material time. The Scheme (Annexure 4), was actually framed on February 5, 1957, and the Railway Board's Secretariat Clerical Service was to be organized, in the manner, set out therein. Under this Scheme, there were to be two grades of service—(i) Grade I—Upper Division Clerk; and (ii) Grade II—Lower Division Clerk. The authorised permanent strength of the Service, in Grade I, was fixed at 45, and of Grade II, at 82. The initial constitution of the Service, was to be with effect from December 1, 1954.

5. On March 30, 1963, some of the provisions, contained in Annexure 4, were modified, by Annexure 7. One of the modifications effected under Annexure 7, relating to the manner of filling up of permanent vacancies and temporary vacancies, in Grade I of the Service, and this modification was also to have effect, from the date of the initial constitution of the Service, viz., December 1, 1954.

6. In 1965, a final panel was drawn up, strictly on the basis of the Scheme, for promotion to the Grade of Upper Division Clerks, in which the names of all the Lower Division Clerks were

arranged, strictly in accordance with their seniority positions, in that Grade. Accordingly, the names of the petitioners who had been promoted as Officiating Upper Division Clerks, in 1957, were entered, in that panel, in accordance with their inter se seniority as Lower Division Clerks. As the posts of Upper Division Clerks were non-selection posts, so far as promotion quota was concerned, they had to be filled in, on the basis of seniority-cum-suitability and hence a particular officer's seniority, as Lower Division Clerk, was duly reflected, in his seniority as Upper Division Clerk. Similarly, Upper Division Clerks, who were promoted as Officiating Assistants, were also promoted, on the basis of their seniority, in the Upper Division Clerks' Grade and, therefore, their seniority, in the Lower Division Clerks' Grade was thus reflected in the Assistants' Grade. The petitioners were required to be reverted for such Upper Division Clerks, who were senior to them, being posted in the Grade of Assistants. Effort, however, was made, to avoid hardship to persons, like the petitioners, who were functioning as Assistants, by deciding to make available, vacancies in the Assistants' Grade, by promotion and by curtailing the quota, reserved for direct recruits; but the petitioners could not be continued as Assistants, for an indefinite period, as difficulty arose, when there was contraction, in the Cadres, by some of the Section Officers, being reverted, as Assistants, in June 1967. This in consequence resulted in the reversion of certain Assistants, including the petitioners, to the posts of Upper Division Clerks. The reversions themselves were made strictly in the reverse order of seniority. According to the Railway Board, the petitioner, in Writ Petition 96 of 1967 is still a temporary Lower Division Clerk, and he has not been even confirmed in that Grade, because he has not passed the requisite typing test. It is further stated that the petitioner, in Writ Petition 165 of 1967 is even now not a permanent Upper Division Clerk, and that he was confirmed, as Lower Division Clerk, in 1966, with effect from September 14, 1957. Therefore, according to the Railway Board, the impugned orders were all valid and legal and did not contravene any provisions of the Constitution, nor did they infringe any of the rights of the petitioner.

7. In order to appreciate the arguments, addressed before us, on behalf of

the petitioners, and respondents 1 and 2, it is necessary to give in chronological order, the events, leading up to the filing of these writ petitions. On August 22, 1956, the second respondent issued a Circular, Annexure 1, about having decided to hold a test, for drawing up a panel of staff, considered suitable for promotion, to the Grade of Assistants. The categories of staff, eligible to appear for the test, as well as the subjects for the written tests, were mentioned therein. There is no controversy that the two petitioners appeared for the test, and passed the examination, and they also successfully got through the interview. The second respondent simultaneously took a decision that posts of Upper Division Clerks, which were introduced at about that time, may also be filled up, on the basis of the results of the test, which was no doubt primarily held for the purpose of filling the posts of Assistants. The criterion for promoting Lower Division Clerks, to the posts of Upper Division Clerks and Assistants, was, that persons, who obtained 50 per cent or more of the marks, were to be promoted, as Officiating Assistants, and those who obtained between 40 and 49 per cent, were to be promoted, as Officiating Upper Division Clerks. Their inter se seniority was also to be, in accordance with their inter se seniority, as Lower Division Clerks. As both the petitioners had passed the test, they were promoted, as Officiating Upper Division Clerks with effect from February 2, 1957. The order, appointing the petitioners, as Officiating Upper Division Clerks, is Annexure 3, dated February 1, 1957. It is the claim of the petitioners that they were promoted, on a regular basis as Upper Division Clerks, and that a panel of Assistants and Upper Division Clerks, was formed by the 2nd respondent.

8. Meanwhile, the framing of a scheme for the Railway Board Secretariat Clerical Service, was in the offing, and such a scheme, was ultimately issued, under Annexure 4, on February 5, 1957. The 2nd respondent has filed a statement, regarding the circumstances under which the Scheme was framed, in consultation with the Union Public Service Commission, and the Ministry of Home Affairs. The Scheme was for filling the posts of Lower Division Clerks, Upper Division Clerks and such of the Upper Division Clerks who can be promoted as Assistants. Paragraph 14, sub-para (1) and (3), dealt with the filling up of

posts of Grade I, Upper Division Clerks, of the Clerical Service. That provided for the different manner in which the permanent vacancies, and temporary vacancies, were to be filled up, in the authorised strength of Grade I of the Service. Under paragraph 14, sub-para (1) (b), promotion to the cadre of Upper Division Clerks, can only be made of permanent Lower Division Clerks, for permanent vacancies, and, under paragraph 14, sub-para (3), only permanent Lower Division Clerks and temporary Lower Division Clerks, with more than three years' standing, and graduate Lower Division Clerks, could be promoted to Temporary vacancies in the Cadre. But, in view of the non-availability of permanent Division Clerks, the Scheme could not be implemented to fill permanent vacancies, immediately.

9. Similarly under para 16 of the Scheme permanent Upper Division Clerks, with three years' service in the grade, or in a higher grade, were eligible for promotion, as Assistants. But, here again, no permanent Upper Division Clerks were available, at that time. As certain vacancies existed, in the posts of Assistants, and required to be filled up, as a purely short-term measure, it was decided, by the 2nd respondent, that some of the posts of Assistants, may be temporarily filled up, by promotion from Upper Division Clerks. In view of this decision, the petitioners were promoted, as Assistants, on an ad hoc basis with effect from February 3, 1958, under Annexure 5, dated February 1, 1958. That order clearly shows that the petitioners, including others, who were officiating as Upper Division Clerks were promoted to officiate, as Assistants, on a purely short-term arrangement. It was further stated, in paragraph 5, of this Annexure, that the promotion is a purely short-term arrangement, till qualified Assistants become available, and that the promotion, under that order, will not confer, on the promotees, any claim for retention, as Assistants, as a long-term measure.

10. It may also be stated at this stage that it is the claim, of both the petitioners, that they have been promoted, on a regular basis, as Assistants, under this Order, and that, in consequence, the order of reversion, passed on June 16, 1967, is illegal. That contention is clearly belied, by the express terms of the Order, Annexure 5, promoting these petitioners.

11. Later on, in or about 1959, as there were vacancies in the grade of Upper Division Clerks, a panel was drawn, by the 2nd respondent, called 'Interim Provision Panel', to fill in temporary vacancies, and certain Lower Division Clerks were considered suitable for promotion as Upper Division Clerks, again, on a purely short-term arrangement. That is Exhibit 6, dated June 24, 1959.

12. On March 30, 1963, the original Service Scheme, Annexure 4, was amended in certain material particulars, by Annexure 7. Paragraph 14, of the original Scheme, was modified, by providing a different method of promotion, to Grade I (Upper Division Clerks). Under this modified scheme, the distinction between the manner of recruitment, in respect of permanent vacancies, and temporary vacancies which existed in the original scheme, was done away with. The modified scheme provided a uniform method of promotion, to both permanent vacancies, in the authorised strength of Grade I Service, as well as temporary vacancies. Broadly, the method of appointment, to this Grade, was: (a) 80 per cent, by promotion of permanent Lower Division Clerks and temporary Lower Division Clerks, with more than three years of service in the Grade, on the basis of seniority, subject to rejection of the unfit; (b) 20 per cent on the basis of competitive examination, limited to the Lower Division Clerks.

13. In 1965, a final panel was drawn up, according to the Railway Board, on the basis of the Scheme, Annexure 4, as modified by Annexure 7. That panel consisted of Lower Division Clerks, fit for promotion to the grade of Upper Division Clerks. The Lower Division Clerks were arranged, strictly in accordance with their seniority position, in that Grade. The final panel is Annexure 14, dated March 30, 1965, and, according to the petitioner in Writ Petition No. 96 of 1967, he has lost 148 places, and, according to the petitioner, in the connected writ petition, he has lost 110 places, in seniority. Both the petitioners are aggrieved about the ranking, given to them in this list.

14. On June 9, 1967, under Annexure 18 the Railway Board had reverted, to the grade of Assistants, with immediate effect, the Officiating Section Officers, shown therein. In consequence, under Annexure 16, dated June 16, 1967, which

is one of the orders, under attack, in both these petitions, the Railway Board reverted, as Upper Division Clerks, several officiating Assistants, including the two petitioners, herein, with effect from June 9, 1967. As mentioned earlier, the main grievance of the petitioners is, that they having been promoted, as Assistants as early as February 3, 1958 and which posts they had been holding till 1967, their reversion, as Upper Division Clerks, under Annexure 16, is illegal and void.

15. We have referred to the relevant orders promoting these two petitioners, in the first instance, as Upper Division Clerks and, later, as Assistants. The order promoting the petitioners, as Assistants, Annexure 5, dated February 1, 1958, has been referred to, already, and that order clearly shows that the promotion was only a short-term, temporary arrangement, on an officiating basis, and that no claim could be based upon that promotion. No doubt, the order, Annexure 3, dated February 1, 1957, promoting the petitioners, as Upper Division Clerks, may, on a superficial reading of that order, give the impression that the promotion, is on a permanent basis, and from which further promotion is to be made, to the Grade of Assistants, but in view of what is stated, on behalf of the Railway Board, the promotion, under Annexure 3, is again, a temporary promotion, because the Scheme, Annexure 4, was to come into force, within a very short time, and that the promotions were made, only on a provisional basis. The regular promotions, or appointments, to Upper Division Grade, which is styled as Grade I were to be made, as envisaged under the Scheme, Annexure 4, dated February 5, 1957. Both the petitioners have, categorically, averred in their petitions, that Annexure 4, as modified by Annexure 7, has retrospective effect from December 1, 1954.

16. The second respondent has also given various particulars, regarding as to how the framing of the Scheme originated, as well as the different stages, it had to pass through. In fact, it is also seen, from the documents filed, on behalf of the respondent, that there was a suggestion, by either the Home Ministry, or the Union Public Service Commission, that the Scheme was to come into effect, on the date it was promulgated; but that was met, by the Board by replying that an assurance had been given to the staff, to whom the Scheme had been circulated, that the

crucial date, for initial constitution of the Scheme, was to be fixed as December 1, 1954. In fact, a reading of Annexures 4 and 7, also clearly shows that the initial constitution of the Services, is to be from December 1, 1954, and it is on that basis, that appointments, or promotions, are to be made. Once it is held that the initial constitution of the Service, is from the date mentioned above, on the basis of Annexure 4, read with Annexure 7, it follows that the promotion of the petitioners, as Upper Division Clerks, under Annexure 3, was not under the Scheme, but really on a provisional, or temporary basis. Notwithstanding the fact that the grievance of both the petitioners is that ranking has not been given to them properly, in Exhibit 16, we are satisfied that it is in accordance with the principles, under the Scheme Annexure 4, as modified by Annexure 7. Therefore, we are not inclined to accept the contention of the petitioners that there has been a promotion, on a permanent basis in the first instance as Upper Division Clerks and, latter, as Assistants, which cannot be disturbed, by any orders that may be passed, by the 2nd respondent. We have already indicated that the regular promotions and appointments have to be made, under the Scheme, with effect from December 1, 1954.

17. In particular, a contention has been raised, on behalf of the petitioner in Writ Petition No. 165 of 1967, that he stands on a different footing, in that he is a permanent Lower Division Clerk and, therefore, his promotion, as an Assistant, must again, have been, on a permanent basis. There is no substance, in this contention, in view of the statement, made by the 2nd respondent, that this petitioner was confirmed, as a Lower Division Clerk in 1966, with effect from September 14, 1957, in which case it follows that he will not be eligible, for promotion, as an Upper Division Clerk, under the Scheme. The petitioner, in Writ Petition No. 96 of 1967, as pointed out, by the 2nd respondent, continues, even now as a temporary Lower Division Clerk, and he has not been made permanent, and, therefore, he cannot certainly be considered eligible, for promotion, under the Scheme.

18. A further contention has been taken, on behalf of the petitioner in Writ Petition No. 165 of 1967, that the Scheme as well as the various orders, passed by the 2nd respondent, violate the provi-

sions of Articles 14 and 16, of the Constitution, inasmuch as he has been deprived of the benefits of Chapters II and III, of the Indian Railway Establishment Manual. Once it is held that the said petitioner does not satisfy the requirement of the Scheme, there is no question of any discrimination, under Article 14, or violation of Article 16, arising for consideration at all. Therefore, both the petitioners, will have to fail, on merits.

19. A more serious contention has, however, been taken, by the petitioners, that the second respondent has no power, in law, to frame, either the Scheme, Annexure 4, or the modified Scheme, Annexure 7, so as to have retrospective effect, from December 1, 1954. Though both the petitioners have raised this contention in the writ petitions, Mr. Chatterjee, learned counsel for the petitioner in Writ Petition No. 165 of 1967, was not prepared to take up that extreme position, because, his attempt, was to show that his client satisfies the requirement of the qualifications laid down for promotion, in Annexure 4, read with Annexure 7. We have already negated that contention; but this legal contention has been persisted, before us, by Mr. K. L. Mehta, counsel appearing for the petitioner, in Writ Petition No. 96 of 1967.

20. Mr. Mehta, by reference to the provisions of the Indian Railway Board Act, 1905 (Act IV of 1905), and to the decision of this Court in *State v. Padmanabhacharya*, 1966-1 SCR 994 = (AIR 1966 SC 602) urged that the 2nd respondent had no power to frame a rule, having retrospective effect. In our opinion, this contention cannot be accepted. Act IV of 1905 is an Act to provide for investing the Railway Board with certain powers or functions, under the Indian Railways Act, 1890. The preamble to that Act shows that a Railway Board has been constituted, for controlling the administration of Railways in India. Section 2 provides that the Central Government, may, by notification, in the Official Gazette, invest the Railway Board, either absolutely, or subject to conditions, with powers, or functions, stated therein. That statute, does not, in any way, advance the petitioner's contention. As we shall presently show, the decision of this Court, referred to above does not also support the petitioners.

21. There is no controversy that the Indian Railway Establishment Code has

been issued by the President, in exercise of the powers, vested in him, by the proviso to Article 309, of the Constitution. Only two rules require to be noted, and they are Rules 157 and 158, occurring in Chapter I, under the sub-heading 'Power to frame rules'. They are as follows:

"157. The Railway Board have full powers to make rules of a general application to non-gazetted railway servants under their control.

158. The General Managers of Indian Railways have full powers to make rules with regard to non-gazetted railway servants under their control, provided they are not inconsistent with any rules made by the President or the Railway Board." We are not concerned, really, in this matter, with Rule 158, because the Schemes, Annexures 4 and 7, in particular, and the various orders, have been passed by the 2nd respondent, the Railway Board. The Railway Board, as will be seen from Rule 157, have full powers to make rules of general application, to non-gazetted railway servants under their control. The question is whether the 2nd respondent, has, while acting under Rule 157, power to make a rule (in this case, the Schemes), having effect from an anterior date.

22. The matter must be considered, in the light of the provisions of Art. 309, of the Constitution. That Article provides:

"309. Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act."

We may emphasize the words 'and any rules so made shall have effect subject

to the provisions of any such Act, which must receive their due weight. To that aspect, we shall come, presently.

23. We have already pointed out, that Annexure 4 was issued on February 5, 1957, and Annexure 7, on March 30, 1963, and that the initial constitution of the Service was to be from December 1, 1954, and it is, on that basis, that the promotions or appointments, to the Service, are to be made. In this case, there is no Act of the appropriate Legislature regulating the recruitment and conditions of service, under the 2nd respondent and therefore, the main part of Article 309 is not attracted. But, under the Proviso therein, the President has got full power to make rules, regulating, the recruitment and conditions of service of persons, under the 2nd respondent. Further, under the Proviso, such person, as may be directed by the President, can also make rules, regulating the recruitment and conditions of service, of persons, under the 2nd respondent. The rules so made, either by the President, or such person, as he may direct, will have currency, until provision, in that behalf, is made by or under an Act, of the appropriate Legislature, under Article 309.

24. It is also significant to note that the proviso to Article 309, clearly lays down that 'any rules so made shall have effect, subject to the provisions of any such Act'. The clear and unambiguous expressions, used in the Constitution, must be given their full and unrestricted meaning unless hedged-in, by any limitations. The rules, which have to be 'subject to the provisions of the Constitution', shall have effect, 'subject to the provisions of any such Act'. That is, if the appropriate Legislature has passed an Act, under Article 309, the rules, framed under the Proviso, will have effect, subject to that Act; but, in the absence of any Act, of the appropriate Legislature, on the matter, in our opinion, the rules, made by the President, or by such person as he may direct, are to have full effect, both prospectively and retrospectively. Apart from the limitations, pointed out above, there is none other, imposed by the proviso to Article 309, regarding the ambit of the operation of such rules. In other words, the rules, unless they can be impeached on grounds such as breach of Part III, or any other Constitutional provision, must be enforced, if made by the appropriate authority.

25. In the case before us, the Indian Railway Establishment Code has been issued, by the President, in the exercise of his powers, under the proviso to Article 309. Under Rule 157, the President has directed the Railway Board, to make rules, of general application to non-gazetted railway servants, under their control. The rules, which are embodied in the Schemes framed by the Board, under Annexures 4 and 7, are within the powers, conferred under Rule 157; and, in the absence of any Act, having been passed by the 'appropriate' Legislature, on the said matter, the rules, framed by the Railway Board, will have full effect and, if so indicated retrospectively also. Such indication, about retrospective effect, as has already been pointed out by us, is clearly there, in the impugned provisions.

26. The decision of this Court in 1966-1 SCR 994 = (AIR 1966 SC 602) does not assist the petitioners. The rule that came up, for consideration, has been referred to, at p. 999, of the Reports, in the judgment of Wanchoo, J., (as he then was), and the Court specifically says that the rule, referred to by it, cannot be made, under the proviso to Article 309 of the Constitution. It is further stated that the notification, referred to, cannot be said to be a rule, regulating the recruitment and conditions of service of persons appointed to the services and posts, in connection with the affairs of the State. This Court further observed that the effect of the notification, or the rule, that it had to consider, was to select certain Government servants, who had been illegally required to retire, and to say that even if the retirement had been illegal, that retirement should be deemed to have been properly and lawfully made. Finally, the Court said, that such a declaration, made by the Governor, cannot, in any sense, be regarded as a rule, made under the proviso to Art. 309. Having held that the rule, which was before it, was not one made under the proviso to Article 309 the Court further observed in that case, that it was not necessary to decide, whether a rule, governing conditions of service, of persons appointed in connection with the affairs of the State, can be made retrospectively under the proviso to Article 309. This decision, in our opinion, can be distinguished, on two grounds: (i) that the rule, in question, construed by the Court was held to be one, not coming within the purview of the proviso to Art. 309;

and (ii) the question, as to whether rule, under the proviso to Art. 309, can be framed, to have retrospective effect, has been left open.

(27) In this connection, we may refer to two decisions, of the Mysore High Court, and one of the Allahabad High Court. The Mysore Court, in the decisions, *Govindaraju v. State of Mysore*, AIR 1963 Mys 265 and *Govindappa v. I. G. of Registration*, AIR 1965 Mys 25, has taken the view that it is not open to the Governor, under the proviso to Article 309, to frame a rule, having retrospective effect. We may state that the decision in *Govindaraju's* case AIR 1963 Mys 265 came up, before this Court, on appeal, in *Nagarajan v. State of Mysore*, 1966-3 SCR 682 = (AIR 1966 SC 1942). But this Court, in *Nagarajan's* case, 1966-3 SCR 682 = (AIR 1966 SC 1942), had no occasion to express any opinion on the question as to whether the Governor under the proviso to Article 309, could frame a rule, having retrospective operation as it took the view that the relevant rules had not been made under Article 309.

28. A Full Bench of the Allahabad High Court, on the other hand, in *Ram Autar v. State of U. P.*, AIR 1962 All 328 (FB) has taken a view, contrary to the one, expressed by the Mysore High Court. We are of opinion that the latter represents the correct view. But, even the Allahabad High Court has not given due importance to the mandatory words, used in the concluding part of the proviso to Article 309 that the rules made, by the authority mentioned therein, 'shall have effect, subject to the provisions of any such Act'. This aspect has been emphasized by us, in the earlier part of this judgment.

29. To conclude, on this aspect, we are satisfied that the Scheme, Annexure 4, as modified by Annexure 7, framed by the 2nd respondent, Railway Board, such as it is, must have effect, as it does not suffer from any defect in its making and does not offend against the Constitution.

30. In the result, both the writ petitions are dismissed; but in the circumstances, parties will bear their own costs.

RSK/D.V.C.

Petitions dismissed.

AIR 1969 SUPREME COURT 125 (V 56 C 26)

(From Patna: AIR 1965 Pat 305)

R. S. BACHAWAT AND K. S. HEGDE JJ.

Union of India, Appellant v. M/s. Khas Karanpura Colliery Co. Ltd., Respondent.

Civil Appeal No. 332 of 1965, D/- 15-4-1968.

(A) Constitution of India, Art. 226 — Delay — Notification under S. 4 (1) of Coal Bearing Areas (Acquisition and Development) Act, 1957 — Writ petition challenging validity of notification filed within six months of date of notification — Held delay was not sufficient to refuse relief prayed for. (Para 5)

(B) Coal Bearing Areas (Acquisition and Development) Act (1957), Ss. 4, 5, 7 — Notification under S. 4 (1) — Effect — Lessee to whom mining lease in the areas is granted has to halt his operations in notified area till action was taken under S. 7 or till period prescribed in that section came to an end — Writ petition challenging notification under S. 4 even if filed before notification under S. 7 was issued is not premature. (Para 6)

(C) Constitution of India, Art. 133 — Pleadings — Pleadings on certain point vague but all facts necessary for determination of point were before court — Point was fully argued before High Court without any objection and was also decided by High Court — Objection cannot be taken to consideration of point in appeal by Supreme Court. (Para 7)

Cases Referred: Chronological Paras
(1961) AIR 1961 SC 954 (V 48) =
1962-1 SCR 44, *Burrakur Coal Co., Ltd. v. Union of India* 8

Dr. Syed Mohammed, Senior Advocate (Mr. S. P. Nayar, Advocate with him), for Appellant; Mr. A. K. Sen, Senior Advocate (M/s. S. C. Banerjee, and A. K. Nag, Advocates with him), for Respondent.

The following Judgment of the Court was delivered by

HEGDE, J.: In this appeal by certificate the question for decision is whether the High Court of Patna was correct in its conclusion that the notification No. S. O. 2991 issued by the Union Government on October 9, 1963 under

S. 4 (1) (*) of the Coal Bearing Areas (Acquisition and Development) Act, 1957, (No. 20 of 1957) — hereinafter called "the Act" — is violative of sub-s. (4) of that section.

2. The facts of the case fall within a narrow compass. The respondent, Khas Karanpura Colliery Limited, took on lease 1401 bighas of land in mouza Sale in the district of Hazaribagh as per a registered lease deed of July 8, 1949, for the purpose of winning coal. Thereafter it commenced working the colliery in 1952. Certain seams were opened up. Electric transmission lines were put up, staff quarters, office quarters, houses for labourers, hospital, school etc. were built. For the purpose of despatching the coal, a separate railway track was constructed and a railway siding built. These works were completed long before the impugned notification was issued. Under the notification in question 1200 bighas of land were notified with a view to acquisition, which included areas on which the railway siding, staff quarters, boiler house, houses for labourers etc. were constructed.

3. The respondent challenged the validity of the said notification in MJC No. 643 of 1964 — an application under Art. 226 of the Constitution — before the High Court. The main contention taken in the writ petition was that the notification in question contravenes sub-s. (4) of S. 4. The High Court accepted that contention and quashed the notification.

4. The material facts are more or less admitted. Along with its writ petition the respondent produced a plan of the

(*) "4 (1) Whenever it appears to the Central Government that coal is likely to be obtained from land in any locality, it may, by notification in the Official Gazette, give notice of its intention to prospect for coal therein.

(2)

(3)

(4) In issuing a notification under this section, the Central Government shall exclude therefrom that portion of any land in which coal mining operations are actually being carried on in conformity with the provisions of any enactment, rule or order for the time being in force or any premises on which any process ancillary to the getting, dressing or preparation for sale of coal obtained as a result of such operations is being carried on are situate."

colliery showing therein the railway track, the railway siding, labour quarters, office premises and various other buildings put up on the land. It had also shown therein the actual places where mining operations were carried on. The correctness of this plan has not been disputed. From that plan it is seen that in a considerable portion of the land notified under S. 4 (1) there are premises on which processes ancillary to the getting, dressing or preparation for sale of coal obtained as a result of the mining operation are being carried on. There is also no doubt that if the respondent is deprived of the benefit of those premises it would be difficult, if not impossible for it, to continue to work the colliery.

5. The High Court has come to the conclusion that in determining the area in which coal mining operation is being actually carried on, one is not to take into consideration merely those spots where actual digging is going on, but also areas which are sufficient to constitute a commercial or economic unit, and if so viewed, the entire leasehold may be justifiably considered as areas on which coal mining operations are actually being carried on. Alternatively, it held that the entire notified area had to be excluded because in parts of that area mining operations are actually being carried on and in the remaining parts there are premises on which processes ancillary to the getting, dressing or preparation for sale of coal obtained as a result of the mining operations are being carried. In other words the entire area is exempt from being notified under S. 4 (1) either because it is protected by the first part of S. 4 (4) or by its second part. These conclusions were challenged before us. It was urged on behalf of the appellant that the words "any land in which coal mining operations are actually carried on" found in the first part of S. 4 (4) do not permit of a liberal interpretation so as to bring in the conception of a commercial or economic unit; they merely mean the actual area where mining is taking place. As regards the alternative conclusion based on the second part of S. 4 (4) it was urged that on the pleadings there was no occasion for the High Court to consider whether the requirements of that part are satisfied. In addition, two other contentions were advanced on behalf of the appellant. They are: (i) no relief under Art. 226 should have been given as the respondent was guilty of laches,

and (ii) the writ petition was premature. We are in agreement with the High Court that there is no substance in the last two contentions advanced on behalf of the appellant. As seen earlier, the impugned notification was issued on October 9, 1963 and the writ petition was filed on March 23, 1964, well within six months of the date of the notification. This delay is not sufficient to refuse the relief prayed for.

6. In support of the contention that the petition was premature, Dr. Syed Mohammed, learned counsel for the appellant, urged that the respondent has no real grievance yet, as only a notification under S. 4 (1) had been issued; further proceedings are yet to take place, and the respondent can be aggrieved only when a notification under S. 7 (*) is issued. We think that this contention is misconceived. As soon as the notification under S. 4 (1) was issued, in view of S. 5, (**) the mining lease granted in favour of the respondent ceased to have effect for so long as that notification was in force. The effect of that

(*) "7. (1) If the Central Government is satisfied that coal is obtainable in the whole or any part of the land notified under sub-section (1) of section 4, it may, within a period of two years from the date of the said notification or within such further period not exceeding one year in the aggregate as the Central Government may specify in this behalf, by notification in the Official Gazette, give notice of its intention to acquire the whole or any part of the land or of any rights in or over such land, as the case may be.

(2) If no notice to acquire the land or any rights in or over such land is given under sub-section (1) within the period allowed thereunder, the notification issued under sub-section (1) of section 4 shall cease to have effect on the expiration of three years from the date thereof."

(**) "5. On the issue of a notification under sub-section (1) of section 4 in respect of any land—

(a) any prospecting licence which authorises any person to prospect for coal or any other mineral in the land shall cease to have effect; and

(b) any mining lease in so far as it authorises the lessee or any person claiming through him to undertake any operation in the land, cease to have effect for so long as the notification under that sub-section is in force."

notification was to require the respondent to bring to a halt all his operations in the area notified till action was taken under S. 7 or till the period prescribed in that section came to an end. Hence it cannot be denied that the respondent was seriously aggrieved by the impugned notification.

7. This takes us to the remaining two contentions noticed earlier. It was strenuously argued by Dr. Syed Mohammed that S. 4 (1) empowers the Government to notify all lands excepting those in which coal mining operations are actually being carried on; the notification in question has excluded 201 bighas in which mining was actually carried on; hence there is nothing illegal in that notification. He wanted us to construe the words "any land in which coal mining operations are being actually carried" strictly. The High Court has rejected this contention after taking into consideration the purposes of the Act, its preamble and the various provisions therein. But we have not thought it necessary to go into that controversy as in our opinion the impugned notification definitely violates the second limb of Section 4(4) and hence it is invalid. It covers land on which amongst other buildings, railway siding, boiler-rooms, office room, fan house and air shaft premises are situate. It cannot be denied that in these premises processes ancillary to the getting, dressing or preparation for sale of coal obtained as a result of the mining operations are being carried on. This conclusion of ours is resisted on the plea that in the writ petition no specific case is pleaded under the second part of sub-section (4) of Section 4 and therefore it is not open for us to consider that aspect of the case. We are unable to accept this contention. It is true that the pleadings on this point are rather vague; but all the facts necessary for determining that question are before the court. That aspect of the case appears to have been fully argued before the High Court without any objection. The High Court has considered and decided that question. Hence the appellant cannot now be permitted to contend that for want of necessary pleadings that question cannot be gone into. If areas in which those premises are situate could not have been notified under S. 4 (1) — as in our judgment they could not have been — it is not for us to decide whether any of the other areas included in the lease-hold could have been notified; we cannot

make out a new notification for the appellant.

8. One other contention was vaguely touched at the hearing of the appeal, and that was that though there are ten seams in the colliery only four seams are at present worked after obtaining the necessary permission, the remaining six seams are not yet opened up for the working; hence those seams cannot be said to have been worked on the date of the notification. Mr. A. K. Sen, learned counsel for the respondent, urged that all the ten seams were being worked in conformity with the provisions of law. According to him, once permission is obtained for grading the coal in a seam and he says that such permission had been obtained in respect of all the seams, in law it means that those seams are being actually worked. We need not go into this question in view of our earlier conclusion. At the hearing reference was made to the decision of this Court in *Messrs. Burrakur Coal Co. Ltd. v. Union of India*, 1962-1 SCR 44 = (AIR 1961 SC 954). The rule laid down in that case does not bear on any of the issues arising for decision in this appeal.

9. For the reasons mentioned above, this appeal fails and is dismissed with costs.

RSK/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 128
(V 56 C 27)

(From Bombay)*

**R. S. BACHAWAT, J. M. SHELAT AND
A. N. GROVER, JJ.**

Dr. Laxman Balkrishna Joshi, Appellant v. Dr. Trimbak Bapu Godbole and another, Respondents.

Civil Appeal No. 547 of 1965, D/- 2-5-1963.

Fatal Accidents Act (1855), S. 1-A — Tort — Negligence — Duties of doctor towards his patient.

The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him

* (First Appeal No. 552 of 1958, D/- 27-2-1963 — Bom.).

certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires: The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. (Para 11)

Held, High Court was right in its conclusions that death of patient was due to shock resulting from reduction of the fracture attempted by the doctor without taking the elementary caution of giving anaesthetic to the patient and that he was guilty of negligence and wrongful acts towards his patient and was liable for damages. F. A. No. 552 of 1958, D/- 27-2-1963 (Bom.), Affirmed. (Para 17)

Mr. Purshotamdas Tricumdas, Senior Advocate, (Mr. I. N. Shroff, Advocate, with him), for Appellant; Mr. Bishan Narain, Senior Advocate, (Mr. B. Datta, Advocate, and Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co., with him), for Respondents.

The following Judgment of the Court was delivered by

SHELAT, J.: This appeal by special leave raises the question of the liability of a surgeon for alleged neglect towards his patient. It arises from the following facts.

2. At about sunset on May 6, 1953, Ananda, the son of respondent 1, aged about twenty years, met with an accident on the sea beach at Palshet, a village in Ratnagiri District, which resulted in the fracture of the femur of his left leg. Since the sea beach was at a distance of 1-1/4 miles from the place where he and his mother lived at the time it took some time to bring a cot and remove him to the house. Dr. Risbud, a local physician, was called at about 8.30 or 8.45 p. m. The only treatment he gave was to tie wooden planks on the boy's leg with a view to immobilise it and give rest. Next day, he visited the boy and though he found him in

THE All India Reporter

1969

Allahabad High Court

AIR 1969 ALLAHABAD 1 (V 56 C 1)

FULL BENCH

B. D. GUPTA, S. N. KATJU AND
SATISH CHANDRA JJ.

Rajendra Prasad Oil Mills, Kanpur and another, Appellants v. Smt. Chunni Devi and others, Respondents.

First Appeal No. 392 of 1956, D/- 4-4-1968.

Civil P. C. (1908), O. 30, R. 10 — 'Person' — Expression covers a limited Company even though such Company is carrying on the business in name or style other than its own.

A Limited Company falls within the meaning of the expression 'person' as used in Rule 10, Order 30 of the Civil P. C. This would be so even though the Limited Company may have been carrying on business in a name or style other than its own without any attempt to conceal its own corporate name and this fact was known to the party suing. (1902) 2 Ch. D. 354 & (1901) 18 Rep. Pat Cas 185 & (1887) 12 AC 371 & (1895) 2 Ch. D. 630 & AIR 1962 SC 1192 & AIR 1944 Cal 138, Rel. on; AIR 1956 SC 354, Dist. Civil Misc. Writ 7871 of 1951, D/- 16-2-1955 (All), Approved; AIR 1960 SC 1080 & AIR 1959 All 540 (FB) & AIR 1918 Mad 362 & (1827) 108 ER 741 & AIR 1958 SC 658 & AIR 1956 SC 354 & AIR 1957 SC 628 & AIR 1967 SC 1643 & AIR 1944 Cal 138 & AIR 1931 Cal 770 & AIR 1932 Bom 516 & AIR 1922 Cal 408 & AIR 1930 Cal 327 & AIR 1926 All 161(2) & AIR 1934 Mad 386, Ref. (Para 30)

Cases Referred: Chronological Paras

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(1967) 2 SCR 762, I. G. Golaknath v. State of Punjab

22

(1962) AIR 1962 SC 1192 (V 49)=
1962 Supp (2) SCR 402, Arjun Prasad v. Shanti Lal Shankerlal Shah

9

(1960) AIR 1960 SC 1080 (V 47)=
1960-3 SCR 887, Kochuni v. State of Madras

22

(1959) AIR 1959 All 540 (V 46)=
1960 All LJ 767 (FB), Kundan Sugar Mills v. Indian Sugar Syndicate

16

(1958) AIR 1958 SC 658 (V 45)=1959
SCR 463, N. E. L. and P. Co. Ltd. v. Shreepathirao

18

(1957) AIR 1957 SC 628 (V 44)=
1957 SCJ 593, Chamarbaugwala v. Union of India

22

(1957) 1957 AC 436=1957-1 All
ER 49, Attorney General v. Prince Ernest Augustus

22

(1956) AIR 1956 SC 354 (V 43)=
1956 SCR 154, Dulichand Luxmi-
narayan v. Commr. of Income Tax
Nagpur

3, 18

(1955) Civil Misc. Writ No. 7871 of
1951, D/- 16-2-1955 (All), British
India Corporation Ltd. v. Govt. of
State of Uttar Pradesh

8

(1944) AIR 1944 Cal 138 (V 31)=
78 Cal LJ 270, Firm Jamuna-
dhar Poddar v. Jamunaram
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10, 24

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27

(1932) AIR 1932 Bom 516 (V 19)=34
Bom LR 1112, Bhagwan Manaji
v. Hiraji Premaji

24

(1931) AIR 1931 Cal 770 (V 18)=
35 Cal WN 432, Neogi Ghose and
Co. v. Nehal Singh

24

(1930) AIR 1930 Bom 216 (V 17)=
32 Bom LR 212, Samrathrai Khet-
sidas v. Kasturbhai

24

IL/IL/D887/68

1969 All/1 I G-9

- (1930) AIR 1930 Cal 327 (V 17)=
ILR 57 Cal 931, Hari Bandhu Pal
v. Hari Mohan 25
- (1926) AIR 1926 All 161(2) (V 13)=
23 All LJ 961, Habib Bux v.
Samuel Fitg and Co. Ltd. 26
- (1926) AIR 1926 All 337 (V 13)=
ILR 48 All 395, Mewa Ram v. Ram
Gopal 10
- (1922) AIR 1922 Cal 408 (V 9)=
ILR 49 Cal 524, Ram Prasad Chimon-
lal v. Anundji and Co. 25
- (1918) AIR 1918 Mad 362 (V 5)=
ILR 41 Mad 624, Perumal Koun-
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- (1902) 1902-2 Ch. D. 354=71 LJ
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British & American Shoe Co. 5, 20
- (1901) 18 Rep Pat Cas 185, Parks
Gunston & Tea Ltd. v. Thomson
Talmev and Co. 5
- (1895) 1895-2 Ch. D. 630=64 LJ Ch
681, Mac Iver v. Burns 7, 23
- (1893) 2 QB 96=62 LJ QB 485, St.
Gobain Chauny and Cirey Co. v.
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- (1887) 12 A. C. 371=56 LJ Ch. 873,
Wright v. Horton 5, 6
- (1827) 108 ER 741=7 B & C 314,
Cortis v. The Kent Water Works
Co. 18

J. Swarup, K. B. Asthana, V. Swaroop,
for Appellants; S. N. Verma, N. P.
Asthana, S. N. Kakker, Sridhar and R.
N. Bhalla, for Respondents.

B. D. GUPTA, J. :- The following
question has been referred for being
answered:—

"Whether a limited company falls with-
in the meaning of the expression 'per-
son' as used in R. 10 of Order 30 of
the Code of Civil Procedure?"

The circumstances in which this ques-
tion arose have been set forward in the
order of reference dated the 17th of
August, 1967, passed by a Division Bench
of which I was member, but may again
be briefly summarised as follows:

2. Murli Dhar Verma, the predeces-
sor-in-interest of the respondents to this
appeal, instituted the suit giving rise to
this appeal for recovery of money as
damages and interest. The sole defendant
to the suit, as originally filed, was des-
cribed as follow:—

"Rajendra Prasad Oil Mills, Kanpur,
through the Director Bishan Dayal, son
of Lala Kishori Lal. . . ."

As a result of an application for amend-
ment, which was allowed, the description
of the defendant was modified as fol-
lows:—

"Rajendra Prasad Oil Mills, Kanpur,
through —

(1) Bishan Dayal, son of L. Kishori Lal,
(2) Rameshwar Prasad, son of Lala
Kishori Lal, and

(3) Sunder Lal, son of L. Ram Bilas. .
. . . Directors of the said Mills."

Only one written statement was filed,
which, according to the heading, was the
written statement of Rameshwar Prasad.
At the very beginning thereof stands
recorded what has been described therein
as the preliminary objection that "Rajen-
dra Prasad Oil Mills, Kanpur, belonged
to N. K. Industries Ltd., Kanpur, a limit-
ed company registered under the Indian
Companies Act, of which Lal Rameshwar
Prasad was the Managing Director, and
the frame of the suit was bad as it was
liable to be dismissed on this ground
alone. This objection gave rise to the
first issue which was as follows:—

"Has the suit been badly framed?"

The learned Civil Judge took the view
that the suit was not badly framed and
after recording his findings on the other
issues, which related to the merits of the
controversy between the parties, decreed
the suit for Rs. 23,743/1/- "against the
defendant" together with proportionate
costs and pendente lite and future in-
terest.

2A. "Rajendra Prasad Oil Mills" and
Rameshwar Prasad thereupon filed this
first appeal praying that the decree of the
court below be set aside and plaintiff's
suit be dismissed. When the appeal came
up for hearing the first contention raised
by Mr. Jagdish Swaroop for the appel-
lants was that no suit could be filed
against "Rajendra Prasad Oil Mills" by
reason of the fact that "Rajendra Prasad
Oil Mills" was not a legal entity. Keep-
ing in view the arguments raised in sup-
port of the above contention the Bench
framed the question which is before us.

2B. Rule 10 of Order 30 C. P. C. runs
as follows:—

"Any person carrying on business in
a name or style other than his own name
may be sued in such name or style as if
it were a firm name, and, so far as the
nature of the case will permit, all rules
under this Order shall apply."

There has been no controversy that
"Rajendra Prasad Oil Mills" was an
undertaking owned by Messrs. N. K.
Industries, a limited company function-
ing under the Indian Companies Act. The
learned Civil Judge appears to have relied
on the provision quoted above in sup-
port of his view that since "Rajendra
Prasad Oil Mills" had entered into the
disputed contract with Murli Dhar Varma
and all dealings relating to the said con-
tract had taken place between Murli Dhar
Varma and "Rajendra Prasad Oil Mills"
there was no legal bar against the plain-
tiff instituting the suit against "Rajendra
Prasad Oil Mills."

The contention on behalf of the appel-
lants, however, is that on a correct inter-
pretation of the provisions contained in

Rule 10 of Order 30 C. P. C. the case of a limited company must be excluded from its purview and that notwithstanding that the fact that such a company may be carrying on business in a name or style other than its own, recourse cannot be had to the provisions contained in the aforesaid rule with the result that, in view of the fact that "Rajendra Prasad Oil Mills" was arrayed as the sole defendant, the suit must be dismissed as not maintainable. There is no controversy that "Rajendra Prasad Oil Mills" is not a legal entity and that, unless the provisions contained in Rule 10 of Order 30 C. P. C. may be availed of as applicable, the suit which has given rise to this appeal was not maintainable. The contention on behalf of the appellants is that though a limited company falls within the definition of the expression 'person', as embodied in the General Clauses Act, it cannot be held to fall within the purview of the expression 'person' in Rule 10 of Order 30 of the Code of Civil Procedure by reason of the limitation contained in the definition itself viz., "Unless there is anything repugnant in the subject or context."

Reference has been made to the Companies Act and it has been urged that the provisions contained in Section 147 of that Act are repugnant to the notion of a limited company carrying on business in a name or style other than its own name. Section 147 of the Companies Act need not be reproduced. Suffice it to say that the provisions contained therein provide for the mode in which the name of a company along with the address of its registered office is required to be published in all matters connected with the business carried on by that company either at the registered office or elsewhere. The provisions also declare that failure to comply with the above requirements, as incorporated in clause (1) would constitute an offence and also lay down the penalty for the commission of such offences. It would, therefore, appear that the provisions contained in the Companies Act do not permit a limited company to carry on business in a name or style other than its own name. The said Act further declares that if a company does so, it would constitute an offence punishable with penalty laid down by the Act itself.

The relevant part of section 3 of the General Clauses Act (X of 1897) runs as follows:—

"In this Act in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context, — (42) 'person' shall include any company or association or body of individuals, whether incorporated or not."

Keeping in view the above definition, the question which, to my mind, is pertinent is as to whether the Code of Civil Procedure contains anything in the subject or context which is repugnant to the notion of a limited company falling within the purview of the expression 'person' in Rule 10 of Order 30 of the Code of Civil Procedure. No such thing has been pointed out so far as the Code of Civil Procedure is concerned. Even if, as a result of the provisions contained in Section 147 of the Companies Act, such a notion were held to be repugnant to the provisions contained in that Act, I do not consider it as having any bearing on the question about the meaning to be assigned to the expression 'person' occurring in the Code of Civil Procedure.

3. Learned Counsel for the appellants relied upon the decision of the Supreme Court in the case of *Dulichand Luxminarayan v. Commr. of Income Tax, Nagpur*, AIR 1956 SC 354 in which it was held that the definition of the word 'person' in the General Clauses Act would not be imported in construing that expression in Section 4 of the Indian Partnership Act because doing so would be totally repugnant to the subject of partnership law. This decision recognises the principle that in interpreting the use of the expression 'person' in an Act the definition of that expression in the General Clauses Act would not apply in case it was repugnant to the content of that Act. It may, therefore, follow that, in construing the expression 'person' whenever used in the provisions contained in the Companies Act, 'Rajendra Prasad Oil Mills' may have to be excluded from the purview of the expression by reason of the fact that the provisions contained in Section 147 of the Companies Act make out that it is not permissible for a company to carry on business in a name or style other than its own name, but it does not follow that, even though the C. P. C. contains nothing to indicate the aforesaid repugnancy, the case of a company carrying on business in a name or style other than its own must be held to be excluded from the purview of the expression 'person' in Rule 10 of Order 30 of that Code.

The decision of the Supreme Court in the case of AIR 1956 SC 354 (supra) thus lends no assistance to the contention of learned counsel for the appellants. It does not appear to be the law that the result of the provisions contained in Companies Act, whereby limited companies are prohibited from carrying on business in any name or style other than their own, is that the expression 'person' wherever used in the Code of Civil Procedure must be construed as excluding the case of a company carrying on business in a name or style other than its

pute by referring to the petitioner-company by that name and style does not invalidate the reference."

The above decision is a direct authority on the question which has been referred and, if I may say so with respect to the learned Judge who has recorded the opinion quoted above, I see no reason to take a different view.

9. I may add that in the case of Arjun Prasad v. Shanti Lal Shankerlal Shah, AIR 1962 SC 1192 the Supreme Court has, in para 8 of the said report, observed that "Whenever the word 'person' is used in any statute a company would be included thereunder."

10. It was contended that Rule 10 applied only to cases where a single individual carried on business in an assumed name. I am unable to accept this contention. Reference may be made to the decision of a Division Bench of the Calcutta High Court in the case of Jamunadhar Poddar Firm v. Jamunaram Bhakat, AIR 1944 Cal 138 in which it was held that Order 30, Rule 10 applies not only to a single individual carrying on business under a firm name or an assumed name but also to a number of individuals carrying on business either under a firm name or in an assumed name when those individuals do not in law constitute a partnership resting on contract. It may also be mentioned that the learned Judges who decided the above case relied, among other cases, on the principle laid down by a Division Bench of this Court in the case of Mewa Ram v. Ram Gopal, AIR 1926 All 337. I fail to see any reason to draw any distinction in this matter between a limited company and a Joint Hindu family.

11. Another contention raised by learned counsel for the appellants was that since the plaintiff knew that the business carried on under name "Rajendra Prasad Oil Mills, Kanpur" was in fact being carried on by Messrs. N. K. Industries Limited the plaintiff was disentitled from impleading the defendant under the assumed name. I am unable to accept this contention. There is nothing in Rule 10 or elsewhere to indicate that the provisions contained in Rule 10 did not apply to cases where the identity of the real party was known to the plaintiff. The object of framing Rule 10 may have been to protect the unwary, but there is nothing in Rule 10 which might indicate that in case the plaintiff knew the real person the provisions contained in Rule 10 would be inapplicable. Rule 10 can be availed of whenever a person factually carried on business under a name or style other than his (or its) own name and the provision being a beneficent one cannot be construed strictly and in a manner not warranted by the language of the statute,

12. I would like now to refer to another circumstance which appears to me to be conclusive of the matter. Provisions parallel to those contained in section 147 of the Companies Act are to be found in sections 65 and 66 of the Indian Companies Act (Act VI of 1882) which was in force at the time the General Clauses Act (1897) was brought on the statute book. Though the question which has arisen for consideration by us relates to the meaning to be assigned to the expression 'person' in rule 10 of Order 30 of the Code of Civil Procedure, the contention of learned counsel for the appellants amounts, in substance, to this that, by reason of the provisions contained in section 147 of the Companies Act, it must be held that the expression 'person', whenever and wherever used in any statute, must be construed as excluding a limited company from the purview of that expression. Keeping in view the fact that provisions parallel to those contained in section 147 of the Companies Act formed part of the provisions of the Indian Companies Act (1882) which was in force at the time the General Clauses Act was brought on the statute book, the acceptance of this contention would result in attributing to the legislature, which enacted the General Clauses Act, an intention which cannot be attributed on any principle of interpretation, because the definition of the expression 'person' in clause (42) of Section 3 of the General Clauses Act, in so far as an incorporated company has been specifically included in that definition, would, if the interpretation contended for was accepted, be rendered not only meaningless and redundant but manifestly misleading. It is, therefore, impossible to accept the contention that an incorporated company, which has been specifically included in the definition of the expression 'person' in the General Clauses Act, must nevertheless be construed as excluded from the purview of the expression 'person' in Rule 10 of Order 30 of the Code of Civil Procedure, even though there is nothing in the subject or context of the Code of Civil Procedure to make out any repugnancy.

13. For all these reasons I would answer the question referred to us in the affirmative.

14. S. N. KATJU, J. :— I agree with the opinion of my brother Gupta.

15. SATISH CHANDRA, J. :— A Division Bench of this court has referred the following question to the Full Bench:—

"Whether a limited company falls within the meaning of the expression 'person' as used in Rule 10 of Order 30 of the Code of Civil Procedure?"

The question arises in this way. N. K. Industries Limited was a company at Kanpur incorporated under the Indian Companies Act. It appears that it owned

two oil mills. One was known as Nihal Chand Kishori Lal Oil Mills and the other as Rajendra Prasad Oil Mills. These two oil mills were the properties of N. K. Industries Limited, Kanpur. They were not independent legal entities. The plaintiff alleged that he had business dealings with the Rajendra Prasad Oil Mills for the last several years. On 22nd May, 1950, this Mills contracted to sell to the plaintiff 100 tons of expeller castor cakes at the rate of Rs. 6/2/- per maund ex-mills delivery. The plaintiff paid the price of the goods amounting to Rs. 16,585/15/- on 22nd June, 1950, but the Mills did not deliver the goods. It, therefore, sued the Mills for recovery of Rs. 28,139/11/6 as damages for breach of contract. Originally the defendant was described as "Rajendra Prasad Oil Mills, Kanpur, through the Director Bishan Dayal, son of L. Kishori Lal." Subsequently the plaint was amended. The defendant was described as "Rajendra Prasad Oil Mills, Kanpur, through: (1) Bishan Dayal, son of L. Kishori Lal, (2) Rameshwar Prasad, son of L. Kishori Lal and (3) Sunder Lal son of L. Ram Bilas, Directors of said Mills." Rameshwar Prasad filed a written statement. In it he took a preliminary objection that Rajendra Prasad Oil Mills, Kanpur, to the knowledge of the plaintiff belonged to N. K. Industries Ltd., Kanpur, a limited company registered under the Indian Companies Act. There was no firm of the name of Rajendra Prasad Oil Mills. The frame of the suit was bad and it was liable to be dismissed.

The trial court held that the evidence proved that the disputed contract had taken place between Murlidhar Verma, the plaintiff, and Rajendra Prasad Oil Mills and not between the plaintiff and N. K. Industries Ltd. Though it was admitted that Rajendra Prasad Oil Mills was owned by the N. K. Industries, and was itself not a legal entity, but since the contract was taken up with the Mills it was not necessary for the plaintiff to institute a suit against N. K. Industries. There was no allegation in the plaint nor did the Civil Judge find that the plaintiff had no knowledge that the N. K. Industries Ltd. was carrying on the business or that the name or style of Rajendra Prasad Oil Mills was an assumed name of some one else; or that three persons through whom the Mills was being sued were competent to represent the Company. On the merits the claim was held proved. The suit was decreed for Rs. 23,743/1/-. The Rajendra Prasad Oil Mills and Rameshwar Prasad came to this court.

15A. At the hearing of the appeal reliance appears to have been placed on Order 30, Rule 10, C. P. C. to sustain the competence of the suit. The Bench hear-

ing the appeal seems to have proceeded on the basis that N. K. Industries Ltd. was carrying on the business in the name and style of Rajendra Prasad Oil Mills. On that basis it referred the question if a company could be a person covered by Order 30, Rule 10, C. P. C. Order 30, Rule 10, C. P. C. runs as follows:

"Any person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all the rules under this Order shall apply."

There was no comparable provision in the Code of Civil Procedure, 1882. It was introduced for the first time in the Code of Civil Procedure, 1908. Rule 10 is a verbatim reproduction of Rule 11 of Order 48-A of the Rules of Supreme Court of England.

16. The question is whether the term "any person" in Rule 10 includes a juristic person. The Code of Civil Procedure does not define this term. The General Clauses Act, which is applicable to the interpretation of the Code of Civil Procedure, by section 3(39) defines the word "person" to include any company or association or body of individuals whether incorporated or not. That definition is applicable unless there is anything repugnant in the subject or context. Under this definition an incorporated body would be a person within meaning of a statute unless there is anything repugnant in the subject or context. According to Raghubar Dayal J. in *Kundan Sugar Mills v. Indian Sugar Syndicate*, AIR 1959 All 540 (FB), paragraph 12:

"The context is not to indicate that the word 'person' should have the meaning of a juridical person, but it should indicate that the word 'person' should not have such a meaning. It is only then that the context would create such a repugnancy as would make non-applicable the definition of the word 'person' in the General Clauses Act."

The proper approach has to be whether the context or the subject presents a repugnancy. If so, of what nature, character or extent. It was urged that the Rule 10 refers to the person who carries on business by the word "his". "His" could properly refer to a human being. It could not be used for a juristic personality. Taken literally the word "his" would refer to a male human and not a female. The excluding of a female would make no sense. Obviously the word "his" has been used in a descriptive rather than in a restrictive sense. Order 33, Rule 1 C. P. C. defines a pauper with reference to a person who inter alia possesses wearing apparel. In *Kundan Sugar Mills case*, AIR 1959 All 540 (FB) mentioned above the Full Bench declared that though a

litate the carrying on of actions against those who conceal their names. He further held that for carrying on of actions against persons who conceal their names the rules relating to actions against firms are to be applied as far as possible. But he held that those rules cannot be applied to a case not within the reason of the rule. The rule involved that you can only sue a man in his firm name in respect of matters which are connected with the business which he carries on under that name. So the underlying principles were emphasised. The rule would apply where a business was carried on in an assumed name by concealment of true name of the person who carried on the business, and, secondly it would apply only in relation to matters arising out of such a business. If a company carries on business in an assumed name but without concealing its own identity, that is to say by publishing its corporate name as well, such a company would not be within the reason of rule of Order 30 Rule 10. It would not be a person of the character for whom Rule 10 was enacted.

24. In AIR 1944 Cal 138, a Division Bench dealing with the object of Rule 10 of Order 30, C. P. C., observed that an individual who carries on a business under a firm name or an assumed name cannot sue as plaintiff in that assumed name vide 35 Cal WN 432 : (AIR 1931 Cal 770); 34 Bom LR 1112: (AIR 1932 Bom 516); 32 Bom LR 212: (AIR 1930 Bom 216) but Order 30 Rule 10 enables a person to sue him as defendant in that assumed name. This distinction which has been made in Order 30 itself has been made in the interest of commerce. The Bench continued:—

"There is no inconvenience or injustice, if a person carrying on business under a firm name or any other assumed name is made to sue in his real name, but different and weighty considerations would apply when he is sued by another person in the assumed name in which he carries or has carried on business. Business may be carried on by correspondence and orders may be, and are usually, placed from one part of the world to another through post and goods may be supplied on credit on such orders. A producer or merchant living in one part of the globe cannot be expected to know or to make enquiries and in some cases it is not possible for him to know or to make enquiries as to who is the owner of the business that is being carried on in an assumed name, and in most cases he would only know the name of the real owner after he had brought his suit, for the defendant must then appear in his own name. (Order 30, Rule 6). It is to be held that a decree obtained by such a producer or merchant in a suit instituted against the assumed name is void

decree, it would lead to manifest hardship, would open up a wide door to fraud and would sap the credit on which commercial dealings largely rest. In our judgment O. 30 R. 10 Civil P. C., rests on these considerations and they must be kept in view in construing that rule."

The aim and aspiration of Rule 10 was to suppress fraud and mitigate hardship and to advance the interest of commerce by preventing a person who conceals his identity and is carrying on business in a firm name or in an assumed name, from getting away from his business obligations. Lack of knowledge of the true identity was the real reason, for the enactment of this provision. Rule 10 seeks to circumvent the effect of concealment.

24-A. This being the true intent and object the rule would apply to only such companies as carried on business by concealing their identity. They would be persons within R. 10 properly so called. Companies which did not conceal their true identity or name, even though carrying on business in an assumed name or style, would not be persons as intended to be involved within Rule 10.

25. Under Rule 10 the suit is filed against the real person who carried on the business and incurred the obligation. It does not provide for merely suing the business name. The real person must be alive. In Ram Prasad Chimonlal v. Anundi and Co., AIR 1922 Cal 408, it was held that if the sole proprietor of a business who carried on business in an assumed name dies and no steps are taken to record his death and his legal representatives are not brought on the record within time, the suit abates. In Hari Bandhu Pal v. Hari Mohan, AIR 1930 Cal 327, it was further held that if the legal representatives are not substituted then the decree is made against a dead man having a different name and in that case the decree becomes an absolute nullity.

26. In Habib Bux v. Samuel Fitz and Co. Ltd., AIR 1926 All 161 (2) it was held that a suit cannot be instituted under Order 30 Rule 10 after the death of the person who carried on business in a firm name, unless, after the death of the sole proprietor the firm carries on business which justifies a presumption that his heirs are its partners. That rule will only apply when the business is being carried on at the time when the suit is instituted. If business is not being carried on in that name at the time of the suit and the business has ceased to exist then all persons who are interested in the assets ought to be impleaded.

27. In Ramanathan v. Palaniappa, AIR 1934 Mad 386 it was held that Rule 10 of Order 30 simply justifies the introduction of the assumed name instead of the

real name of the defendant, but does not absolve the plaintiff from his liability to propose a proper guardian, if the defendant represented by such a name is really a minor. Where no proper guardian is appointed for the minor the decree is a nullity and cannot be enforced against him. In *St. Gobain Chauny and Cirey Co. v. Hovermann's Agency*, (1893) 2 QB 96, Lord Esher, M. R., held that Rule 11 of Order 48-A did not apply to a foreigner resident out of the jurisdiction of the Court even though he carried on business within the jurisdiction in the name or style other than his own name.

It was observed:—

"The words 'any person' are of course large enough to include a foreigner, and a foreigner who is resident abroad, and to include one who has never been in England in his life and has never had what has been called the protection of the English law, and merely carried on business in England by his agents. But the question is, ought the Court to give an interpretation to the words which would include such a person?"

He ruled that the words should not be construed so as to bring within the jurisdiction persons who neither by nationality, nor by residence, are capable of being made subject to the jurisdiction.

28. There is nothing in the language of Order 30 Rule 10, C. P. C. to expressly suggest that the person must be alive, not dead, not a minor and not a foreigner or that the business must not cease to exist. But all these restrictions have been deduced from the object and real reason of the rule; and the operation of the rule has been so confined as to exclude such classes of cases. So, to be in accord with the underlying context and subject of Order 30 Rule 10 the word "person" occurring therein ought to be confined to those who conceal their identity while carrying on business. Subject to this condition all those individuals or entities mentioned in the definition of the word "person" in the General Clauses Act would be within the purview of Order 30 Rule 10. Before a plaintiff can successfully sue another in the assumed name under Order 30, Rule 10 he will have to allege and establish that because of concealment he was unaware of the true name or identity of the person carrying on the business in the assumed name or style. The policy of the law is that persons can themselves be made liable for their business obligations. Order 30 Rule 10 is an exception. It applies where there is concealment and the plaintiff is unaware of the true identity of the businessman. Such a businessman alone whether a human or juristic entity is "person" within meaning of Order 30 Rule 10, C. P. C.

29. My answer to the question referred to this Bench is: a limited company

alleged and established to be carrying on business in an assumed name by concealment of its own corporate name is a person within meaning of Order 30 Rule 10, C. P. C.

BY THE COURT

30. The answer to the question referred to the Full Bench is as follows:—

"A Limited Company falls within the meaning of the expression 'person' as used in Rule 10, Order 30 of the Code of Civil Procedure. This would be so even though the Limited Company may have been carrying on business in a name or style other than its own without any attempt to conceal its own corporate name and this fact was known to the party suing."

GGM/D.V.C.

Reference answered accordingly.

AIR 1969 ALLAHABAD 11 (V 56 C 2)

M. H. BEG, J.

Shyama Charan, Petitioner v. Commissioner, Rohelkhand Division, Bareilly and others, Respondents.

Civil Misc. Writ No. 3286 of 1962, D/- 15-11-1967.

(A) Constitution of India, Art. 311 — Disciplinary action — Evidence to be supplied with charge — Not an inflexible rule.

In disciplinary proceedings against the servants of Local Bodies, although it is better to mention evidence which it is proposed to consider in support of the charge itemwise, no inflexible rule can be laid down that in every case, the charge must state the evidence in support of the charge. In some case, the best evidence may be provided after the charge and by the accused himself. (Para 4)

(B) Constitution of India, Art. 311 — Disciplinary action — Show cause notice — Report of Enquiring Officer not sent with it — Effect.

Whether the opportunity afforded to a public servant in a particular case is reasonable must depend upon the circumstances of that case. AIR 1960 SC 493, Rel. on. (Para 6)

Thus, although it would be better to supply the report of the Enquiring Officer to the public servant concerned where the information contained in the report is very meagre he cannot be held to have been prejudiced by the fact. to supply him with a copy of that report. (Para 7)

(C) Constitution of India, Art. 311 — Disciplinary action — Show cause notice — One week's time given for reply — Effect.

Want of sufficient time to show cause should be taken into account in considering.

IL/IL/E80/68

ing the totality of facts and circumstances to determine whether reasonable opportunity was given to show cause. The mere fact that only one week's time was given for reply will not therefore, vitiate the proceedings against the petitioner if the opportunity to show cause can be held to be reasonable on the whole. AIR 1964 Orissa 279, Ref. to. (Para 8)

(D) Constitution of India, Art. 311 — Dismissal of public servant — Appeal — No rule that personal hearing should be given, though it is better to give such hearing. (Para 9)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 1269 (V 54)=

C. A. No. 499 of 1965, State of Orissa v. Dr. (Miss) Binapani Devi 2

(1964) AIR 1964 Orissa 279 (V 51)=

ILR (1964) Cut 286, Bibhuti Bhusan Das v. Divisional Superintendent S. E. Railway 8

(1961) AIR 1961 SC 1070 (V 48)=

1961 Jab LJ 414, Jagdish Prasad Saxena v. State of Madhya Bharat 6

(1960) AIR 1960 SC 493 (V 47)=1960-

2 SCR 569, Kapur Singh v. Union of India 6

G. D. Srivastava, for Petitioner; V. Mitra & S. C., for Opposite Party.

ORDER :— The petitioner is a dismissed employee of the Antarim Zila Parishad, Bareilly, opposite party no. 3. He has prayed for a writ of certiorari to quash the order of the President, Antarim Zila Parishad, opposite party no. 2 passed on 4-1-1962 dismissing the petitioner from service and also the order of the Commissioner dated 12-7-1962 upholding the dismissal.

2. Mr. G. D. Srivastava appearing for the petitioner has raised a number of objections to the disciplinary proceedings taken against the petitioner. The first of these objections was that the charge which was preferred against the petitioner does not contain an actual statement of the evidence which was to be used against the petitioner. In this connection Mr. Srivastava relied upon a recent decision of the Supreme Court in State of Orissa v. Dr. (Miss) Binapani Devi, C. A. No. 499 of 1965, SC Notes Vol 9 No. 4, February 15, 1967=(AIR 1967 SC 1269) In this case it was held:

"..... the person against whom an enquiry is held must be informed of the charge he is called upon to meet, the evidence in support thereof. The rule that tends to whose prejudice an order is being passed is entitled to a hearing before judicial tribunals and to adjudicate upon matters involving civil consequences."

In that case, the Supreme Court was dealing with the essentials of natural jus-

tice in explaining the fundamental rules of the natural justice. It mentions that the person charged must be informed of the case and the evidence in support thereof. But, it did not specifically lay down any rule that the show cause notice itself must mention the evidence in the form of enumerated items. My attention was invited to an appendix of a copy of G. O. No. R. O. 57/XI-A-14-1953 dated Lucknow June 13, 1953 from the Secretary to Government, Uttar Pradesh, to all District Magistrates, Uttar Pradesh, relating to the procedure to be followed in disciplinary proceedings against servants of the local bodies. In the appendix, the form of charge to be used in Disciplinary Proceedings is given. Here, after the specimen charge framed somewhat in the manner in which the charge is framed in a criminal proceeding, the following sentence occurs:—

"Evidence which it is proposed to consider in support of the charge."

Thereafter, the evidence has to be mentioned itemwise and numbered. It is certainly better to follow this direction and set out the evidence in support of the charge.

3. In the present case, the charge (Annexure I to the petition) is a four page document containing 12 heads of charges. After each charge, actual facts upon which the charge is based are mentioned. But, these facts are not numbered. As an instance I may mention charge no. 2 which states: "a sum of Rs. 268/- was drawn in the name of the Engineer A. Z. P. who paid the amount to you for the purchase of stamp, writing and registration charges in connection with the donation of the building of Dhaunra by Sri Ram Murti Ji". After that, occurs the following statement of facts: "The entire file of the case was also handed over to you. Neither the account nor the stamp and the connected file has so far been submitted by you. In this case you have admitted that a sum of Rs. 78.50 are still in balance with you which should have been refunded by you long ago but you are misappropriating it as per your statement". Thus, it was indicated, after framing of each charge, that the Adhyaksh was going to rely upon certain facts within the knowledge of the petitioner himself which had been put to the petitioner in the course of the enquiry conducted in relation to the charges.

4. The petitioner in reply to the charges dated 23-9-1961 submitted a lengthy reply and explanation (Annexure IV of the petition) dated 25-11-1961. So far as charge no. 2 mentioned above was concerned, the petitioner divided it into two portions, denying the receipt of the file but admitting the payment of Rs. 268.50 to him and also admitting that the expenses meant, to be incurred on the

purchase of stamped paper and writing of the document had remained with the petitioner and may be deducted from his salary. The petitioner also said that the balance of the amount remained with him would be returned if the registration of the document did not materialise. It was clear from his reply that he has given no explanation for failure to get the document registered. He admitted that the amount still due from him may be deducted from his salary. Such a statement could certainly be interpreted as an admission that he had misappropriated the amount in the eye of law. The evidence in support of the charge in the form of this admission was contained in the petitioner's own reply to the charge. In such a case, the petitioner could not complain that the charge did not contain all the evidence. In fact, the evidence consisting of the admission was supplied by the petitioner himself. I, therefore, do not think that any inflexible rule can be laid down that, in every case, the charge must state the evidence in support of the charge. In some cases, as in the case of the petitioner, the best evidence may be provided after the charge and by the accused himself.

5. The second objection was that the petitioner had not been supplied with a copy of the enquiry report. A copy of this report is annexed as Annexure 2 of the counter affidavit. The report is extremely short and merely mentions the replies given by the petitioner. It is in the nature of an office report giving a summary of facts of the case and containing the comment after each summary against each charge: "Hence, the charge is proved". The summary of the evidence begins in every case with the admissions made by the petitioner himself. It would certainly have been proper if this enquiry report had been sent to the petitioner together with the show cause notice sent by the Adhyaksh. In the present case, neither the show cause notice nor the so called report of the Enquiring Officer, was attached to the petition by the petitioner or submitted by the opposite parties. A supplementary affidavit was sought to be filed today to make good the shortcoming, and it was received in evidence. It did not, however, necessitate a reply of the opposite parties to meet the supplementary affidavit filed at so late a stage. The supplementary affidavit attaches a copy of the show cause notice. The show cause notice summarises the findings arrived at by the Enquiring Officer. It also mentions that, after considering the explanation of the petitioner to the charges served upon him and the enquiry held by the Secretary under the authority of the Adhyaksh and the entire evidence which was placed before the petitioner himself, and, after giving the petitioner

an opportunity to explain all the charges and the evidence, and having heard the petitioner in person and given him the opportunity to produce evidence, which the petitioner did not produce, the Adhyaksh had arrived at a conclusion to award the punishment of dismissal. The show cause notice gave the petitioner 7 days' time for submitting his explanation or reply and stated that, in the absence of such explanation, it would be assumed that there was no reply to be given.

6. A number of cases were cited in support of the proposition that the report of the Enquiring Officer ought to have been supplied to the petitioner together with the show cause notice. The main case cited was of Jagdish Prasad Saxena v. State of Madhya Bharat, AIR 1961 SC 1070. In this case, the Supreme Court pointed out that the petitioner did not get sufficient opportunity to meet charges framed against him as he did not get an opportunity to cross-examine certain witnesses and was also not given a copy of the report made by the Enquiring Officer so that he could not offer an explanation as regards the points made against him. The enquiry report was mentioned as one of the items which the petitioner in that case did not get the opportunity to meet. This omission was considered as a part of the total set of facts upon which the Supreme Court arrived at the conclusion that the petitioner in that case did not get a reasonable opportunity to show cause. On such a question, there can be no hard and fast rule laid down as pointed out by the Supreme Court in Kapur Singh v. Union of India, AIR 1960 SC 493, where it was held that an opportunity of making an oral representation is not a necessary ingredient of an opportunity of showing cause within the meaning of Article 311. It was pointed out:

"Whether the opportunity afforded to a public servant in a particular case is reasonable must depend upon the circumstances of that case."

7. In the petitioner's case, although it would have been better to supply the report of the Enquiring Officer to him, yet, the information contained in that report was so meagre that the petitioner could not be said to have been prejudiced by the failure to supply him with a copy of that report. In fact, he had received all the information contained in the report already by means of charges framed against him and what took place in the enquiry itself. The report gives summaries of evidence and conclusions as indicated above. The petitioner already knew more than that was contained in the report. More counter affidavit, that the petitioner had access to the report and had seen it. A 20-12-1961 It was also when he came to the office.

mentioned that the findings of the enquiry report were mentioned in the show cause notice. It was for this purpose that the supplementary affidavit was filed. The allegation that the petitioner had actually seen the enquiry report was not controverted in the rejoinder affidavit by any reference to paragraph 35 of the counter affidavit. Mr. Srivastava pointed out that it was controverted in paragraph 28 of the rejoinder affidavit which states that the petitioner was not given intimation of contents of or shown the enquiry report. This rejoinder affidavit was filed so late on 11-9-1967. The contents of paragraph 28 are incorrect in view of the summary of the findings in the report given in the show cause notice of which a copy is annexed to the supplementary affidavit permitted to be filed by the petitioner at the hearing. In any case, in view of all the facts mentioned above, the mere omission to supply a copy of the enquiry report was not sufficient to show that the petitioner did not get sufficient opportunity to show cause.

8. The third objection was that the petitioner was not given time to file a reply to show cause notice inasmuch as the show cause notice gave a week's time only for a reply. Reliance was placed upon the direction already mentioned in Annexure VIII to the writ petition. This direction given to the local bodies about show cause notices states that from a fortnight to a month should be given for giving an opportunity to reply to a notice to show cause. In the present case, the petitioner was certainly given only one week and the application to give further time was not granted. The petitioner, therefore, relied upon *Bibhuti Bhusan Das v. Divisional Superintendent S. E. Railway*, AIR 1964 Orissa 279 where it was held, in similar circumstances, that a more reasonable opportunity to show cause ought to be given. However, as already indicated above, this want of sufficient time to show cause should be taken into account in considering the totality of facts and circumstances to determine whether reasonable opportunity was given to show cause. This defect will not vitiate the proceedings against the petitioner if the opportunity to show cause can be held to be reasonable on the whole.

9. The last objection was that the Commissioner before passing his order did not give a personal hearing. No rule is shown to me in support of the position that a dismissed employee should be given a personal hearing by an appellate authority, although I am of the view that it is better that a personal hearing should be given by the appellate authority.

10. After having considered pros and cons of the opportunity which was given

to the petitioner to be heard I have come to the conclusion that, in view of the admission by the petitioner of his guilt, such defects in the opportunity given to the petitioner as have been pointed out do not vitiate the proceedings. The finding given by the Commissioner, as the appellate authority, that the petitioner had admitted the guilt so far as the charge no. 2 is concerned, has not been assailed by any ground in the writ petition. Moreover, after examining the charge and the replies I think that the finding given is justified as already indicated above. Therefore, in the circumstances of the present case, no useful purpose will be served by quashing the proceedings against the petitioner and sending them back for a retrial.

11. In the circumstances of the case, I dismiss the writ petition. The parties will bear their own costs.

DRR

Writ Petition dismissed.

AIR 1969 ALLAHABAD 14 (V 56 C 3)

S. N. DWIVEDI AND

GANGESHWAR PRASAD, JJ.

Shiv Singh and others, Appellants v. The State Transport Appellate Tribunal and others, Respondents.

Special Appeals Nos. 234 and 553 of 1966, D/- 22-12-1967, from judgment of R. S. Pathak J. in Writ No. 1827 of 1963, D/- 3-3-1966.

Constitution of India, Art. 226 — Motor Vehicles Act (1939), S. 48 — Rejection of two applications for permits by R. T. A. — Unsuccessful applicants filing two appeals therefrom — Tribunal remanding both appeals by common order — Joint writ petition by aggrieved applicants against order in appeal is maintainable. W. P. No. 1827 of 1963, D/- 3-3-1966 (All), Reversed.

The distinction between a right common to several persons and a joint right is of cardinal importance in the determination of the question whether several persons may join together in filing a single writ petition. The rule is that persons having a common joint interest in the subject matter in controversy may be joined as relators while those having separate and distinct rights may not.

(Para 5)

Separate appeals were filed before the Appellate Tribunal by two applicants whose applications were rejected by the R. T. A., while granting permits to other applicants. Order of R. T. A. was set aside and case was remanded for fresh consideration. Four applicants who were affected by the order in appeal filed joint writ petition against the order.

IL/JL/E115/68

Held that by reason of the fact that the record of the grant of permits was one integral unit and the order of the State Transport Appellate Tribunal did not in any manner break its unity, a single joint writ petition for a writ of certiorari by all the applicants who were aggrieved by the order in appeal was in order. It could not be said that as there were two appeals before the Tribunal, there were in all eight records. Hence filing of eight writ petitions was not at all necessary. Consequently the persons affected by the order passed in writ proceedings could file a single special appeal. (Para 6)

By the very nature of its task the Regional Transport Authority was called upon to choose between the applicants by judging the relative claims of all of them together and it was only upon a comparative assessment of the suitability of all the applicants that the permits could be granted. In these circumstances the record relating to the grant of permits was only one record and it was not split up into as many as the number of applicants nor further split up into two records in respect of each grantee of a permit by the fact of two separate appeals having been filed by two unsuccessful applicants. The appellants could have filed a joint writ petition and it was not necessary that each of them should have filed a separate petition. The State Transport Appellate Tribunal did not at all consider the respective claims of the parties before it to the grant of permit and it only directed the Regional Transport Authority to fill the vacancies according to law by setting aside its order. The order of the State Transport Appellate Tribunal was, therefore, not merely one which affected all the appellants equally but was also an indivisible order giving rise to a joint grievance to the appellants and, therefore, to a joint interest in all the applicants to have the grievance redressed by means of a writ quashing the order. W. P. No. 1827 of 1963, D/- 3-3-1966 (All), Reversed; AIR 1960 All 366, Distinguished.

(Para 4)

(B) Motor Vehicles Act (1939), Ss. 47 (3), 48 — Decision to increase number of permits and grant of same by R. T. A. in one and the same meeting — Two acts constitute two distinct and dissociated stages — Procedure not illegal. W. P. No. 1827 of 1963, D/- 3-3-1966 (All), Reversed.

The fact that increase in the number of vacancies and the grant of permits were both done by the Regional Transport Authority at the same meeting and its decisions in regard to both these matters were incorporated in the same resolution, does not render the decision il-

legal. The essence of the matter is that the two acts should constitute two distinct and dissociated stages in the procedure relating to the grant of permits and the first stage should precede the second. If the second stage followed the first after some interval of time and only such considerations influenced the decision at the first stage as could legitimately be taken into account in the fixation or variation of the strength of permits on the route it is immaterial what the interval of time separating the two stages was. So long as the decision reached under section 47 (3) with regard to the number remains intact and is not modified the decision under section 48 has to conform to it, the necessary implication being that if the number originally fixed under section 47 (3) has been modified the decision under section 48 must again be in conformity with the modification.

(Paras 11, 13)

Legal position regarding fixation of number of permits to be granted and grant of permit is that first the number of stage carriages for which permits may be granted has to be fixed under section 47 (3) of the Motor Vehicles Act and when, after fixing the number, the Regional Transport Authority proceeds under section 48 of the Act to grant permits it has to limit the permits granted by it to the number fixed under section 47 (3) and it cannot grant permits in excess of that number. The Regional Transport Authority has the power to vary the number fixed by it under section 47 (3) but the variation must be made prior to and remain dissociated from the grant of permits under section 48. The matters to be taken into account in fixing the number of stage carriages for which permits are to be granted being quite distinct from matters to be considered in granting permits, the fixation of the number and the grant of permits have to be done separately in separate stages. The stage relating to fixation of the number of permits precedes the stage relating to the grant of permits, and these two things cannot be mixed up and done together. Any variation of the number originally fixed must also be effected before the grant of permits under section 48 and if no such variation has taken place it is not open to the Regional Transport Authority when considering the applications grant of permit under section 48 to ignore the number fixed by it, originally or variation, under section 47 (3) and grant permits in excess of it. W. P. No. 1827 of 1963, D/- 3-3-1966 (All), Reversed and AIR 1963 SC 64, Ex. 9, Civil Appeal No. 95 of 1965, D/- 3-3-1967 (SC), Foll. AIR 1965 All 366, Distinguished.

(C) Evidence Act (1872), S. 115 — Estoppel against statute — Admission of erroneous opinion on question of law by party's counsel in lower Court — Not binding on that party while seeking relief in appeal. Case law discussed.

(Paras 16, 22)

Cases Referred: Chronological Paras

- (1967) Civil Appeal No. 95 of 1965,
D/- 27-10-1967 = (1967) 2 SCWR
857, Jaya Ram Motor Service v.
Sri Rajarathinam 12
- (1965) AIR 1965 All 242 (V 52),
Satya Pal Khetra Pal v. State
Transport Appellate Tribunal U. P.
Lucknow 2A, 14, 23
- (1963) AIR 1963 SC 64 (V 50) =
(1963) 3 SCR 523, Abdul Mateen v.
Ram Kailash Pandey 2, 9, 13,
14, 15, 23, 25
- (1963) AIR 1963 SC 1165 (V 50) =
(1964) 1 SCR 316, Banarsi Das v.
Kanshi Ram 17
- (1960) AIR 1960 All 366 (V 47) =
ILR (1959) 2 All 201, Uma Shan-
kar Rai v. Divisional Supdt.
Northern Rly. Lucknow 5
- (1955) AIR 1955 SC 62 (V 42) =
1955 Cri LJ 193, Qali Das Dhanji-
bhai v. State of Bombay 18
- (1934) AIR 1934 All 531 (V 21) =
154 Ind Cas 168, Kamta Prasad
Misir v. Chait Narain Singh 23
- (1929) AIR 1929 Bom 89 (V 16) =
ILR 53 Bom 309, Punjabai Bhilasa
v. Bhagwandas Kisandas 19
- (1919) AIR 1919 Cal 972 (V 6) =
27 Cal LJ 447, Secy. of State v.
Sibaprosad Jana 20
- (1899) ILR 21 All 286 = 1899 All
WN 66, Jagwant Singh v. Silan
Singh 21

S. N. Kakkar and Sri Dhar, for Ap-
pellants.

GANGESHWAR PRASAD, J.: These are two special appeals against the judgment of a learned Single Judge of this Court by which he dismissed a writ petition filed by the appellants for quashing an order of the State Transport Appellate Tribunal U. P.

2. The circumstances which led up to this petition may be briefly stated. In December 1960 Baharaich-Rupaidiha route was advertised by the Regional Transport Authority, Gorakhpur and applications were invited by it for permanent stage carriage permits. The route was a new one and the number of permits to be granted for it had been fixed at four. The appellants and respondents Nos. 3 and 4 applied for permit along with many other persons. The applications received in response to the advertisement came up for consideration before the Regional Transport Authority on April 15, 1961. At that date the Regional Transport Authority decided to raise the

number of permits to be issued for the route from four to six and granted permits as follows: One permit to Shiv Singh appellant No. 1 jointly with Param Hans Singh; one permit to Narain Ram appellant No. 2; one permit to Har Saran Dass appellant No. 3; one joint permit to Mohd. Khatib Ahmad Siddiqi appellant No. 4, and Zainuddin Ahmad appellant No. 5; one joint permit to Abdul Majid and Mohammad Bashir; and one joint permit to Onkar Mal Lakshmi Narain Maheshwari. The applications of respondents Nos. 3 and 4 were rejected and no permit was granted to them. The grantees of the last two permits did not, however, lift their permits which were, consequently revoked by the Regional Transport Authority on September 14, 1961. Subsequently, by a resolution dated January 8, 1962 the Regional Transport Authority deleted the name of Param Hans from the permit issued to him jointly with Shiv Singh appellant No. 1. The parties differ as to the reason for the deletion, but the position in any case was that the four permits granted for the Baharaich-Rupaidiha route came to be held by the appellants, the first three holding one permit each and the remaining two holding a joint permit.

Against the order of the Regional Transport Authority granting these permits to the aforesaid ten persons in the manner indicated above two appeals were filed, appeal no. 209 of 1961 by respondent no. 3 and appeal no. 332 of 1961 by respondent no. 4. When the appeals came up for hearing before the State Transport Appellate Tribunal it appears to have been urged on behalf of the appellants that irrespective of anything else in view of the decision of the Supreme Court in Abdul Mateen v. Ram Kailash Pandey, AIR 1963 SC 64 the order of the Regional Transport Authority was invalid because it could not have raised the number of permits from four to six. What the learned counsel for the respondents to the appeals actually or in effect said in regard to the above contention is a matter on which the parties are not agreed. However, by its order dated May 15, 1963 the State Transport Appellate Tribunal set aside the order of the Regional Transport Authority and directed it to fill the vacancies according to law. The material portion of the order of the State Transport Appellate Tribunal — and that is the only portion dealing with the merits of the appeal — is as follows:

"It was argued by learned counsel for the appellants when this matter came up for hearing on the 9th May, 1963 that in view of the decision of the Hon'ble Supreme Court reported in AIR 1963 SC 64, the order of the R. T. A. made at

their meeting held on the 15th April, 1963, is invalid and should be set aside. There is no objection from the opposite party. The order of the R. T. A. is, therefore, set aside and it is directed to fill the vacancies according to law."

2A. The main grounds on which the order of the State Transport Appellate Tribunal was challenged in the writ petition were that the decision of the Supreme Court in Abdul Mateen's case, AIR 1963 SC 64 was misconstrued and misapplied by the State Transport Appellate Tribunal, and that, at any rate, two of the permits having not been taken out and having been subsequently cancelled the order of the Regional Transport Authority was no longer open to any objection. The learned Single Judge did not decide the questions raised in the aforesaid grounds of challenge because, in his opinion, the writ petition had 'run up against an objection which should preclude its consideration on the merits.' The objection was that the order of the State Transport Appellate Tribunal had been passed upon the consent of the petitioners, and, upholding that objection, the learned Judge observed:

"The impugned order could be said, in the circumstances to have been passed upon the consent of the parties. That being so, I am not inclined to hear the petitioners against the order of the Appellate Tribunal. I am fortified in my decision by the view taken by this Court in *Satya Pal Khetra Pal v. State Transport Appellate Tribunal U. P. Lucknow*, AIR 1965 All 242."

The learned counsel for the appellants, in his arguments before us, stressed the aforesaid grounds of the writ petition and further urged that the order passed by the State Transport Appellate Tribunal should be regarded as having been passed not merely upon the consent of the parties but also upon the Tribunal's own misconception of what has been laid down by the Supreme Court in *Abdul Mateen's case*, AIR 1963 SC 64, that in conceding that in view of the decision in the above case the order of the Regional Transport Authority was invalid and had to be set aside, the counsel for the present appellants (who were respondents in the appeal before the State Transport Appellate Tribunal) was obviously mistaken in law and the concession could not therefore preclude the appellants from challenging the order of the State Transport Appellate Tribunal, and that in any case it was the duty of the State Transport Appellate Tribunal to examine for itself the applicability of the said decision to the case and it could not be relieved of that duty by the concession made by the counsel for the present appellants. Before proceeding to consider the questions raised by the learned counsel, however, it is

necessary to dispose of certain technical and procedural matters connected with these appeals.

3. As noted above respondents nos. 3 and 4 had filed separate appeals against the order of the Regional Transport Authority but both the appeals were disposed of by a common order by the State Transport Appellate Tribunal. Against that order the appellants filed one single writ petition. Before the learned single Judge hearing the petition a preliminary objection to the maintainability of the petition was taken by respondents nos. 3 and 4 on the ground that it was not open to the petitioners to join together in one petition and, at any rate, the order disposing of the two appeals could not be challenged by a single petition. The view that the learned Judge took on the objection was that since there were four applications for permit by the petitioners, one by each of the first, second and third petitioners and one jointly by the fourth and fifth petitioners, the order disposing of each appeal would be an order in four records, and as there were two appeals it must be held that there were in all eight records. The petitioners were, however, permitted by the learned Judge to pay the court fee required for eight writ petitions, and the writ petition was decided after the said court fee had been paid.

The appellants preferred only one special appeal (no. 234 of 1966). During the hearing of the said appeal there was again a preliminary objection on behalf of the respondents that a single appeal was not maintainable. The learned counsel for the appellants did not concede that a single appeal was not maintainable, but he asked for a fortnight's time to enable him to file another special appeal by way of precaution. The time asked for was allowed. Another special appeal (no. 553 of 1966) was then filed by the appellants but this was done eight days after the expiry of the time allowed by the Court. Along with special appeal no. 553 of 1966 the appellants filed an application for condoning, under Section 5 of the Limitation Act, the delay in filing it, stating that the appellants were under the bona fide belief that one appeal would be competent because the judgment of the learned single Judge was in one writ petition and there was only one judgment by which the petition was dismissed. The respondents were granted three weeks time to file a counter-affidavit but counter-affidavit was filed. In the course of arguments addressed to us on behalf of the respondents after the filing of appeal no. 553 of 1966 it was not contended that the appellants were not entitled to the benefit of section 5 of the Limitation Act nor was it urged that more than two appeals ought not to have been allowed.

been filed against the judgment of the learned single Judge. We have, however, to decide the objection and to determine whether the appeals are competent and entertainable.

4. The initial question in that connection is whether there were, as the learned single Judge held, eight records in respect of which the applicants prayed for a writ of certiorari or there was only one record. To us it appears that both before the R. T. A. and before the State Transport Appellate Tribunal there was one single record, and the order passed by the Tribunal was in respect of one single record even though it disposed of two appeals in each of which the grantees of four separate permits were arrayed as respondents. The claim of no applicant for permit could be considered in isolation and without reference to the claims of the other applicants.

By the very nature of its task the Regional Transport Authority was called upon to choose between the applicants by judging the relative claims of all of them together and it was only upon a comparative assessment of the suitability of all the applicants that the permits could be granted. In these circumstances the record relating to the grant of permits was, in our opinion, only one record and it was not split up into as many as the number of applicants nor further split up into two records in respect of each grantee of a permit by the fact of two separate appeals having been filed by two unsuccessful applicants. We are also of the opinion that the appellants could have filed a joint writ petition and it was not necessary that each of them should have filed a separate petition. The State Transport Appellate Tribunal did not at all consider the respective claims of the parties before it to the grant of permit and it only directed the Regional Transport Authority to fill the vacancies according to law by setting aside its order. The order of the State Transport Appellate Tribunal was, therefore, not merely one which affected all the appellants equally but was also an indivisible order giving rise to a joint grievance to the appellants and, therefore, to a joint interest in all the applicants to have the grievance redressed by means of a writ quashing the order.

5. The distinction between a right common to several persons and a joint right is of cardinal importance in the determination of the question whether several persons may join together in filing single writ petition and this distinction is the basis of a Division Bench decision of this Court in *Uma Shanker Rai v. Visional Supdt., Northern Rly.*, 1960 AIR 1960 All 366. That case was before the Division Bench upon

a reference made by a single Judge who expressed the opinion that a writ petition could not be filed by several persons unless their right was joint and inseparable and that in case of a common right it is not open to the persons who are affected by a common order to file a joint writ petition. The Division Bench, while holding that in the case before it one single writ petition on behalf of all the petitioners was not maintainable, accepted the distinction drawn by the referring Judge. The Bench also quoted with approval a passage from an unreported single Judge decision of this Court in which it was held that two or more persons cannot join in a single application for a writ of mandamus to enforce separate claims but it was at the same time observed that in cases of joint ownership it may be possible for two or more persons to file a joint writ petition.

Further, the Bench referred to a passage from *Ferris and Ferris in their Extraordinary Legal Remedies* (1926 Edition) where, in the chapter dealing with mandamus the learned authors have, on the basis of American decisions, said at page 275: "The rule is that persons having a common joint interest in the subject matter in controversy may be joined as relators while those having separate and distinct rights may not." We have omitted the remaining portion of the observation quoted by the Bench because it deals with the consequences of misjoinder and not with the question as to when and in what circumstances a petition for mandamus suffers from the defect of misjoinder. Adverting, then, to the English Law the Bench observed that "under the English Law also it is not permissible for two or three applicants not having a joint right to join in a writ petition" and drew attention to *Halsbury's Laws of England* (Hailsham's Edition Volume IX) paragraph 1325 at page 783 where in relation to mandamus it has been stated: "Two or more persons cannot join in a single application for a writ of mandamus to enforce separate claims. There must be separate applications for separate writs, and this although the several applicants are successors in the office in respect of which the claims arise." It is obvious that the above statement of the law relates to writs for the enforcement of separate claims, and the Division Bench held that one single objection on behalf of the claimants before it was not maintainable as it found that their claims were separate and they had no joint right.

6. Examining the position in the instant case in the light of the authorities noted above, we find that although the permits granted to the appellants were separate the appellants, by means of their

writ petition, did not really seek to enforce their rights under the permits granted to them, but to get the order of the State Transport Appellate Tribunal quashed. It is true that it was the right granted to the appellants under the permits that gave them the locus standi to file the petition, but what made them aggrieved and thus furnished the occasion and gave them the right to ask for a writ of certiorari was the order of the State Transport Appellate Tribunal. This latter right was not merely common to all the appellants but was a joint and inseparable right. Could the order of the State Transport Appellate Tribunal have remained intact and retained its force against any of the appellants if it had been set aside as against one of them as a result of a writ petition filed by him? Could the fact that the other appellants had not challenged the order stand in the way of a writ petition filed by any one of the appellants? The answers to these questions seem to be clearly in the negative and if that is so it should, in our opinion, follow that the appellants had, to quote the words of Ferris and Ferris, a common and joint interest in the subject matter in controversy.

We need not enter into the question whether the rule as to joinder stated in Extraordinary Legal Remedies by Ferris and Ferris and Halsbury's Laws of England is confined to writs for mandamus or extends to writs for certiorari, because in the instant case the filing of a single joint writ petition by the appellants was well within the rule. We may, however, observe that it may not be entirely without significance that in the authorities mentioned above there is no reference to any analogous rule in relation to certiorari. However, by reason of the fact that the record of the grant of permits was one integral unit and the order of the State Transport Appellate Tribunal did not in any manner break its unity, we hold that a single joint writ petition for a writ of certiorari by all the appellants was in order. We further hold that the fact that the appellants, in compliance with the order of the learned single Judge paid the court fee payable for eight writ petitions did not have the effect of converting that single writ petition into multiple petitions. It is true that respondents Nos. 3 and 4 had filed two separate appeals before the State Transport Appellate Tribunal but that could not render the filing of two writ petitions necessary. A writ petition is not in the nature of an appeal, and having regard to the nature of the order passed by the State Transport Appellate Tribunal it was open to the appellants to challenge it by means of a single petition. The appellants of both the appeals before the State Transport Appellate Tribunal

were impleaded as parties to the petition and thus there was nothing wrong in the frame of the petition and nothing to prevent the issue of a writ of certiorari in case the appellants were found entitled to it.

7. From what we have held above it naturally follows that a single special appeal lies against the judgment of the learned single Judge. There was only one writ petition before the learned Judge and he delivered only one judgment. One special appeal against that judgment is therefore quite competent. As we have noted above, upon an objection raised by the respondents, one more special appeal (no. 553 of 1966) was filed by the appellants by way of precaution. This appeal was filed beyond time but the appellants claimed that they were entitled to the benefit of Section 5 of the Limitation Act. The respondents filed no counter-affidavit in reply to the affidavit filed by the appellants in support of their claim and even in the course of arguments on their behalf subsequent to the filing of the other appeal it was not urged that the appellants are not entitled to the benefit of section 5 of the Limitation Act, and that special appeal no. 553 of 1966 is barred by limitation. Indeed, no objection as to any procedural defect in the appeals was, thereafter, raised on behalf of the respondents. In the circumstances of the case we are of opinion that the delay in filing special appeal no. 553 of 1966 should be condoned, and we accordingly do so. There are thus two special appeals against the judgment of the learned single Judge, but, as we have held above, one single appeal was quite sufficient, and thus even if special appeal no. 553 of 1966 had not been filed or the appellants had not been entitled to condonation of delay in filing it the position would not have been different.

8. There is another matter to be disposed of before taking up the merits of the appeals. On an application made by the appellants after the filing of special appeal no. 234 of 1966 this Court ordered that the proceedings before the Regional Transport Authority pursuant to the order of the State Transport Appellate Tribunal be stayed. The Regional Transport Authority did not properly appreciate the effect of the stay order and on May 21, 1966 it proceeded to consider the pending applications for permits for the route in question and filled up three vacancies by granting three permits—one to appellant no. 1, one to appellant no. 2, and one to appellants nos. 4 and 5 jointly leaving the fourth vacancy to be filled up later. On October 10, 1966 appellants nos. 1 to 4 and 5 who were grantees of the aforesaid three permits made an application for permission to withdraw special appeal no. 234 of 1966 and the

application was allowed on October 11, 1966. What the above mentioned appellants really intended was that they should be permitted to withdraw from the appeal and it was this prayer which can be said to have been granted. It appears that, subsequently, upon a correct interpretation of the stay order passed by this Court, the Regional Transport Authority vacated the order granting the said three permits and by its communication dated December 17, 1966 informed the grantees of its decision and directed them to deposit their permits. Thereupon appellants nos. 1 to 4 and 5 made an application to this Court on January 4, 1967 praying that the order dated October 11, 1966 permitting them to withdraw their appeal be recalled and they be permitted to pursue their appeal. On behalf of respondents nos. 3 and 4 a counter-affidavit was filed stating that the application was not bona fide, but at the hearing of the appeal before us no argument was addressed to us by the learned counsel for the respondents on this aspect of the case.

We have, however, considered the matter and we think that the order permitting withdrawal of appeal by appellants nos. 1 to 4 and 5 should be vacated. The said four appellants were led into filing the application for withdrawal because of the permits granted to them on May 21, 1966 and the order granting the permits having been subsequently vacated as due to a misunderstanding of the order of this Court we regard it just and proper that the order permitting withdrawal of the appeal by the abovementioned four appellants be also vacated and we accordingly do so. We may also note that even if special appeal no. 234 of 1966 is deemed to be withdrawn so far as appellants nos. 1 to 4 and 5 are concerned the other special appeal no. 553 of 1966, still remains on behalf of all the appellants, and further that appellant no. 3 of special appeal no. 234 of 1966 who did not withdraw from the appeal is at all events entitled to press it.

9. We may now turn to the merits of the appeal. The first question that arises for consideration is whether in view of the decision of their Lordships of the Supreme Court in Abdul Mateen's case, AIR 1963 SC 64 the order of the Regional Transport Authority by which he granted permits to the appellants was invalid and had to be set aside by the State Transport Appellate Tribunal. In that case (to reproduce the facts substantially in the words of the decision) the Regional Transport Authority while dealing with applications made to it on its advertisement for two vacancies on the route concerned made a certain choice and passed an order under section 48 of the Motor Vehicles Act 1939 (as amended by Bihar

Act XXVII of 1950). There were then appeals to the Appellate Authority which made modifications in the orders passed by the Regional Transport Authority; but both these authorities proceeded on the basis that there were only two permits to be issued, that being the number fixed under section 47(3). Then there was a revision under the Bihar Amendment Act by one of the aggrieved persons, the grant of the permit to whom had been set aside by the Appellate Authority. The revision was heard by the Minister for Transport and he upheld the order of the Appellate Authority. But while doing so, he felt that the ends of justice would be met if an additional permit was granted to the person whose permit had been cancelled by the Appellate Authority and, therefore, allowed him service on the route. Thereupon a disappointed applicant for permit filed a writ petition before the Patna High Court challenging the order of the Minister for Transport.

The main contention of the petitioner was that the grant of an additional permit was wholly unjustified, particularly in face of the far superior claim of the petitioner as compared to that of the person to whom it was granted. The High Court accepted the contention that the State Government had no power when dealing with applications under section 64-A of the Motor Vehicles Act (as amended by Bihar Act XXVII of 1950) to increase the number of the permits from two which was the limit fixed by the Regional Transport Authority to three, and its order granting the third permit was without jurisdiction. That part of the order by which a third permit was granted by the State Government was accordingly set aside. There was then by special leave, an appeal to the Supreme Court by the grantee of the additional permit. Their Lordships of the Supreme Court said that the main question for decision in the appeal was whether the State Government acting under S. 64-A of the Bihar Amendment Act had the power to increase the number of permits for which applications had been invited by the Regional Transport Authority and in deciding that question their Lordships examined the whole scheme of the Act in the matter of granting stage carriage permits and observed:

"It will be clear from this scheme of the Act that the main section for the grant of a stage carriage permit is section 48 and in passing an order granting or refusing to grant a stage carriage permit, the Regional Transport Authority has to act subject to the provisions of section 47. Section 57 is a procedural section and provides for the procedure in applying for and granting permits. The power of the Regional Transport Autho-

ity to grant stage carriage permits is to be found in section 48 and that power is subject to the provisions of section 47. Section 47 (1) lays down matters for which the Regional Transport Authority shall have regard when considering an application for a stage carriage permit and section 47 (3) gives power to the said authority having regard to the matters mentioned in sub-section (1) to limit the number of stage carriages generally etc. It would be clear therefore that when the Regional Transport Authority proceeds in the manner provided in section 57 to consider an application for a stage carriage permit and eventually decides either to grant it or not to grant it under section 48 its order has to be subject to the provisions of section 47, including section 47 (3) by which the Regional Transport Authority is given the power to limit the number of stage carriages generally etc. Therefore, if the Regional Transport Authority has limited the number of stage carriages by exercising its power under section 47 (3), the grant of permits by it under S. 48 has to be subject to the limit fixed under section 47 (3). We cannot accept the contention on behalf of the appellant that when the Regional Transport Authority following the procedure provided in section 57, comes to grant or refuse a permit it can ignore the limit fixed under section 47 (3), because it is also the authority making the order under section 48. Section 47(3) is concerned with a general order limiting stage carriages generally etc. on a consideration of matters specified in section 47 (1). That general order can be modified by the Regional Transport Authority, if it so decides, one way or the other. But the modification of that order is not a matter for consideration when the Regional Transport Authority is dealing with the actual grant of permits under section 48 read with section 57, for at that stage what the Regional Authority has to do is to choose between various applicants who may have made applications to it under section 46 read with S. 57. That in our opinion is not the stage where the general order passed under section 47 (3) can be reconsidered, for the order under section 48 is subject to the provisions of section 47, which includes section 47 (3) under which a general order limiting the number of stage carriages etc., may have been passed. Section 57 (2) shows that an application for permit may be made at any time not less than six weeks before the date on which it is desired that the permit shall take effect or if the Regional Transport Authority appoints dates for the receipt of such applications, on such dates. All applications, whether received one way or the other, have to be dealt with in the

manner provided by section 57 and the final order for grant of stage carriage permit has to be passed under S. 48. But, at that stage, as we have already pointed out, the Regional Transport Authority is only considering whether the applications made before it are to be granted or not and has to choose between various applicants where there are more applicants than the number of vacancies which might have been advertised or there are more applicants than the number limited under section 47 (3). The scheme of the Act therefore is that a limit is fixed under section 47 (3) and the applications received are dealt with in the manner provided by section 57 and permits can be granted under S. 48 subject to the limit fixed under S. 47(3)."

According to the above quoted observations, as we understand them, the legal position is this. First the number of stage carriages for which permits may be granted has to be fixed under S. 47 (3) of the Motor Vehicles Act and when, after fixing the number, the Regional Transport Authority proceeds under Section 48 of the Act to grant permits it has to limit the permits granted by it to the number fixed under Section 47 (3) and it cannot grant permits in excess of that number. The Regional Transport Authority has the power to vary the number fixed by it under Section 47 (3) but the variation must be made prior to and remain dissociated from the grant of permits under Section 48. The matters to be taken into account in fixing the number of stage carriages for which permits are to be granted being quite distinct from matters to be considered in granting permits, the fixation of the number and the grant of permits have to be done separately in separate stages. The stage relating to fixation of the number of permits precedes the stage relating to the grant of permits, and these two things cannot be mixed up and done together. Any variation of the number originally fixed must also be effected before the grant of permits under Section 48 and if no such variation has taken place it is not open to the Regional Transport Authority when considering the applications for grant of permits under section 48 to ignore the number fixed by it, originally or by variation, under Section 47 (3) and to grant permits in excess of it.

10. Let us now see what actually happened in the instant case. We have before us a certified copy of the resolution of the Regional Transport Authority relating to the increase in the number of stage carriages for which permits were to be granted (sic) was raised from four to six and to the actual grant of permits. The resolution clearly shows that the increase in the number preceded the consideration of the applications for permits

and it was only after the number had been increased to six that the Regional Transport Authority took up the question of the grant of permits. The resolution states:

"Before considering the suitability of the applicants for the grant of permits on this route vis-a-vis each other on the route the R. T. A. considered the question of relimitation of the strength as some of the members were of the opinion that strength should be raised to six instead of four. After due consideration of the fact that the route went upto the border of Nepal Territory, from where quite a good many passengers come every day for Nanpara and Baharaich, the R. T. A. increased the strength to six The R. T. A. then took up consideration of the applications."

11. It is true that the increase in the number of vacancies and the grant of permits were both done by the Regional Transport Authority at the same meeting and its decisions in regard to both these matters were incorporated in the same resolution. But the question as to whether the number of stage carriages for which permits were to be granted should be increased was kept apart from the question as to who should be granted permits, and the former question was determined not only prior to the second question but also in the light of only such matters as were relevant to it. The fact that both these questions were considered and decided at the same meeting and the decisions were incorporated in the same resolution did not, therefore, render the decision illegal. Supposing that the Regional Transport Authority had in a meeting held on a previous day or on the same day first decided to vary the number originally fixed under Section 47 (3) and had thereafter proceeded in another meeting to grant permits under Section 48, could the variation and the subsequent grant of permits be said to have been illegal? The answer should, in our opinion, clearly be in the negative. Were then, the variation and the grant of permits illegal merely by reason of the fact that they were both done at the same meeting?

What appears to be the essence of the matter is that the two aforesaid acts should constitute two distinct and dissociated stages in the procedure relating to the grant of permits and the first stage should precede the second. If the second stage followed the first after some interval of time and only such considerations influenced the decision at the first stage as could legitimately be taken into account in the fixation or variation of the strength of permits on the route it is in our opinion immaterial what the interval of time separating the two stages was. This we understand to be the

principle laid down by their Lordships of the Supreme Court in Abdul Mateen's case.

12. We have been shown an uncertified copy of the judgment D/- 27-10-1967 of the Supreme Court in Civil Appeal no. 95 of 1965 *Jaya Ram Motor Service v. Sri Rajarathinam* and counsel for both the parties have placed reliance on it. In that case the view expressed in Abdul Mateen's case was followed and with reference to the facts of the case it was observed:

"In the present case, the Authority has already resolved to introduce a new bus route and invited applications for a permit under section 57 (2). It could no doubt have acted under section 47 (3) and modified its earlier decision. Instead, what it did was that while considering the question as to who amongst the 34 applicants should be granted that permit, i.e., at the stage not under section 47(3) but under section 48 (1), it decided to refuse all applications on the ground that there was no longer any need for any such permit. In other words, though the earlier order was still intact that Authority rejected the applications on the ground that there was no need for any fresh permit. The order was clearly contrary to the previous order passed under section 47 (3) and therefore cannot be said to be in consonance with section 47 as required by section 48 (1). The order was not one under section 47 (3) but under section 48 (1) refusing thereby the applications including those of the appellant and the respondent and was therefore subject to an appeal under section 64 (1) (a). The respondents as also the appellant were therefore entitled to appeal against such an order."

13. These observations support us in our interpretations of the decision in Abdul Mateen's case, AIR 1963 SC 64 and make two things clear. Firstly, section 47 (3) not only provides for the fixation of the number of stage carriages for which permits may be granted but also empowers modification of the decision regarding the number. Secondly, so long as the decision reached under section 47(3) with regard to the number remains intact and is not modified the decision under section 48 has to conform to it, the necessary implication being that if the number originally fixed under section 47 (3) has been modified the decision under section 48 must again be in conformity with the modification.

14. We may in this connection refer to the decision of a learned single Judge of this Court in AIR 1965 All 242 to which reference has been made in the judgment under appeal before us in another connection. Dealing with what may be

done under section 47 (3) and when the learned Judge observed:

"There is no provision in the Act which prohibits proceedings under section 47 (3) being started after applications have been invited under S. 48 of the Act and there is nothing in the judgment of Abdul Mateen's case, AIR 1963 SC 64, to that effect. No doubt the proceedings under section 47 (3) are different from those under section 48 read with section 57 of the Act and the law requires separateness i.e., the separate identity of the two proceedings to be maintained. Learned counsel for the respondents has not been able to urge any valid ground on the basis of which it could be held that if during the continuance of the proceedings under section 48 read with section 57 of the Act, the R. T. A. has before it material to suggest an increase in the strength, it is powerless to do anything until those proceedings are over, permits are granted and the matter in appeal decided and possibly a writ petition in this Court disposed of. It would result into great public inconvenience, unnecessary duplication and waste of labour and money if that was held to be the law."

Emphasis was thus laid by the learned Judge on whether the raising of the strength was on grounds relevant to it and was antecedent to the actual decision under section 48. Referring to the facts of that case the learned Judge proceeded to say:

"Having given what I consider to be the ratio of Abdul Mateen's case, AIR 1963 SC 64, I now proceed to see whether that ratio can be applied to the facts before us. In the present case what had happened was that the meeting of the R. T. A. continued from 16th to 24th October 1962. There is controversy between the parties as to on which date the strength on the route was increased from 15 to 20, but one thing is certain and there is no controversy on that point that the strength was so increased before the applications had been disposed of and the permits granted. The question therefore that requires consideration is whether in view of these facts, the present case is hit by the rules laid down by their Lordships in Abdul Mateen's case, AIR 1963 SC 64. As I see it, even though the two proceedings that is one under section 47 (3) of the Act and the other under section 48 read with section 57 of the Act, were held in the same meetings, almost simultaneously, notionally they were two different proceedings and it is clear from the proceedings of the R. T. A. itself that the decision arrived at under section 47 (3) of the Act increasing the strength of the route was taken earlier than the decision with regard to the grant of permits. I am

therefore of the opinion that the case of Abdul Mateen, AIR 1963 SC 64, is clearly distinguishable."

15. For the reasons stated above it seems to us obvious that the order of the Regional Authority granting permits to the appellants was in no manner contrary to what had been laid down in Abdul Mateen's case, AIR 1963 SC 64 and in conceding that in view of that case the order of the Regional Transport Authority had (and?) its meeting on April 15, 1961 was invalid and should be set aside the counsel for the appellants (respondents before the State Transport Appellate Tribunal) was clearly mistaken. It is not necessary for us to embark upon a speculation as to what exactly the nature of that misapprehension was which led the counsel for the appellants to make the concession; but, if we may make a guess, it appears that he either thought that the Regional Transport Authority had no power to raise the strength of permits or that the raising of the strength could not have been done at the same meeting at which the permits were subsequently granted. Neither of these conclusions, we think, follow from Abdul Mateen's case, AIR 1963 SC 64, the first being contrary to what has been expressly laid down in the case, and the second being not supported by the observations made there and based upon an incorrect and upon a too narrow and formalistic construction of the word 'stage' used in the observations.

16. The question then is as to whether the appellants are bound by the concession made by their counsel before the State Transport Appellate Tribunal and it is not open to them to question the correctness of the order passed as a result of the concession. It cannot be denied that the concession related to the true meaning and effect of a declaration of law made by the Supreme Court and its impact on the order under appeal before the State Transport Appellate Tribunal. Obviously, therefore, it was an admission on a question of law, and it is well settled that an erroneous admission on a question of law made by a party or his agent is not binding and it does not preclude the party from making an assertion contrary to the admission and from seeking the relief to which on a proper construction of the law he is entitled. We will draw attention to only a few authorities bearing on the point.

17. In one of the connected suits decided by the Supreme Court in Banarsi Das v. Kanshi Ram, AIR 1963 SC 1165 the question was as to when a partnership had been dissolved. In the plaint the plaintiff had alleged that the partnership being at will it stood dissolved on May 13, 1944 when a particular suit was filed. Banarasi Das de-

defendant had in his written statement admitted the above facts, but in the appeal before the High Court it was contended by him that that portion of the decree of the court below which declared the partnership to have been dissolved on May 13, 1944 was incorrect and should be set aside. The High Court refused to permit him to urge that point in view of the admission made by him in his written statement. Dealing with this aspect of the case, the Supreme Court observed:

"In the plaint in the present suit the plaintiff Kundan Lal alleged in para 10 that the partnership being at will it stood dissolved on May 13, 1944, when Sheo Prasad filed suit no. 105 of 1944 in the court of the Sub-Judge Lahore. No doubt, as pointed out by the High Court, Banarasi Das had admitted this fact in his written statement at not less than three places. The admission, however, would bind him only in so far as facts are concerned but not in so far as it relates to a question of law."

18. In *Kali Das Dhanjibhai v. State of Bombay* AIR 1955 SC 62 the facts were that the appellant had given a particular description of his establishment in the application for registration and the question was whether that description was to be regarded as final in judging the true legal character of the establishment. In regard to this question the Supreme Court observed as follows:

"The learned High Court Judges were influenced by matters which we consider inconclusive. The appellant applied for registration under the Bombay Act and in the statement made under S. 7 he called his establishment a 'workshop' and described the nature of his business as a 'factory'. The learned Judges considered that this imported admission that his establishment was a 'shop' because of the use of the word 'shop' in 'workshop'. This might have raised an inference of fact against the appellant had nothing else been known but when the facts are fully set out as above and admitted, the appellant's opinion about the legal effect of those facts is of no consequence in construing the section. No estoppel arises."

19. *Punjabai Bhilasa v. Bhagvandas Kisandas*, AIR 1929 Bom 89 was a case in which it had been conceded in the lower court that section 70 of the Contract Act had no application and with regard to that concession the Bombay High Court remarked that a pleader's admission on a pure question of law is not binding on his client and amounts to no more than his view that the question is unarguable.

20. *Secy. of State v. Shibaprasad Jana*, AIR 1919 Cal 972 dealt with a case where in a suit to obtain resettlement

the right of the plaintiff to get a fresh lease had been conceded by the defendant's pleader in the trial court. The Calcutta High Court, relying upon the two decisions of the Judicial Committee, held that an erroneous admission by a counsel on a point of law is of no effect and does not preclude the party from obtaining his legal rights.

21. In *Jagwant Singh v. Silan Singh*, (1899) ILR 21 All 286, the facts were that in mutation proceedings the parties had made a joint application, stating that they owned and possessed the property left by the deceased owner in certain shares and praying for mutation in accordance with the shares specified in the application, and the application had been granted. In a suit relating to the property the District Judge held that the plaintiff who was a party to the said application was bound by his admission and dismissed his claim which was contrary to it. This view of the District Judge was not accepted by a learned Judge of this Court and he held:

"In appeal here it is contended by the learned Vakil for the appellants, who has argued the case very ably that the plaintiff's admission in the mutation proceedings forms no bar to the assertion of his legal rights in the present suit. I am of opinion that this contention must be sustained. When, in the mutation proceedings, the plaintiff stated that he and the two sets of defendants were, on Salig Singh's death, the owners of his property in Banbhirpur in equal shares, he made, no doubt under a misapprehension as to what were his legal rights, a mistaken statement of law. By law the plaintiff was the sole owner. Now, it has been held that an admission of a 'thing' so as to make the admission matter of estoppel within the meaning of section 115 of the Evidence Act in the case *Juttendro Mohan Tagore v. Ganendra Mohan Tagore*, (1872) L. R. Sup. I. A. 47, their Lordships of the Privy Council observed at page 71 of the judgment: 'the plaintiff is not bound by an admission on a point of law, nor precluded from asserting the contrary in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled'."

22. We would not multiply authorities any further. The position clearly is that the concession made by the learned counsel for the appellants before the State Transport Appellate Tribunal was due to an erroneous opinion on a question of law and it cannot stand in the way of the appellants in getting the relief to which they may be found entitled.

23. Reliance on behalf of the respondents was placed in this connection on AIR 1965 All 242 (Supra) and it was

urged that quite apart from the concession regarding the effect of Abdul Mateen's case, AIR 1963 SC 64 on the order of the Regional Transport Authority, the counsel for the appellants further agreed to the case being sent back to the Regional Transport Authority with a direction to refill the vacancies, and the appellants cannot, therefore, now assail the correctness of the order to that effect. We do not find it possible to accept this contention. The order of the Tribunal clearly indicates that the concession was confined only to how the decision in Abdul Mateen's case, AIR 1963 SC 64 affected the order of the Regional Transport Authority and it did not extend to the manner in which the appeals were to be disposed of. Further, the order of remand and the direction that the Regional Transport Authority would fill up the vacancies according to law had for its sole basis the concession made by the counsel for the appellants. In these circumstances it is not possible to hold that there were two separate and independent concessions by the counsel for the appellants, one in regard to the invalidity of the order of the Regional Transport Authority in the light of the Supreme Court decision and the other in regard to the manner in which the appeals were to be disposed of, and that even if the first concession is ignored the second concession itself precludes the appellants from challenging the order of the Tribunal.

It was also faintly suggested by the learned counsel for the respondents that the concession that the order of the Regional Transport Authority should be set aside was unconnected with the concession regarding the invalidity of the order and the former concession was not a concession on a question of law and was, therefore, binding upon the appellants. This suggestion is wholly without substance. There can be no doubt that the two concessions were intimately connected as cause and effect and the order itself shows that in unmistakable terms. In AIR 1965 All 242 it was certainly observed that "inasmuch as the operative portion of the order is based upon the consent of the parties and on an admission made before the Tribunal by the counsel for the parties, it cannot and need not be quashed" but the nature and the circumstances of the consent and the admission made in that case are not clear from the judgment and there is nothing in it to indicate that the consent and the admission were based upon any misapprehension of law. The case therefore, does not help the respondents. It would be useful in this connection to refer to the case of Kamta Misir v. Chait Narain Singh, AIR 1934 All 531. The facts of the case were that

two suits for pre-emption were filed by persons of equal status, one of them by Kamta Prasad and his son Chandi Prasad and the other by Beni Madho. The counsel for Kamta Prasad and Chandi Prasad made a statement that as his clients formed a joint Hindu family they were entitled to one half of the property sought to be pre-empted. The trial Court and the first appellate court decreed both the suits for half a share each. Dealing with the effect of the statement made by the counsel Mukerji, J. observed:

"On the merits, the question is whether the two plaintiffs, father, and son, are to be treated as two claimants for pre-emption, or whether as one because the family is joint. As a question connected with this I have to find whether the statement of the pleader recorded at p. 42C of the record amounted merely to an admission on a point of law which is not binding on the plaintiffs or whether it amounted to a request to the court that whatever might be the legal title of the plaintiffs, they would be satisfied if a decree was made for one half of the property in favour of the two plaintiffs. The language of the pleader indicates that what he stated was an expression of his opinion. It is nonetheless an expression of the pleader's opinion, although the Munsif thought it relieved him from the necessity of deciding the point. I hold that the plaintiffs are not bound by the statement of their pleader."

24. Applying to the instant case the test which was applied by the learned Judge in the above case, it is not possible to say that the counsel for the appellants argued to the order of the Regional Transport Authority being set aside irrespective of the validity or invalidity of the order passed by the Regional Transport Authority. The position clearly is that the entire order of the Tribunal had for its foundation an admission on a question of law which, we find, was erroneous, and it is accordingly open to the appellants to challenge its correctness.

25. The answer to the question whether the State Transport Appellate Tribunal applied its mind to and came to any conclusion of its own on the effect of Abdul Mateen's case, AIR 1963 SC 64 on the order of the Regional Transport Authority should clearly be in the negative. The order of the Tribunal nowhere mentions that the Tribunal accepted the correctness of the argument that in view of the decision of the Supreme Court in Abdul Mateen's case, AIR 1963 SC 64 the order of the Regional Transport Authority was invalid and should be set aside and all that it says is that the said argument was advanced by the learned

counsel for the appellants (respondents here) before the Tribunal and there was no objection from the opposite party. No doubt in the counter-affidavit filed in this Court by Syed Ziyarat Hussain, Reader of the State Transport Appellate Tribunal, who claims to have been present at the time of the hearing of the appeals, it has been stated in para 7 that the Tribunal was of opinion that the case was covered by the decision reported in AIR 1963 SC 64 which position was conceded by the counsel for the respondents. It is however, difficult to accept the affidavit of the Reader in proof of the Tribunal's opinion in face of the order itself; but even if this statement were to be accepted the position would not change. The order of the Tribunal would even in that case suffer from a serious infirmity. It would certainly be then free from the defect that the Tribunal did not apply its mind to and arrive at its own conclusion on a question of law, but it would be subject to the defect of being based upon an erroneous view of law taken by the Tribunal itself.

26. We may also point out that, as noted above, grantees of two permits had not lifted their permits and the Regional Transport Authority had consequently cancelled their permits on September 19, 1961. On May 15, 1963, therefore, when the Tribunal disposed of the appeals there were in existence four permits only and the number of permits did not, therefore, exceed the number originally fixed under section 47 (3).

27. After having carefully considered the arguments of the learned counsel for the parties we find that the order of the State Transport Appellate Tribunal was manifestly erroneous and it ought to have decided the appeals on merits. We further hold that the appellants are not precluded from challenging the correctness of the order passed by the Tribunal.

28. We accordingly allow both the appeals and set aside the judgment of the learned single Judge. The order of the State Transport Appellate Tribunal dated May 15, 1963 is quashed and the Tribunal is directed to hear and decide appeals Nos. 209 of 1961 and 332 of 1961 on merits. In the circumstances of the case we make no order as to costs.

BNP/D.V.C.

Appeals allowed.

AIR 1969 ALLAHABAD 26 (V 56 C 4)

FULL BENCH

JAGDISH SAHAI, K. B. ASTHANA
AND R. S. PATHAK, JJ.

Maqbool Raza Ghaffar Hussain, Petitioner v. Joint Director of Consolidation, U. P. Lucknow and others, Opposite Parties.

Civil Misc. Writ No. 3106 of 1962, D/- 11-9-1967.

(A) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ch. IX-A and Ss. 240-J and 240-D (as introduced by Act 20 of 1954) — Scope — Compensation statement sealed and signed under S. 240-J is not conclusive as regards status of a person as "Adhivasi" — Consolidation authorities competent to go into question.

An analysis of provisions contained in Ch. IX-A reveals that they have been made with a view to acquire the rights, title and interests of a land holder in plots belonging to him but held by Adhivasis and for payment of compensation to the land holder for the acquisition of his rights in the said land. The only purpose for which this Chapter was enacted was to provide for the acquisition of the rights of a land-holder and for payment of compensation to him. It is thus foreign to the scheme of Chapter IX-A to decide the question as to who is the Adhivasi of the land sought to be acquired. There is in fact or in law no adjudication and Chapter IX-A being not one providing for any such adjudication, the compensation statement cannot be treated to be a decision on the question as to who is the Adhivasi of that land. There can therefore, be no question of its creating either a bar of res judicata or one of conclusiveness. Consequently the consolidation authorities are competent to go into the question as to who was Adhivasi and thereafter the Sirdar of the land in dispute and that the compensation statement sealed and signed under section 240-J does not either create a bar of res judicata or that of conclusiveness. ILR (1966) 2 All 539, Expl. and Dist. 1966 All LJ 771, Dist.; 1967 All LJ 308, Approved. (Paras 9, 26, 30 & 32)

(B) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Section 240-G (as introduced by Act 20 of 1954) — Word "person interested" means person interested in receiving compensation. (Para 14)

Cases Referred: Chronological Paras

(1967) 1967 All LJ 308 = ILR

(1967) 1 All 589, Jagdamba Prasad
Misra v. Rafiuddin

3, 34

(1966) Misc. Writ No. 1193 of 1966
 D/- 3-5-1966 = ILR (1966) 2 All
 539, Smt. Ashghari Begum v. Deputy
 Director of Consolidation U. P. 2, 33
 (1966) 1966 All LJ 771 = ILR (1967)
 1 All 55, Smt. Basari Wali v.
 Board of Revenue U. P. 2, 33
 Bashir Ahmad, for Petitioner.

ORDER: This reference arises out of consolidation proceedings. The consolidation authorities held that the fifth respondent Hasan Raza was the Adhivasi of the land in dispute, being in possession of the same in the years 1356F and 1359F. The main question that arises for consideration in this case is whether it was open to the consolidation authorities to go into the question as to whether Hasan Raza was the Adhivasi or the Sirdar of the land in dispute once a compensation statement had been prepared under section 240-D and had become final under section 240J of the U. P. Zamindari Abolition and Land Reforms Act (hereinafter referred to as the Act), in which the petitioner, Maqbul Raza had been shown as the "Adhivasi".

2. The submission of the petitioner is that in view of the provisions contained in Chapter IX-A of the Act once a compensation statement becomes final, the entry in it showing a particular person as "Adhivasi" is conclusive. The case was referred to a larger Bench because it was thought that there was a conflict of authority in this Court inasmuch as the view taken in Misc. Writ No. 1193 of 1966 Smt. Ashghari Begum v. Deputy Director of Consolidation, D/- 3-5-1966 (All) differed from the one expressed in Smt. Basari Wali v. Board of Revenue, 1966 All LJ 771.

3. Jagdamba Prasad Misra v. Rafiuddin, 1967 All LJ 308 to which one of us (Jagdish Sahai, J.) was a party is another decision of this Court relevant for our purposes. The view taken in this decision is that the entry of the name of a person in the compensation statement is not conclusive and his right to be treated as an Adhivasi or Sirdar of the land in respect of which compensation statement is prepared can be enquired into in a competent court in a subsequent or collateral proceeding.

4. The provisions of Chapter IX-A were introduced in the Act in 1954 by Act 20 of 1954. The act as originally framed did not contain any provision for the acquisition of the rights of a landlord over plots which were held by an Adhivasi. It was confined only to the acquisition of proprietary rights of an intermediary or a land holder.

5. Chapter IX-A is headed as "conferment of Sirdari rights on Adhivasi". The preamble of Act 20 of 1954 reads:

"An Act to amend the U. P. Zamindari Abolition and Land Reforms Act and other laws relating to Land Tenure."

5A. Chapter IX-A contains in all 14 sections. Section 240-A with which Chapter IX-A opens provides for the acquisition of rights title and interest of a land holder in the land held by an Adhivasi. Section 240-B of the Act deals with the consequences that ensue on the acquisition of rights title and interests of a land holder under section 240-A of the Act. Section 240-C provides for payment of compensation to the landlord for the acquisition of his rights, title and interests in the land occupied by an Adhivasi. Sec. 240-D requires the preparation of a compensation statement and reads:

"240-D. Compensation Statement—

For purposes of assessment and payment of compensation for acquisition of rights, title and interest of the landholder in the land referred to in section 240-A the Compensation Officer shall prepare a compensation statement showing—

(a) the name or names of the landholder;

(b) Where the land referred to in section 240-A was on the date immediately preceding the date of vesting,

(i) recorded as sir, khudkasht or fixed rate tenancy of the landholder, or

(ii) included in the holding of a person belonging to any of the classes mentioned in clause (d) of section 18, or

(iii) included in the holding of a person belonging to any of the classes mentioned in section 19, the rent computed at hereditary rates applicable on the said date;

(c) where the land referred to in section 240-A was land other than land mentioned in clause (b), the rent payable for such land by the tenant thereof on the said date and

(d) such other particulars as may be prescribed".

Section 240-E deals with the manner in which the compensation shall be paid to the landholder. Section 240-F requires the publication of the compensation statement prepared under section 240-D and reads:

"240-F. Preliminary publication of statement. The compensation statement prepared under section 240-D shall be published in the manner prescribed and a copy thereof shall also be sent to the landholder concerned." Section 240-G provides for filing of objections and reads:

"240-G. Filing of objections —

Any person interested or the State Government may in the manner prescribed file before the compensation Officer an objection upon such statement within the period of one month from the date of its publication."

5B. Section 240-H deals with the manner in which the objections would be disposed of and reads:

"240-H. Disposal of objections—

(1) Except as provided in sub-section (2), the Compensation Officer shall after hearing the parties, if necessary, on the objections filed under section 240-G dispose of the objections in the manner prescribed,

(2) Where the objection filed under sub-section (1)—

(a) is that the land is not land referred to in sub-section (1) of section 240-A, the Compensation Officer shall frame an issue to that effect and refer it for disposal to the court, which would have jurisdiction to decide a suit under section 229-B read with Section 234-A in respect of the land and thereupon all the provisions relating to the hearing and disposal of such suits shall apply to the reference as if it were suit;

(b) involves a question of title and such question has not already been determined by a competent court, the Compensation Officer shall, except in cases in which section 240-H applies refer the question for determination to the Court of competent jurisdiction.

Explanation :— Whether a person is or is not an adhivasi shall not be deemed to raise a question of title within the meaning of this clause. (3) The District Judge shall determine the question referred to him under clause (b) of sub-section (2) in the manner prescribed and his decision thereon shall be final."

6. Section 240-HH provides that if a question in respect of title to a land arises the matter shall be referred to an arbitrator. Section 240-I provides an appeal to the Collector and reads:—

"240-I. Appeal to the Collector.

Notwithstanding anything contained in any law, any person aggrieved by the order of the Compensation Officer deciding the objection in so far as it relates to the amount of compensation under section 240-H, may appeal to the Collector, who shall decide the appeal in the manner prescribed and the decision of the Collector shall be final."

7. Section 240-J provides that the statement prepared under Section 240-D shall be published and reads:—

"240-J. Final publication of the statement :—

(1) Where no objection has been filed in regard to the compensation statement published in pursuance of section 240-F, or where such objections are filed and have been finally disposed of, the statement shall where necessary be amended, altered or modified. The Compensation Officer shall sign the statement and affix his seal thereto.

(2) The statement so signed and sealed shall become final.

(3) A copy of the final statement shall be supplied free of charge to the landholder concerned."

8. Section 240-K deals with the cases in which compensation will be paid and section 240-L states that the provisions of Chapter IX-A will not be applicable to evacuee properties. Section 240-M confers on the State Government the power to make rules for the purposes of the Act.

9. An analysis of these provisions reveals that they have been made with a view to acquire the rights, title and interests of a land holder in plots belonging to him but held by Adhivasis and for payment of compensation to the land holder for the acquisition of his rights in the said land.

10. Chapter II of the Act only deals with the acquisition of proprietary rights of an intermediary or a land holder.

11. Inasmuch as the Legislature decided also to acquire the rights of a land holder in plots occupied by Adhivasis provisions were made for that purpose and Chapter IX-A was introduced in the Act.

12. The marginal note to section 240-D is "for purposes of assessment and payment of compensation for acquisition of the rights, title and interest of the land holder". The text of that section also shows that the only purpose for which it is enacted was to provide a method by which rights of a landholder over a plot or plots held by an Adhivasi could be acquired and compensation paid.

13. Section 240-F requires a copy to be sent to the land holder. There is no such requirement with regard to a person who is recorded as an Adhivasi or one who claims to be such. If the purpose of Chapter IX-A was also to adjudicate upon disputes as to which particular person is the "Adhivasi" or the "Sirdar" of a particular plot, section 240-F would have required a copy of the statement being sent also to the person whose name is recorded as an "Adhivasi" or a "Sirdar". It would also have provided for publication of a general notice so that persons laying a claim could come and file objections. The omission to have such provisions clearly indicates that the provisions of Chapter IX-A were confined only to the question of acquisition of land held by Adhivasis and payment of compensation to the landlord, and the determination of the question as to which particular person is the "Adhivasi" or "Sirdar" of the land is foreign to the scheme of that Chapter.

14. It has been contended by Mr. Bashir Ahmad that the expression 'person interested' occurring in Section 240-G is of the widest amplitude and, therefore, it would also include persons who claim

to be Adhivasis. In our judgment, the submission is not well founded for two reasons. Firstly, there is nothing in the provisions falling under Chapter IX-A even to suggest that an adjudication in respect of the matter as to who is the "Adhivasi" of the land is made or can be made by the Compensation Officer. Secondly, the expression 'person interested' has been used in other parts of the Act also so as to mean the landlord or the intermediary. Chapters II and III, deal with the acquisition of proprietary rights and compensation payable to the landholders. Section 47 occurs in Chapter III and deals with the payment of compensation to intermediaries. It uses the words 'any person interested.' Those words have been used in the sense of any person interested in receiving compensation. In our judgment, in the same sense these words have been used in section 240-G. The context in which these words have been used being the acquisition of a landlord's rights and payment of compensation to him, there is full justification for the view that these words mean persons interested in receiving compensation. It is well settled that a word or an expression derives its meaning from the context in which it is used.

15. In the present case clearly the context is not, the adjudication of the question as to who is the Adhivasi of the land sought to be acquired. Therefore, the words "persons interested" cannot have the meaning of being persons interested in upholding their right or in supporting their claim of being the Adhivasis of the land sought to be acquired. The reason for enacting section 240-G is that if some one who is not recorded as landholder claims to be the landholder and wants to file an objection, he may do so.

16. It is clear that only two kinds of objections are contemplated by section 240-H of the Act, that is, (1) that the land is not the one to which sub-section (1) of section 240-A is applicable, that is to say, the land is not one which is in the occupation of an Adhivasi and (2) that the person whose name is recorded in the compensation statement is not the landholder and the objectors are the landholders and entitled to receive compensation. A third type of objection is not contemplated.

17. It is clear from clause (b) of section 240-H(1) that if a question of title is raised and such question has not been decided by a competent court, the Compensation Officer shall refer that matter to a competent court for decision. It is elementary that the right of an Adhivasi is not a right to title. It is only a right to occupy. Apart from it, the explanation is categorical that whether or not a particular person is an Adhivasi does not

amount to a question of title and cannot be referred to a competent court for decision.

18. No doubt sub-section (2) of Section 240-H provides that in case the objection is to the effect that the land in respect of which the rights of landholder are sought to be acquired is not one held by an Adhivasi the Compensation Officer shall frame an issue and refer it for decision to a court of competent jurisdiction to decide it as a suit under section 229-B read with section 234-A of the Act. These provisions read:—

"229-B. Suit by an asami for declaration of rights.

(1) Any person claiming to be an asami whether exclusively or jointly with any other person may sue the landholder.

(a) for a declaration that he is an asami of the holding, or

(b) for a declaration of his share therein.

(2) In any suit under sub-section (1) any other person claiming to hold as asami under the landholder shall be impleaded as defendant.

(3) The provisions of sub-sections (1) and (2) shall mutatis mutandis apply to a suit by a person claiming to be bhumidhar or sirdar, as the case may be with the amendment that for the word "landholder" the words "the State Government and Gaon Sabha" are substituted therein."

"234-A. Application of sections 212-B, 212-C and 229-B to 229-D in the case of an Adhivasi — The provisions of sections 212-B, 212-C and 229-B to 229-D shall apply to an adhivasi as if he were an asami."

19. The use of the words "Compensation Officer shall frame an issue to that effect" clearly mean that the issue would be whether or not the land is one which is in the occupation of an Adhivasi. The use of the words "to that effect" rule out the possibility that the issue can be wide enough in its amplitude so as to include in its ambit the question as to which particular person is the Adhivasi of that land. From this it clearly follows that the court to which the matter is referred would not be competent to decide as to which particular person is Adhivasi of that particular land and all that it can decide is, as to whether or not the land is one which is occupied by an Adhivasi whoever he may be.

20. It is clear from section 240-I of the Act that the appeal that can be filed can be in respect of the quantum of compensation only. It clearly follows from the words "deciding the objection in so far as it relates to the amount of compensation under section 240-H." The language of section 240-I cannot permit any other interpretation than that the appeal is

confined to the quantum of compensation only. Clearly no appeal can be filed by a person claiming to be an Adhivasi on the ground that he and not the one whose name is recorded in the compensation statement is the Adhivasi of the land.

21. From what we have said above, the following conclusions clearly follow:

22. The law does not require a copy of the statement being sent to a person who is recorded as an Adhivasi or to one claiming to be as such, nor does it require publication of the statement prepared under section 240-D.

23. That no issue is to be framed on the question as to who is the Adhivasi of the land in dispute.

24. That no right of appeal has been given to a person who claims to be an Adhivasi of the land in respect of which acquisition proceedings are going on.

25. It is, therefore, clear that by enacting Chapter IX-A it was never the intention of the Legislature to provide for a machinery to decide the question as to who is the Adhivasi of a particular plot of land.

26. Mr. Bashir Ahmad has strongly contended that the words "was held or deemed to be held an Adhivasi" occurring in section 240-A of the Act are indicative of the intention of the Legislature that an enquiry is to be made as to who is the person who is the Adhivasi of the land in dispute. We have reproduced the preamble the heading of Chapter IX-A as also the statutory provisions contained in that Chapter. The only purpose for which this chapter was enacted was to provide for the acquisition of the rights of a landholder and for payment of compensation to him.

27. We would also like to point out that even before Chapter IX-A was introduced in the Act, it had in it provisions for deciding disputes between various persons claiming to be Adhivasis. (See Section 229-B and Section 234-A of the Act). Suits under Ss. 229-B and 234-A of the Act lie before an Assistant Collector. Inasmuch as the Act had in it provisions (secs. 229-B and 234-A) for the adjudication of disputes between persons claiming to be Adhivasis or Sirdars, it could not have provided for parallel provisions (Chapter IX-A) for the same purpose. We are, therefore, unable to agree with Mr. Bashir Ahmad that the words "was held or deemed to be held an Adhivasi" suggest that in proceedings under Chapter IX-A, the Compensation Officer holds an enquiry and decides as to who is the person entitled to be the Adhivasi of that plot of land.

28. It may be pointed out that in Chapter IX-A the Officer who is to prepare the compensation statement has been

described as the "Compensation Officer" and not as an "Assistant Collector" or "Court." A Compensation Officer is not a court. He has no judicial functions to perform. The revenue courts mentioned in the U. P. Land Revenue Act are the Board of Revenue, the Commissioner, the Collector, the Assistant Collector Ist Class and the Assistant Collector second class. A Compensation Officer has not been described as a Court in any Act or Manual. Compensation Officers are creatures of the Act and the functions assigned to them are to prepare compensation statements and pay the compensation. Compensation Officers, no doubt, are appointed from amongst the Assistant Collectors Ist Class. But that does not mean that the two terms are synonymous. It is significant to note that a Compensation Officer has not been given the power even to decide whether or not the land is one held by an Adhivasi. He has to refer that matter to an Assistant Collector. If the Compensation Officer was a court the law would not have required him to make a reference to an Assistant Collector Ist Class empowered to decide a case under section 229-B read with section 234-A of the Act. That being the position, we are unable to see how the circumstance that the name of a particular person is recorded in compensation statement as an "Adhivasi" can be treated to a judicial adjudication that he in fact and law is the "Adhivasi" to the exclusion of others.

29. Before a dispute can be deemed to have been adjudicated upon there must be a forum competent to decide it. An issue must be framed and a judgment must be pronounced. We have already shown above that the Compensation Officer is not a court. He does not perform any judicial functions. We have also shown above that he cannot frame an issue on the question as to who is the Adhivasi of the land sought to be acquired. He cannot even decide the issue that he is required to frame, as to whether or not the land is held by an Adhivasi. Lastly, there is no provision requiring him to record a judgment or a decision.

30. In that view of the matter we are of the opinion that it is foreign to the scheme of Chapter IX-A to decide the question as to who is the Adhivasi of the land sought to be acquired.

31. All that the sub-sec. (2) of Section 240-J of the Act provides is that the statement so signed and sealed shall become final. It is final only in respect of the liability of the land to be acquired, the amount of compensation payable in respect of it and the person to whom it is payable. This conclusion is fortified by the following words used in section 240-J:—

"Where no objection has been filed in regard to the compensation statement . . . or where such objections are filed and have been finally disposed The compensation officer shall sign the statement and affix his seal thereto. (2) The statement so signed and sealed shall become final."

The words used are 'no objection has been filed in regard to the compensation statement'. (Underlined (here in ' ') by us.) This would show that compensation statement is confined only to that part of the document which deals with matters relating to compensation and in respect of which objections can be filed. That part of the document in respect of which no objections can be filed does not become final.

32. There being in fact or in law no adjudication and Chapter IX-A not providing for any such adjudication, the compensation statement cannot be treated to be a decision on the question as to who is the Adhivasi of that land. There can, therefore, be no question of its creating either a bar of res judicata or one of conclusiveness.

33. Mr. Bashir Ahmad has placed reliance upon the decision of Dwivedi and Khare JJ. in Civil Misc. Writ No. 1193 of 1966, D/- 3-5-1966 (All). If that case is treated to be an authority for the proposition that the effect of section 240-J is that the right of the person who is recorded there as an Adhivasi in the compensation statement cannot be challenged in a competent court of law in a separate or collateral proceeding, we would respectfully disagree with our learned brothers. We, however, do not think that the learned Judges have gone to that length. 1966 All LJ 771 (supra) is, in our opinion, not a direct authority on the question referred to us.

34. We find ourselves in agreement with the view taken by this Court in 1967 All LJ 308 (supra).

35. It is true that sometimes, though very rarely, the legislature creates rights only on the basis of mere entry. As for example a person, who is recorded as occupant in the Khasra or Khatauni of 1356F, becomes an Adhivasi, but for creation of such a right there must be an express provision to that effect, as section 20 of the Act is. It is elementary that a person can be divested of his vested rights only by a legislative enactment.

36. For the reasons mentioned above we are of the opinion that the consolidation authorities were competent to go into the question as to who was Adhivasi and thereafter the Sirdar of the land in dispute and that the compensation statement sealed and signed under section 240-J did not either create a bar of res judicata or that of conclusiveness.

37. Mr. Bashir Ahmad has submitted that the whole case has been referred to this Bench and that one of the questions that requires determination by us is whether the decision of the consolidation authorities does not suffer from a mistake apparent on the face of the record. The only mistake of law that Mr. Bashir Ahmad has suggested is that the consolidation authorities did not go into the effect of the entries made in the remarks column of the Khasra. In our judgment the entries have been fully considered by the consolidation authorities and no mistake of law much less one apparent on the face of the record has been committed by them.

38. The result is that we dismiss this petition with costs.

GGM/D.V.C.

Petition dismissed.

AIR 1969 ALLAHABAD 31 (V 56 C 5)

S. N. SINGH J.

Vidya Datta . Dyundi and another, Plaintiffs-Appellants v. Jagmandar Das and others, Defendants-Respondents.

Second Appeal No. 4175 of 1961, D/- 21-11-1967, from decree of Civil and S. J., Tehri and Garhwal, D/- 10-7-1961.

Limitation Act (1908), Art. 148, S. 28 — Mortgage in erstwhile Tehri Garhwal State payable in 8 years — Stipulation that for first four years mortgagors not to redeem — Time runs from expiry of four years and suit for redemption could be filed within 11 years from this date under Art. 117 of Tehri Garhwal Limitation Act — Right to file suit barred before merger of State in State of Uttar Pradesh — Right not revived by application of Indian Limitation Act — Principles of section 28 held applied, even when the Tehri Garhwal Act did not contain similar provision — Principle that mortgage will remain always a mortgage held had no application — T. P. Act (1882), S. 60.

Tehri Garhwal had its own Limitation Act before the merger. In Tehri Garhwal (before the merger) a suit for redemption could be filed under Art. 117 of this State Limitation Act within 11 years of the accrual of the right of redemption.

(Para 8)

The mortgage of a shop in Tehri Garhwal State was executed on the 29th of August, 1931 payable in 8 years and there was a definite stipulation in the document that for the first four years the mortgagors could not redeem the mortgage. Thereafter they were permitted to redeem the property on payment of the mortgage amount due.

Held, that the mortgagors could redeem the property any time after the 29th of August, 1935 with the result that the

IL/IL/E87/68

time began to run from this date. A suit for redemption could be filed within 11 years of this date up to the 29th of August 1946. The suit was instituted on the 2nd of September 1961 much beyond the period of limitation and was clearly barred by time. (Para 8)

The intention of the parties in the present case was that although the right to foreclose would arise after the expiry of eight years, right to redeem could be exercised after the expiry of four years. The intention of the parties was clear that after the expiry of the first 4 years the mortgagors were given a right to redeem and right of redemption accrued to the mortgagors on the expiry of four years. AIR 1932 PC 207 & AIR 1952 All 479 & AIR 1960 Pat 51 & AIR 1928 All 131, Distinguished. (1880) ILR 5 Bom 22 & AIR 1937 All 32, Rel. on. (Para 8)

Before the erstwhile Tehri Garhwal State was merged in the State of Uttar Pradesh the right to file a suit had come to an end. A right which had come to an end when the Indian Limitation Act was made applicable to this area could not be revived unless there was express provision in the merger order. In the absence of any express enactment about retrospectivity, the Indian Limitation Act could not be applied retrospectively to the facts of this case. (Para 10)

It was true that there was no provision like section 28 of the Indian Limitation Act in the Tehri Garhwal State's Limitation Act but where section 28 of the Limitation Act is not made applicable, the principle thereof can be applied. Consequently the right of the mortgagor had got extinguished after the expiry of the period of limitation. (1899) ILR 21 All 204 (FB) & AIR 1935 Lah 787 & (1912) 16 Cal WN 351, Rel. on. (Para 11)

It is not correct to say that in order to apply section 28 of the Limitation Act or principles thereof, adverse possession or independent possession of the defendants was a necessary condition. AIR 1921 Bom 368 (2) & AIR 1926 Oudh 313 & AIR 1929 Oudh 402, Distinguished. (Para 12)

Since the right of the mortgagor to redeem had come to an end, the principle that a mortgage will always remain a mortgage irrespective of the fact as to the length of his possession, did not apply. AIR 1958 SC 770 & AIR 1963 SC 70, Distinguished. (Para 13)

Cases Referred: Chronological Paras

- (1963) AIR 1963 SC 70 (V 50)=
(1963) 3 SCR 229, Padma Vithoba v. Mohd. Multani 13
(1960) AIR 1960 Pat 51 (V 47)=1959
BLJR 616, Harbans Narain Singh v. Ramdhari Mahton 8
(1958) AIR 1958 SC 770 (V 45)=1959
SCR 509, Ganga Dhar v. Shankar Lal 13

- (1952) AIR 1952 All 479 (V 39)=1950
All LJ 666, Swayambar Singh v. Ghasitey Ram 8
(1950) AIR 1950 All 88 (V 37)=ILR
(1951) 1 All 117, Suraj Bali v. Rang Rahadur 6
(1937) AIR 1937 All 32 (V 24)=
1936 All LJ 1358, Bageshary Tawari v. Nandoo Singh 9
(1935) AIR 1935 Lah 787 (V 22)=
ILR (1937) Lah 517, Kartar Singh v. Kharkha 11
(1932) AIR 1932 PC 207 (V 19)=59
Ind App. 376, Lasa Din v. Mst. Gulab Kunwar 8
(1929) AIR 1929 Oudh 402 (V 16)=
6 Oudh WR 652, Mubinulnissa v. Ali Hussain 12
(1928) AIR 1928 All 131 (V 15)=25
All LJ 1051, Shiam Lal v. Jagdamba Prasad 8, 9
(1926) AIR 1926 Oudh 313 (V 13)=29
Oudh Cas 131, Sukhdeo v. Mt. Ram Dulari 12
(1921) AIR 1921 Bom 368(2) (V 8)=
ILR 45 Bom 1020, Swamirao v. Bhimabhai 12
(1912) 16 Cal WN 351=14 Cal LJ
292, Nanda Kumar Dobey v. Aiodhya Sahu 11
(1899) ILR 21 All 204=1899 All
WN 36 (FB), Dalip Rai v. Deoki Rai 11
(1880) ILR 5 Bom 22, Vadju v. Vadju 8

G. C. Ghildayal, for Appellants; S. D. Agarwal, for Respondents.

JUDGMENT :— This appeal arises out of a suit brought by the plaintiffs for the redemption of a mortgage with possession in respect of a shop situate in erstwhile Tehri Garhwal State. The suit was filed on the 2nd of September, 1951. The plaintiffs' case was that they had mortgaged a shop in favour of Kabool Chand and Fateh Chand for a consideration of Rs. 1,600/- on the 29th of August, 1931, and had put the mortgagees in possession over the same. It was alleged that the mortgage was for a period of eight years and it was stipulated in the mortgage deed that the mortgagors would not redeem in the first four years and that after the expiry of four years they would be entitled to redeem the mortgage at any time. The plaintiffs sued for redemption but without depositing the amount due and alleged that they would pay the money found due on accounting.

2. This suit was contested by the defendants mainly on the ground that it was time barred. It was also asserted that the mortgagees had purchased the right of redemption on payment of Rs. 400 more and that the mortgagees had spent about Rs. 3,000 over the repairs of the shop in dispute and it was asserted that the suit was liable to be dismissed.

3. Before the two courts below the only question which was mooted was one of limitation. Both the Courts have held that the suit was barred by limitation having been filed more than 11 years after the date of the accrual of the cause of action.

4. The plaintiffs have come up in appeal to this Court and the learned counsel for the appellants has raised two points for the consideration of this Court.

5. It was firstly contended that the right to redeem accrued on the expiry of eight years and not four years as held by the courts below, and before the expiry of the period of limitation, the State of Tehri Garhwal was merged in the State of Uttar Pradesh and the Indian Limitation Act applied with the result that the plaintiffs could redeem the property within 60 years from the date of the accrual of the right of redemption.

6. Secondly it was contended relying on a decision of this court in the case of Suraj Bali v. Rang Bahadur, AIR 1950 All 88 that even if the first contention was not accepted, the relationship of mortgagors and mortgagees subsisted be-

tween the parties at the date of merger, that is 1st of January, 1950 when the Uttar Pradesh Merged States Act 1950 came into force. It was contended that in the Tehri Garhwal State's Limitation Act there was no provision like section 28 of the Indian Limitation Act with the result that although the remedy of the plaintiffs might have been barred but their right was not extinguished and they were entitled to recover possession on payment of the mortgage money.

7. I have heard the learned counsel for the parties in support of their respective contentions on the two points raised by the learned counsel for the appellants and after having heard them I am of opinion that the decision of the two courts below has to be upheld.

8. This case comes from the area which was in the erstwhile Tehri Garhwal State. Tehri Garhwal had its own Limitation Act before the merger. In Tehri Garhwal before the merger a suit for redemption could be filed within 11 years of the accrual of the right of redemption. The relevant Article was Article 117 of the Tehri Garhwal State's Limitation Act. It read as follows:—

न० सिविल	नालिश अपील या दरखास्त की किस्म	मियाद	कैसे मियाद गिनी जायगी
११७	बन्धक रखी हुई स्थावर सम्पत्ति (रहनशुदा जायदाद गैर मनकूला) के ईनकिकाक बाबत नालिश।	११ वर्ष	जब हक इनकिकाक पैदा हो उस तारीख से।

The above shows that a suitor could institute a suit for redemption within 11 years of the accrual of the right of redemption. In the present case, the mortgage in dispute was executed on the 29th of August, 1931 payable in 8 years and there was a definite stipulation in the document that for the first four years the mortgagors could not redeem the mortgage. Thereafter they were permitted to redeem the property on payment of the mortgage amount due. The terms of the mortgage clearly show that the right to redeem accrued to the mortgagors just after the expiry of four years i. e., the mortgagors could redeem the property any time after the 29th of August, 1935 with the result that the time began to run from this date. A suit for redemption could be filed within 11 years of this date upto the 29th of August 1946. The present suit was instituted on the 2nd of September, 1951 much beyond the period of limitation and was clearly barred by time as held by the two courts below. The contention of the learned counsel for the appellants that the right given to the mortgagors to redeem after four years was only for the benefit of the mortgagors and the right to redeem accrued only after

the expiry of eight years does not appeal to me. Learned counsel for the appellants has supported his submission by relying on the cases of Lasa Din v. Mst. Gulab Kunwar, AIR 1932 PC 207, Swayamber Singh v. Ghasite Ram, AIR 1952 All 479, Harbans Narain Singh v. Ramdhari Mahton, AIR 1960 Pat 51 and Shiam Lal v. Jagdamba Prasad, 25 All LJ 1051= (AIR 1928 All 131). I have looked into the cases cited by the learned counsel but I find that the principle of law laid down in those cases cannot be applied to the facts of the present case. AIR 1932 PC 207 (Supra) and AIR 1952 All 479 (supra) are the cases of instalment bonds wherein the debtor was allowed to pay within a certain period by instalments but there was a clause that in default of certain instalments the creditor was entitled to realise the entire amount. It was held that the right given to the mortgagee was for the benefit of the mortgagee and this benefit could be waived by him. These cases have interpreted Articles 75 and 132 of the Limitation Act and are distinguishable. AIR 1960 Pat 51 (Supra) deals with Article 148 of the Limitation Act and it held that 60 years' rule of limitation starts from

the date when the right to redeem accrued. I do not think that this case is at all helpful to the appellants. In 25 All LJ 1051 (supra) which is equivalent to AIR 1928 All 131, it was held as follows:—

"In the absence of any agreement, expressed or implied to the contrary, the right to redeem and the right to foreclose must be regarded as co-extensive.

The mere use of the words "Andar Miyad" in the mortgage-deed is not enough to evidence a contract to the effect that the mortgagor is given a right to redeem before the expiry of the stipulated period for which the mortgage is effected."

In this case it was also held that the mortgage being for a period of 15 years any suit instituted before the expiry of the period was premature. It is well settled that in the absence of any agreement express or implied to the contrary, the right to redeem and the right to foreclose must be regarded as co-extensive vide *Vadju v. Vadju*, (1880) ILR 5 Bom 22. We have to see as to whether there is any express or implied agreement to the contrary in the present case or not. The term of the document has already been given above and it shows that there was an agreement to the contrary. The intention of the parties in the present case was that although the right to foreclose would arise after the expiry of eight years, right to redeem could be exercised after the expiry of four years. To me it appears that the intention of the parties was clear that after the expiry of the first 4 years the mortgagors were given a right to redeem and right of redemption accrued to the mortgagors on the expiry of four years.

9. In the case of *Bageshary Tewari v. Nandoo Singh*, AIR 1937 All 32 this Court had occasion to consider a mortgage deed wherein the mortgagor mortgaged land to mortgagee on 5th October, 1869 with a stipulation in the mortgage deed that mortgagor might redeem the mortgage in the month of Jeth of any year within the period of ten years; and if mortgagor failed to redeem within ten years mortgagee would become the owner of the property. Mortgagor instituted a suit for redemption more than 60 years after the first Jeth succeeding 5th October 1869, the date of mortgage. It was held that the suit was barred under Art. 148 of the Limitation Act. This case clearly supports the view that I have taken in this case and this has considered the Division Bench case of 25 All LJ 1051 = (AIR 1928 All 131) (supra). For the reasons given above and the reasons given in this authority I am of opinion that the suit instituted in the present case was barred by limitation.

10. In view of this finding it is clear that before the erstwhile Tehri Garhwal

State was merged in the State of Uttar Pradesh the right to file a suit had come to an end. A right which had come to an end when the Indian Limitation Act was made applicable to this area could not be revived unless there was express provision in the merger order. In absence of any express enactment about retrospectivity the Indian Limitation Act could not be applied retrospectively to the fact of this case.

11. Now coming to the second contention of the learned counsel for the appellants, it is true that there is no provision like section 28 of the Limitation Act in the Tehri Garhwal State's Limitation Act but it has been variously held that where section 28 of the Limitation Act is not made applicable, the principle thereof can be applied, vide *Dalip Rai v. Deoki Rai*, (1899) ILR 21 All 204 (FB), *Kartar Singh v. Kharkha*, AIR 1935 Lah 787 and *Nanda Kumar Dev v. Ajodhya Sahu*, (1912) 16 Cal WN 351 at page 354 (D. B.). In view of these authorities it has to be held that although there was no provision like section 28 of the Indian Limitation Act in the Tehri Garhwal State's Limitation Act, the principle underlying the section was applicable and the right of the plaintiff-appellant got extinguished after the expiry of the period of limitation.

12. Learned counsel for the appellants submitted that in order to apply S. 28 of the Limitation Act or principles thereof, adverse possession or independent possession of the defendants was a necessary condition and he supported his submission by citing *Swamirao v. Bhimbhai*, AIR 1921 Bom 368 (2), *Sukhdeo v. Mt. Ram Dulari*, AIR 1926 Oudh 313 and *Mubinulnissa v. Ali Hussain*, AIR 1929 Oudh 402. In my opinion, these cases do not help the learned counsel. These cases have dealt with the situation where an owner of the property is said to have not lost his right of property because he happened not to be in possession of it for 12 years. It was said that his right under section 28 of the Limitation Act could only be extinguished if the possession of the possessor was adverse. The facts of the cases relied on by the learned counsel for the appellants are distinguishable. To the facts of those cases adverse possession was a necessary condition. But the same cannot be said in every case. If the contention of the learned counsel is accepted, then there cannot be extinction of right to redeem even after the expiry of 60 years. This cannot be accepted to be the correct position in law.

13. Next it was argued that a mortgagee will always remain a mortgagee irrespective of the fact as to the length of his possession and he cannot prescribe higher title by adverse possession than

1969

that of a mortgagee. Reliance was placed on two decisions of the Supreme Court in the cases of Ganga Dhar v. Shankar Lal, AIR 1958 SC 770 paragraphs 8 and 9, and Padma Vithoba v. Mohd. Multani AIR 1963 SC 70. This contention of the learned counsel is also besides the point. Here in the present case, we have to see whether the right of the plaintiffs to redeem had come to an end or not. In view of the above discussion there can be no doubt that that right came to an end after the expiry of 11 years from the date of the accrual of the right to redeem. There is no question of prescribing the rights of a mortgagee. In the present case on the extinction of the right of the mortgagors in view of the principles of section 28 of the Limitation Act, the ownership right vests in the mortgagees.

14. In view of what has been said above, none of the two contentions raised by the learned counsel has any force. Accordingly, this appeal fails and is hereby dismissed with costs.

RGD

Appeal dismissed.

AIR 1969 ALLAHABAD 35 (V 56 C 6)

GANGESHWAR PRASAD. J.

Abdul Rauf, Plaintiff-Appellant v. Shamshulhaq and others, Defendants-Respondents.

Second Appeal No. 2050 of 1954, D/- 5-11-1965, against decree of Addl. Civil J., Azamgarh, D/- 1-9-1954.

(A) Mussalman Wakf Validating Act (1913), Ss. 1 and 5 — Retrospective operation given by Act of 1930 — Effect — (Mussalman Wakf Validating Act (1930), S. 2.)

The Mussalman Wakf Validating Act, 1913 provides a statutory criterion for judging the validity of wakfs of the nature mentioned therein, and since it has been given a retrospective effect by the Mussalman Wakf Validating Act XXXII of 1930, the validity of all such wakfs whether created before or after its commencement has to be judged now by that statutory criterion, subject of course to the saving provision contained in section 5 of the Act and the proviso to section 2 of Act XXXII of 1930. (Para 8)

(B) Mussalman Wakf Validating Act (1913), Ss. 1, 3, 4 — Change brought about by Act in Muhammadan law as to wakf indicated.

The essence of the change brought about by the Mussalman Wakf Validating Act of 1913 is that the requisite condition for the validity of a wakf-alal-aulad is that its ultimate benefit should be reserved for the poor or for any other

religious, pious, or charitable object of a permanent nature, and not that its benefit should be substantially for any such object. The benefaction may be so negligible or so remote in point of time that the purpose of the wakf may not appear to be substantially devoting the income of the dedicated property to any of the aforesaid objects; but that would not impair the validity of the wakf, if any such object is to be the ultimate recipient of the benefaction. The reservation of ultimate benefit for any such object imparts to a disposition of property the character of a wakf under the Act and exercises a validating influence upon the disposition, in spite of the remoteness of the benefit or its problematical nature.

(Para 9)

(C) Mussalman Wakf Validating Act (1913), Ss. 3 and 4 — Wakf for the maintenance of wakif and his family — Ultimate benefit reserved for religious or charitable purpose (upkeep of Madarsa) — Intermediate beneficiary outside class of persons contemplated by S. 3(a) — Wakf is not thereby rendered invalid at its inception — Only effect is to cut out invalid disposition — Benefit of wakf is accelerated and goes to ultimate charitable purpose — Doctrine of cy pres — Scope and applicability.

Under a wakf-deed executed in 1932 the wakif himself was to remain in possession of the wakf property as the first mutawalli during his lifetime and to utilise its income for his own needs and the maintenance of his family and thereafter his wife was to remain in possession as mutawalli and likewise utilise the income of the property. After her death the mutawalliship was to devolve on certain persons who did not belong to the family of wakif and thereafter it was to devolve on their descendants generation after generation. But in case their line became extinct the entire income was to be spent for the upkeep of a Madarsa.

Held that though the provision with regard to descendants of persons who did not belong to wakif's family was invalid, under S. 3(a) of the Act it did not render the entire wakf invalid from its inception and after the death of the wife the benefit of wakf went to the ultimate beneficiary designated in the deed of wakf viz., the Madarsa. 1959 All LJ 486 & AIR 1962 All 364, Foll. Case law ref.

(Para 14)

It is not correct to say that when some of the dispositions made in a wakf are found to be invalid the court can uphold and give effect to the remaining dispositions only by invoking the doctrine of cy pres. The efficacy of a settlement of property cannot be destroyed in entirety on account of the existence therein of some provisions which are not sanctioned by law, and the valid provisions thereof

can take effect when they are clearly severable from and independent of the invalid provisions and particularly when they do not come into play simultaneously with the invalid provisions according to the terms of the deed. In the Mussalman Wakf Validating Act too there is nothing to suggest that if an intermediate beneficiary under a wakf governed by the Act falls outside the class of persons for whose maintenance and support provision may be made under the wakf, the entire wakf will fail and even the ultimate object of the bounty of the wakif will be deprived of the benefit intended to be conferred upon it. But even if it is assumed that it is only by applying the doctrine of cy pres that, upon the failure of intervening dispositions, the court can allow the benefit of the wakf to be appropriated by the ultimate beneficiary, there can be no doubt about the application of the doctrine. (Para 11)

The doctrine of cy pres is a doctrine of Equity and its course has not been confined to any rigidly fixed groove but has covered diverse situations. There have been variations in the application of the doctrine and courts have employed it liberally for preventing the failure of charities. A general charitable intent as an essential condition for the application of the doctrine has, therefore, to be construed in a broad sense having regard to the context in which the question of its application arises. Under the Mussalman Wakf Validating Act the ultimate intent controls the entire disposition and itself imparts to it the character of a valid wakf. The ultimate charitable intent in a wakf governed by the Act should consequently be regarded as fulfilling the requisite condition for attracting the cy pres doctrine. (Para 12)

Cases Referred: Chronological Paras

- (1962) AIR 1962 All 364 (V 49)=
1962 All LJ 272, Abdul Qavi Khan
v. God Almighty 13
- (1959) 1959 All LJ 486, Munir Uddin
Ahmad v. Sunni Central Board
of Waqfs U. P. Lucknow 13
- (1957) AIR 1957 All 94 (V 44)=
ILR (1954) 2 All 556, Mohammad
Sabir Ali v. Tahir Ali 13
- (1948) AIR 1948 PC 168 (V 35)=
1948 All LJ 422, Beli Ram and
Brothers v. Mohammad Afzal 7, 8
- (1947) AIR 1947 Lah 117 (V 34)=ILR
(1946) Lah 300, Mohamad Afzal v.
Din Mohammad 8
- (1932) AIR 1932 Oudh 71 (V 19)=
ILR 7 Luck 300, Ramzan v. Mst.
Rahmani 13
- (1895) ILR 22 Cal 619=22 Ind App
76 (PC), Abdul Fata Mahomad
Ishaq v. Basamaya Dhur 7
- (1893) ILR 20 Cal 116 (FB), Bikani
Mia v. Shuk Lal Poddar 7, 8

- (1890) ILR 17 Cal 498=17 Ind App.
28 (PC), Mahomed Ahsanulla
Chowdhary v. Amarchand Kundu 7
- (1881-82) ILR 6 Bom 42, Fatma Bibi
v. Advocate General of Bombay 13
- S. J. Hyder, for Appellant.

JUDGMENT :— The main question involved in this appeal relates to the validity of a deed of wakf executed by one Sheikh Karamat on 8-2-1932. The material provisions of the deed are as follows. Sheikh Karamat himself would remain in possession of the wakf property in the capacity of a Mutwalli during his lifetime and utilize its income for his own needs and for those of his wife and other relations. Thereafter, his wife Fahima Bibi would remain in possession of the property as a Mutwalli for her life and spend its income on herself and on the poor, without being accountable to anybody. Upon the death of Fahima Bibi the Mutwalliship would devolve upon Shamsul Haq, Abdul Rauf and Abdul Maruf, the respondents in this appeal, who would spend a sum of Rs. 4 per month out of the income of the wakf property over a Madarsa named in the deed and would appropriate the rest of the income to their own use. After the death of the respondents their descendants, generation after generation would be the Mutwallis of the wakf and managers of the wakf property subject to the terms of the wakf deed. On the extinction of the line of the respondents the entire income of the wakf property would be devoted to the upkeep of the Madarsa by a pious and a competent person selected by the Muslim residents of the villages mentioned in the deed, and if at any time the Madarsa designated in the deed ceases to exist the income would be spent over some other Madarsa.

2. In 1933 Sheikh Karamat instituted a suit for cancellation of the deed of wakf against the respondents but the suit was withdrawn by him with permission to file a fresh suit. Then, in 1934 he executed a deed of revocation annulling the wakf deed of 1932, and contemporaneously with it he appears to have executed another deed of wakf providing that after his death and the death of his wife Fahima Bibi, the Mutwalliship would go to Sheikh Mansab, the brother of Fahima Bibi. Again, in 1938 Sheikh Karamat executed a third deed of wakf annulling the second deed as well and providing that after him and his wife Fahima Bibi the Mutwalliship of the wakf would go to the appellant, who is the grandson of his brother Sheikh Amanat, and would then continue devolving upon the appellant's descendants generation after generation. Under this deed of 1938 a sum of Rs. 10 per annum out of the income of the wakf property is to be spent by all the Mutwallis towards the upkeep of the Madarsa mentioned therein and on the extinction

of the line of the appellant the entire income of the wakf property has to be devoted to charity.

3. It appears that on the basis of the wakf deed of 1932 mutation in the revenue records in respect of the zamindari property comprised in the deed was effected in the name of Sheikh Karamat and after his death in 1940 in the name of Fahima Bibi as Mutwalli of the property. Upon the death of Fahima Bibi, which took place in 1946, a dispute regarding the Mutwalliship arose between the appellant and the respondents. Mutation in the revenue records was ordered to be made in favour of the respondents, and the suit which has given rise to this appeal was then instituted by the appellant for a permanent injunction restraining the respondents from interfering with his possession of the wakf property and for other alternative and incidental reliefs.

4. The appellant, who claims under the wakf deed of 1938, alleged that the execution of the earlier wakf deeds of 1932 and 1934 by Sheikh Karamat was brought about by means of fraud and those deeds did not represent the real intention of Sheikh Karamat. It was contended by him that Sheikh Mansab and the respondents did not belong to the family of Sheikh Karamat and as such no wakf could in law be created for their maintenance and support. The result, according to his contention, was that the deed of 1938, was the only valid and operative deed of wakf and it was the appellant who was the legal and the real Mutwalli of the wakf property. The respondents denied that the wakf deed of 1932 had been obtained by fraud and asserted that it truly represented the intention of Sheikh Karamat and had also been given effect to.

They further asserted that they were relations of Sheikh Karamat, that the wakf deed of 1932 was perfectly legal and valid, and that they were in possession as Mutwallis under it since after the death of Fahima Bibi. In the alternative, their case was that if the respondents were not held to be Mutwallis under the law, the wakf created by the deed of 1932 will be deemed to have been appropriated after the death of Fahima Bibi, to the charity mentioned in the deed as the ultimate beneficiary and the appellant could even then have no interest whatsoever in the wakf property. It was further pleaded by the respondents that as the suit filed by Sheikh Karamat, for cancellation of the wakf deed of 1932 had been allowed to be withdrawn with permission to file a fresh suit subject to the condition of previous payment of the costs of that suit and the costs had not been paid, the present suit was not maintainable. The plea of limitation under Article 91 of the Limitation Act was also taken.

5. The courts below have found that the wakf deed of 1932 was not secured by fraud and they have held it to be genuine and valid and to be a deed which was fully acted upon. On the question whether the respondents can be said to have belonged to the family of Sheikh Karamat the trial court has recorded a finding against the respondents. This finding does not appear to have been challenged before the lower appellate court and the judgment of the lower appellate court proceeds on the basis that the respondents did not belong to the family of Sheikh Karamat. Both the Courts below have, however, held that although the dispositions in favour of the respondents and their descendants in the wakf deed of 1932 were invalid, they did not invalidate the deed in entirety and only resulted in bringing into operation, immediately after the death of Fahima Bibi, those provisions which were to take effect after the death of the respondents and the extinction of their line. It has accordingly been held by them that the wakf deeds of 1934 and 1938 were, altogether void and ineffective, and the plaintiff has no interest in the wakf property. The plea that the present suit was not maintainable because of the failure to pay the costs of the suit withdrawn by Sheikh Karamat has also found, favour with both the courts below. As to the plea of limitation, the trial court has given no finding, but the lower appellate court has held that the suit is barred by Article 91 of the Limitation Act.

6. The findings of fact recorded by the courts below have not been challenged before me as, indeed, they could not be. It has also not been disputed that if the wakf deed of 1932 was valid and took effect as such the deeds of 1934 and 1938 were void and ineffective, and the appellant has in that case no interest in the property in suit. Mr. S. J. Hyder, learned counsel for the appellant, has only assailed the validity of the wakf deed of 1932 and urged that the provisions in the aforesaid deed in favour of the respondents and their descendants were repugnant to the creation of a lawful wakf and since those provisions were integral and, from the point of view of duration as also of the quantum of benefit, the most substantial part of the purpose for which Sheikh Karamat purported to create a wakf under that deed, they vitiated the wakf at its source and the deed was invalid from its inception. The question for decision, therefore, is whether the wakf created by the deed of 1932 was invalid ab initio on account of the provisions in favour of the respondents and their descendants or whether a valid wakf came into existence in spite of the said provisions and it took effect as if there were no intermediate beneficiaries at all be-

tween Fahima Bibi and the charity designated in the deed as the ultimate beneficiary.

7. Having regard to the nature of the wakf created by means of the deed of 1932, it is unquestionable that its validity has to be determined with reference to the Mussalman Wakf Validating Act of 1913. But, for a proper appreciation of the effect of the said Act on the provisions of the wakf deed in question it is necessary to bear in mind its historical background. In *Mahomed Ahsan Ulla Chowdhry v. Amarchand Kundu*, (1890) ILR 17 Cal 498 (PC) where the Privy Council had before it a wakf-alal-aulad with an ultimate gift over to charity after the extinction of the line of the settlor, the test applied by the Privy Council to the validity of the wakf was whether the wakf property had in substance been given to charitable uses, and it was held that the wakf in question was not a dedication but only a veil to cover arrangements for the aggrandisement of the family and to make the property inalienable.

The Privy Council observed however, that it was not called upon by the facts of that case to decide whether a gift of property to charitable use which is only to take effect after the failure of all the grantor's descendants is an illusory gift. In *Bikani Mia v. Shuk Lal Poddar*, (1893) ILR 20 Cal 116 (FB), following the Privy Council decision in (1890) ILR 17 Cal 498 (PC), it was held by a Full Bench of the Calcutta High Court, with Ameer Ali, J. dissenting, that substantial dedication to religious and charitable purposes was necessary for the validity of a wakf. The view expressed by Ameer Ali, J. in his dissentient judgment was that there was a consensus of opinion among the Mahomedan lawyers of every school and sect that wakfs for children, kindred or neighbours in perpetuity are valid, and to hold that a wakf, the benefaction of which is bestowed wholly or in part on the wakif's family and descendants, is invalid, would have the effect of abrogating an important branch of the Mahomedan Law. Referring to the Privy Council decision in *Mahomed Ahsan Ulla Chowdhary's case*, (1890) ILR 17 Cal 498 (PC), Ameer Ali, J. observed that their Lordships had clearly abstained from laying down any general rule and there was nothing in their remarks to justify an inference that their Lordships intended to repeal the Mahomedan Law.

Then came the Privy Council decision in *Abdul Fata Mahomed Ishaq v. Rasamaya Dhur*, (1895) ILR 22 Cal 619 where not only the test of substantial dedication to charitable uses laid down in (1890) ILR 17 Cal 498 (PC) was reaffirmed but it was laid down that a wakf to charity may be illusory

whether from its small amount or its uncertainty and remoteness. The opinion of Ameer Ali, J. in his dissentient judgment in *Bikani Mia's case*, (1893) ILR 20 Cal 116 (FB) which was in accordance with the view expressed by him in his *Tagore Law Lectures on Mahomedan Law* was not accepted by the Privy Council as in consonance with Mahomedan Law as known and administered in India, and a wakfnama which settled a property in perpetuity on the family of the settlors with an ultimate gift for the benefit of the poor to take effect upon the failure of the descendants of the family was held as not establishing a wakf according to Mahomedan Law. This decision caused great dissatisfaction among the Muslims of India, and the Mussalman Wakf Validating Act of 1913 was in consequence enacted with the object, in the language of the preamble to the Act, of removing doubts which had arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious, or charitable purposes.

This was the historical background of the Mussalman Wakf Validating Act of 1913 and it was summed up by the Privy Council in *Beli Ram and Brothers v. Chaudri Mohammad Afzal*, AIR 1948 PC 166 in the following words:

"Before the passing of the Mussalman Wakf Validating Act (VI of 1913) it had been established by decisions of this Board that a wakf was invalid if the gift to charity contained therein was illusory, whether because of the smallness of the proportion of the property allotted to charity, or because the gift to charity was postponed for such a length of time as to make the prospect of charity ever taking problematical. The law on this point was altered by the said Act . . ."

8. Mr. S. J. Hyder has contended that the Mussalman Wakf Validating Act of 1913 did not have the effect of giving legislative recognition to the pure Muslim Law as it was expounded by Ameer Ali, J. in his dissentient judgment in *Bikani Mia's case*, (1893) ILR 20 Cal 116 (FB) or in his *Tagore Law Lectures*, and he has relied on an observation of Ram Lal, J. to that effect in *Mohammad Afzal v. Din Mohammad*, AIR 1947 Lah 117. The contention appears, to be well founded, but I think it is not of much practical importance, and at any rate it does not help Mr. S. J. Hyder in his attack on the validity of the wakf deed in question. The Mussalman Wakf Validating Act provides a statutory criterion for judging the validity of wakfs of the nature mentioned therein, and since it has been given a retrospective effect by the Mussalman Wakf Validating Act XXXII of 1930, the

validity of all such wakfs whether created before or after its commencement has to be judged now by that statutory criterion, subject of course to the saving provision contained in section 5 of the Act and the proviso to section 2 of Act XXXII of 1930. The real question, therefore, is not whether the Mussalman Wakf Validating Act of 1913 has brought the law into accord with what the pure Muslim Law, according to the exposition of Ameer Ali, J. in *Bikani Mia's case*, (1893) ILR 20 Cal 116 (FB) or in his *Tagore Law Lectures*, was, but what is the essence of the change effected by the Act in the law as laid down in the Privy Council decisions preceding it.

9. The essence of the change brought about by the Mussalman Wakf Validating Act of 1913 is that the requisite condition for the validity of a wakf-alal-aulad is that its ultimate benefit should be reserved for the poor or for any other religious, pious, or charitable object of a permanent nature, and not that its benefit should be substantially for any such object. The benefaction may be so negligible or so remote in point of time that the purpose of the wakf may not appear to be substantially devoting the income of the dedicated property to any of the aforesaid objects; but that would not impair the validity of the wakf, if any such object is to be the ultimate recipient of the benefaction. The reservation of ultimate benefit for any such object imparts to a disposition of property the character of a wakf under the Act and exercises a validating influence upon the disposition, in spite of the remoteness of the benefit or its problematical nature.

10. What happens, then, if an intermediate beneficiary for whom provision has been made under a wakf governed by the Mussalman Wakf Validating Act of 1913 is found to be outside the class of persons for whose maintenance and support a wakf may be made under the Act? Does the disposition in favour of such a person strike at the root of the wakf and render it invalid at its inception and incapable of taking effect, or does the ultimate object of the wakf sustain it notwithstanding that defect and the result is that the invalid disposition is cut out and the achievement of the final purpose of the wakf is accelerated? Mr. S. J. Hyder has contended that the deed is totally deprived of validity in these circumstances, and he has urged that acceleration can be effected only by the doctrine of cy pres; and that doctrine has no application to a gift which lacks a general charitable intent as, according to him, the wakf in question does. The argument ignores that essential characteristic of wakfs governed by the Mussalman Wakf Validating Act of 1913 which I

have emphasized above and it is untenable both on principle and on authority.

11. Firstly, it is not correct to say that when some of the dispositions made in a wakf are found to be invalid the court can uphold and give effect to the remaining dispositions only by invoking the doctrine of cy pres. The efficacy of a settlement of property cannot be destroyed in entirety on account of the existence therein of some provisions which are not sanctioned by law, and there is no reason why the valid provisions thereof should not take effect when they are clearly severable from and independent of the invalid provisions and particularly when they do not come into play simultaneously with the invalid provisions according to the terms of the deed. In the Mussalman Wakf Validating Act too, there is nothing to suggest that if an intermediate beneficiary under a wakf governed by the Act falls outside the class of persons for whose maintenance and support provision may be made under the wakf, the entire wakf will fail and even the ultimate object of the bounty of the wakf will be deprived of the benefit intended to be conferred upon it. But even if it is assumed that it is only by applying the doctrine of cy pres that, upon the failure of intervening dispositions, the Court can allow the benefit of the wakf to be appropriated by the ultimate beneficiary, there can be no doubt about the application of the doctrine.

12. The contention of Mr. S. J. Hyder is that an ultimate charitable intent must be distinguished from a general charitable intent, and that the doctrine of cy pres can have no application to a wakf which has charity as its ultimate object only. This contention unduly limits the scope of the doctrine of cy pres and takes a too narrow view of what is meant by a general charitable intent. The doctrine of cy pres is a doctrine of Equity and its course has not been confined to any rigidly fixed groove but has covered diverse situations. There have been variations in the application of the doctrine and courts have employed it liberally for preventing the failure of charities. A general charitable intent as an essential condition for the application of the doctrine has, therefore, to be construed in a broad sense having regard to the context in which the question of its application arises. Under the Mussalman Wakf Validating Act the ultimate intent controls the entire disposition and itself imparts to it the character of a valid wakf. The ultimate charitable intent in a wakf governed by the Act should consequently be regarded as fulfilling the requisite condition for attracting the cy pres doctrine. In fact, the ultimate charitable intent also constitutes a general and an overriding intent in a wakf of this kind, A

bad link in the chain of dispositions contained in a wakf-alal-aulad will not, therefore, destroy the wakf and frustrate the ultimate wish of the wakif, and the invalidity of some provision therein will only have the effect of eliminating that particular provision from the scheme of the wakf and accelerating the accomplishment of its ultimate object.

13. I may now refer to the authorities. In *Fatma Bibi v. Advocate General of Bombay*, (1881-82) ILR 6 Bom 42 it was observed by West, J. that if the intermediate purpose of a dedication fails the rule of Mahomedan Law appears to be that the final trust for charity does not fail with it but is accelerated being itself regarded as the principal object in virtue of which effect is given to the accompanying and intervening dispositions. In *Ramzan v. Mst. Rahmani*, AIR 1932 Oudh 71 where a wakf provided for enjoyment of the estate, which was the subject of a wakf, by a person who was not a member of the settlor's family and could not, therefore, to that extent be given effect to, it was held by a Division Bench that the whole deed did not on that account become invalid at its inception. The question received a very exhaustive treatment, if I may say so with respect, at the hands of Ram Lal, J. in the Division Bench case of AIR 1947 Lah 117 where after quoting the Oudh case mentioned above, the learned Judge observed that the case was a direct authority for the proposition that if the giving of a benefit to the kindred transgresses the limits laid down by the Wakf Validating Act that interest can be cut out and the benefits captured by charity, and proceeded to apply the above principle to the case before him.

I may mention that although the decree passed by the Lahore High Court in that case was affirmed by the Privy Council in AIR 1948 PC 168 (Supra) the Privy Council did not express any opinion on the principle on which the Lahore Court had acted. However, the point is directly covered by two Division Bench cases of this Court: *Munir Uddin Ahmad v. Sunni Central Board of Wakfs*, U. P. Lucknow, 1959 All LJ 486, and *Abdul Qavi Khan v. God Almighty*, AIR 1962 All 364. In the former case it was laid down that the invalidity of certain gifts or benefactions does not involve the destruction of the endowment as a whole and that this principle would also apply to Muslim Wakfs. In the latter case, the principle laid down in the former was followed and it was held that the failure of the wakf in favour of intermediate beneficiaries had the effect of accelerating the wakf in favour of the ultimate beneficiary i. e. the charity. Against these authorities Mr. S. J. Hyder has cited another Division Bench case of this Court: *Mohammad*

Sabir Ali v. Tahir Ali, AIR 1957 All 94. That case does not, however, support the case of the appellant. There, a wakf had to justify itself both under the provisions of the Mussalman Wakf Validating Act of 1913 and the Oudh Estates Act, the wakf was held valid under the former Act, but it was held to be in contravention of the provisions of the Oudh Estates Act. The observations made by Agrawala, J. in considering whether the wakf was to be set aside as a whole or only to the extent of such of its provisions as contravened the Oudh Estates Act cannot, therefore be applied in judging the validity of a wakf with reference to the Mussalman Wakf Validating Act of 1913. The authorities too are thus clearly against the contention advanced by Mr. S. J. Hyder and the two Division Bench cases of this Court, which deal directly with the question involved in the instant case, conclude the case against the appellant.

14. The finding of the trial court that the respondents did not belong to the family of the appellant is certainly correct. It is also clear that no provision could have been made for the descendants of the respondents under section 3(a) of the Mussalman Wakf Validating Act of 1913. But the result was not that the wakf became invalid at its inception but that immediately after the death of Fahima Bibi the benefit of the wakf went to the ultimate beneficiary designated in the deed of wakf. The appellant has, consequently no interest in the property in suit and his claim has been rightly dismissed.

15. In view of my finding that the appellant has no interest in the property in suit, it is not necessary to enter into the question whether the suit of the appellant is incompetent by reason of the failure to deposit the costs of the suit filed by Sheikh Karamat or into the question whether the suit is barred by limitation.

16. The appeal fails and it is accordingly dismissed. I make no order as to costs in this Court.

KSB

Appeal dismissed.

AIR 1969 ALLAHABAD 40 (V 56 C 7)
FULL BENCH

W. BROOME, H. C. P. TRIPATHI
AND S. D. SINGH, JJ.

Zila Parishad, Muzaffarnagar and another, Appellants v. Jugal Kishore Ram Swarup and another, Respondents.

Special Appeal No. 315 of 1967, D/- 15-5-1968, from judgment of D. D. Seth J. in Civil Misc. Writ No. 2123 of 1961, D/- 16-9-1966.

IL/IL/D879/68

(A) Constitution of India, Sch. 7 List I Item 82 — Income-tax and circumstances and property tax are fundamentally distinct — Latter tax not covered by item 82 — 1961 All LJ 743 & 1955 All LJ 630 & AIR 1957 All 433, Overruled.

Circumstances and property tax cannot be equated with income tax and is not covered by item 82 of List I in Sch. 7 of the Constitution. It is essentially a tax on status or financial position combined with a tax on property and is fundamentally distinct from income tax. It is true that in the majority of cases the assessment of this tax depends on the amount of income earned by the assessee from various sources (i. e. his profession, business or property); but that will not make it an income tax. It is not essential that there should be income before such a tax can be levied; and it is purely as a matter of convenience that income is adopted as the yardstick for the assessment of the tax. 1961 All LJ 743 & 1955 All LJ 630 & AIR 1957 All 433, Overruled. AIR 1948 All 382 (FB) & AIR 1957 SC 18, Rel. on. (Para 3)

(B) Municipalities — U. P. Town Areas Act (2 of 1914), S. 14(1)(f) — Validity — Circumstances and property tax comes within Sch. 7, List II, Items 49 and 60 of the Constitution — Provision is intra vires State Legislature — (Constitution of India, Art. 246 and Sch. 7, List II, Items 49 and 60).

The language of the proviso to Cl. (f) of S. 14(1) shows that clauses (a) to (e) have been treated as equivalent to Clause (f), for the object of the proviso is obviously to avoid the duplication of tax. Clause (f) is therefore equated with a tax on trades, callings and professions (clause (d)), corresponding to 'circumstances', plus a tax on lands and buildings (clauses (a), (b), (c)) corresponding to property.

(Para 4)

Circumstances and property tax is leviable only on immovable property (lands and buildings) or on financial status derived from professions, business or employment; and legislation in relation to such a tax is clearly within the competence of the State Legislature by virtue of items 49 and 60 of List II of the 7th Schedule of the Constitution. S. 14(1)(f) of the U. P. Town Areas Act is therefore, valid. (Paras 4, 5)

Cases Referred: Chronological Paras

(1961) 1961 All LJ 743=1961 All WR (HC) 430, Raghubir Singh v. Town Area Committee 3

(1957) AIR 1957 SC 18 (V 44)=1956 SCR 664, Ram Narain v. State of U. P. 3, 4

(1957) AIR 1957 All 433 (V 44), Western U. P. Electric Power and Supply Co., Ltd. Etawah v. Town Area Jaswant Nagar, 3

(1955) 1955 All LJ 630=1955 All WR (HC) 520, Tata Oil Mills Co., Ltd. v. District Board of Allahabad 3
(1948) AIR 1948 All 382 (V 35)=1948 All LJ 338 (FB), District Board of Farrukhabad v. Prag Dutt 3

(1936) 1936 AC 352=105 LJ PC 81, In re a Reference under Govt. of Ireland Act 3

P. C. Gupta, for Appellants.

BROOME J.:— The following question has been referred to this Bench for decision:

"Whether clause (f) of sub-section (1) of section 14, U. P. Town Areas Act, 1914 is valid."

2. S. 14 of the said Act enumerates the various taxes that may be imposed by a Town Area Committee; and clause (f) of this section relates specifically to the levy of circumstances and property tax. This provision was introduced in the U. P. Town Areas Act by an amending Act (U. P. Act XXIII of 1950), which came into force in July 1950. Such a tax was not being levied by Town Areas before the commencement of the Constitution and consequently cannot be saved by Art. 277. The question therefore arises whether the amendment conferring the power on Town Area Committees to levy this tax was within the legislative competence of the State Legislature. The argument advanced by learned counsel for the appellant in this connection is two-fold. Firstly, it is contended that circumstances and property tax is essentially a form of income tax, which is a subject exclusively within the jurisdiction of Parliament, being covered by item no. 82 of List I of the Seventh Schedule of the Constitution. And secondly it is urged that in any case it does not fall under any of the heads enumerated in Lists II or III of the Seventh Schedule and consequently must be deemed to be a matter exclusively within the jurisdiction of Parliament by virtue of item no. 97 of the Union List.

3. Cases are not lacking where circumstances and property tax has been held to be a tax on income, vide the Single Judge decision in Raghubir Singh v. Town Area Committee, 1961 All LJ 743 and the Division Bench decisions in Tata Oil Mills Co. Ltd. v. District Board of Allahabad, 1955 All LJ 630 and Western U. P. Electric Power and Supply Co. Ltd. Etawah v. Town Area Jaswant Nagar, AIR 1957 All 433. But a Full Bench of this Court in District Board of Farrukhabad v. Prag Dutt, AIR 1948 All 382 (FB) has underlined the essential distinction between the two kinds of tax in the following words:

"The fundamental difference between a tax on 'income' and a tax on 'circum-

stances and property' is that income tax can only be levied if there is income and if there is no income, no tax is payable but in the case of circumstances and property tax, where a man's status has to be determined, his total business turnover may be considered for purposes of taxation, though he may not have earned any taxable income. As has been pointed out in 1936 A. C. 352, the measure of the tax is not itself the test. In determining the nature of the tax consideration may be given to the standard on which the tax is levied, but that is not the determining factor."

And further light is shed on the nature of circumstances and property tax by the remarks of the Supreme Court in *Ram Narain v. State of U. P.*, AIR 1957 SC 18, in which it was observed:

"A tax on 'circumstances and property' is a composite tax and the word 'circumstances' means a man's financial position, his status as a whole, depending, among other things, on his income from trade or business."

Circumstances and property tax, therefore, is essentially a tax on status or financial position combined with a tax on property and is fundamentally distinct from income tax. It is true that in the majority of cases the assessment of this tax depends on the amount of income earned by the assessee from various sources (e. g. his profession, business or property); but that will not make it an income tax. It is not essential that there should be income before such a tax can be levied; and it is purely as a matter of convenience that income is adopted as the yardstick for the assessment of the tax. We are not prepared, therefore, to equate circumstances and property tax with income tax and we have no hesitation in repelling the contention of learned counsel for the appellant that circumstances and property tax is covered by item no. 82 of List I of the Seventh Schedule of the Constitution.

4. It now remains to be seen whether this tax comes under any of the heads mentioned in Lists II and III of the Seventh Schedule. It is clear from its very name that it is a composite tax, made up of two components; a tax on property and a tax on circumstances (which, as interpreted by the Supreme Court in *Ram Narain's* case, AIR 1957 SC 18, means a tax on status or financial position). The tax on property is confined to immovable property and clearly falls within the jurisdiction of the State Legislature by virtue of item no. 49 of the State List, viz. Taxes on lands and buildings. Coming to the tax on circumstances, status or financial position, we note that the Supreme Court, in the case already cited has pointed out that a man's 'cir-

cumstances' depend, among other things, on his income from trade or business; and by an obvious analogy they will also depend on the income which he may derive from his profession or employment. That being so, we are forced to conclude that a tax on a man's circumstances means a tax on his trade, business, profession or employment; and such a tax is covered by item no. 60 of the State List, viz. Taxes on professions, trades, callings and employments. Learned counsel for the appellant objects that there is a separate provision for a 'tax on trades, callings or professions' in clause (d) of section 14(1) of the U. P. Town Areas Act, which he argues, must be quite distinct from the 'tax on persons assessed according to their circumstances and property' mentioned in clause (f). But as soon as we read the section as a whole, this objection is found to be without substance. The section, in so far as it is relevant for the purposes of this case, runs as follows:—

"14. Imposition of Town Tax. — (1) Subject to any general rules or special orders of the State Government in this behalf, the taxes which a Committee may impose are the following:

(a) A tax upon the rent payable under the provision of the U. P. Tenancy Act

... ..
(b) A tax upon the rent received by proprietors or under-proprietors on account of land as defined in Section 3 of the U. P. Tenancy Act

(c) A tax upon the assumed rental value of sir and khudkasht land

(d) A tax on trades, callings or professions.

(e) A tax upon a building payable by the owner thereof

(f) A tax on persons assessed according to their circumstances and property not exceeding such rate and subject to such limitations and restrictions as may be prescribed.

Provided that such a person is not already assessed under clauses (a) to (e) above.

(g) Any other tax, being one of the taxes mentioned in sub-section (1) of section 128 of the U. P. Municipalities Act, 1916."

The proviso to clause (f) is significant. It shows that circumstances and property tax will not be imposed if a tax has already been levied under clauses (a) to (e) which relates to land, or under clause (e) which relates to buildings, or under clause (d) which relates to trades, callings and professions. Clauses (a) to (e) have thus been treated as equivalent to clause (f), for the object of the proviso is obviously to avoid the duplication of taxes. Circumstances and property tax (Clause (f)) is therefore equated with a tax on trades, callings and professions (clause (d)), corre-

sponding to 'circumstances', plus a tax on lands and buildings (cls. (a), (b), (c), and (e)) corresponding to property. In this view of the matter there is clearly no force in the contention that the tax on trades, callings and professions, mentioned in clause (d), is something different and distinct from the tax on circumstances, leviable under clause (f).

5. An attempt has been made to argue that circumstances and property tax is not completely covered by item no. 49 (taxes on lands and buildings) and item no. 60 (Taxes on professions, trades, callings and employments) of the State List, because it might be levied on other sources of income, like dividends from securities, which clearly lie outside the purview of items 49 and 60. But we have not come across any case in which this tax has been assessed on any income of that kind; and so far as the present case is concerned, learned counsel for the respondent has categorically stated that the tax has been assessed on business income alone. In our view circumstances and property tax is leviable only on immovable property (lands and buildings) or on financial status derived from professions, business or employment; and legislation in relation to such a tax is clearly within the competence of the State Legislature by virtue of items 49 and 60 of List II of the Seventh Schedule of the Constitution.

6. Our answer to the question referred to us, therefore, is that section 14(1)(f) of the U. P. Town Areas Act is valid.

KSB Answered in the affirmative.

AIR 1969 ALLAHABAD 43 (V 56 C 8)
SATISH CHANDRA J.

G. S. Chooramani and others, Petitioners v. State of U. P. and another, Opposite Parties.

Civil Misc. Writ No. 3043 of 1966, connected with Civil Misc. Writ Nos. 3638 and 3642 of 1966, D/- 25-10-1967.

(A) Civil P. C. (1908), Preamble — Interpretation of statutes — Statement of objects and reasons and Parliamentary debates can be looked into for ascertaining the intention of legislature, the mischief which the statute was enacted to suppress and the prevailing conditions when it was enacted.

For finding the true intention of the legislature it is admissible to see what was the state of the law before the Act was made, and what was the mischief and defect to cure which the Act was passed. Parliamentary history including the speech of the minister introducing the bill is admissible as evidence of the cir-

cumstances which necessitated the passing of the Act. Statement of objects and reasons or the legislative debates are permissible to ascertain the historical setting of an enactment. Similarly the debates can be referred to show that the use of a particular word was up for consideration at all before the legislature or not. Similarly the statement of objects and reasons can be used for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation, that is, for ascertaining the conditions prevailing at the time which actuated the sponsor of the bill to introduce the same and the extent and urgency of the evil which he sought to remedy. AIR 1955 SC 661 & AIR 1951 SC 41 & AIR 1956 SC 246 & AIR 1965 SC 1251 & AIR 1950 SC 27 & AIR 1965 SC 1017 & AIR 1954 SC 92, Rel. on. (Para 7)

(B) Tenancy Laws — U. P. Government Estates Thekedari Abolition Act (1958) (1 of 1959), S. 3 — Act applies not only to thekedaris but also cultivating lessees on Government Estate — Act intends to extend benefits of U. P. Zamindari Abolition and Land Reforms Act to cultivating lessees whose leases have been abolished — State cannot single out leases in any particular district, abolish them and not extend benefit of Reforms Act — State cannot use its discretion contrary to intention of Act — Notification abolishing leases without applying Reforms Act, is an act of bad faith, ineffective and must be quashed — Constitution of India, Art. 31 — Civil P. C. (1908) Preamble — Interpretation of statutes — Meaning of words — Constitution of India, Art. 226 — Use of discretionary power by executive.

The U. P. Thekedari Abolition Act did not apply only to thekedari leases but also to the cultivator. But the historical survey plainly and unambiguously establishes that the legislature in enacting the Thekedari Abolition Act did not intend that the non-thekedari lessees of Government Estates would vanish or be uprooted from the soil. Cultivatory leases were intended to be respected. Cultivators were to have the benefit of the laws relating to land reforms and were to become bhumidhar or sirdar. (Para 11)

The Thekedari Abolition Act was in force in the district of Naini Tal. All leases in respect of Government Estates in 35 villages were determined by the impugned notification but there had been no enforcement of the U. P. Zamindari Abolition and Land Reforms Act to the Government Estates in these villages. The lessees' rights, title and interest under the leases had vanished. They did not acquire any rights under the Zamindari Abolition and Land Reforms Act. For the lessees it was urged that the impugned

notification was a mala fide exercise of power. It was contended by the State that the Act conferred a discretionary power on the Executive to determine leases in any district, that the impugned notification was squarely within the language of the section which did not make the determination of the leases conditional upon the introduction of land reforms.

Held that the Courts are not tied down merely to the literal view of words. The literal meaning had only a prima facie preference in a court; but to arrive at the real meaning it was always necessary to get on exact conception of the aim, and the scope and object of the whole Act. Words took their colour and contents from their context; which included other enacting provisions, the preamble, the existing state of the law and the mischief which by legitimate means the court could find that the statute was designed to remove. AIR 1967 SC 1643 and AIR 1957 SC 628, Rel. on.

(Para 14)

A discretionary power could be validly exercised within the language of the law as circumscribed by its purpose and policy. If by taking advantage of the flexibility of the language, the executive created a tiny loophole and attempted to drive through it a coach and four to gain an end and contrary to the true intent and content of the law, it fraudulently diverted the use of power, such an exercise was colourable and void. The benefits of the Zamindari Abolition and Land Reforms Act had been extended to Government Estates in 31 districts. It was never the intention of the legislature to single out the District of Naini Tal for a harsh and oppressive treatment, by extinguishing the leases of the pioneers who risked their lives and fortune to develop the area for the first time in its history, without extending the benefits of the land reforms provisions. The impugned notification was an act of bad faith with the legislature. It was fraud on powers and was for that reason ineffective. The impugned notification deserved to be quashed.

(Paras 17, 18)

(C) Civil P. C. (1908) Preamble — Interpretation of statutes — Proviso — Positive independent provision.

The legislature can enact a positive independent provision in the form of a proviso. AIR 1966 SC 459 (Pr. 8) & AIR 1964 SC 1413 (Pr. 21), Ref.

(Para 31)

(D) Tenancy Laws — U. P. Thekedari Abolition Act 1958 (1 of 1959), S. 3 — Abolition of leases on Govt. Estate—Provisions are void under Art. 31A, Second proviso, of the Constitution inasmuch as Act does not seek to provide compensation at market rate — Applicability of Govt. Grants Act (as amended in U. P.)—

S. 3 of the Grants Act makes U. P. Imposition of Ceiling on Land Holdings Act applicable — Provisions are not severable — Thekedari Abolition Act became void with effect from 20th June 1964, when Second proviso to Art. 31A came into force — Notification under Act abolishing leases is also void — Constitution of India, Art. 31A, Proviso 2 — Government Grants Act (1895) (as amended by U. P. Amendment Act 1960), S. 3 — Tenancy Laws — U. P. Imposition of Ceiling on Land Holdings Act (1960), S. 4.

Article 31A, after the 17th Amendment, carves out a field of legislation from Article 31(2) and is a complete code in respect of that field. The field is acquisition of an estate. On this field Article 31A acts in different ways. Negatively it protects laws relating to that field from an attack under Articles 14, 19 and 31. Positively, by the second proviso, it protects persons personally cultivating land within their ceiling limits, from acquisition without payment of compensation at the market rate. This is a protection against Article 31(2), because under Article 31(2), such land could be acquired without paying compensation at the market rate. If Article 31(2) were also to apply, the result would be that Parliament will be deemed to give with one hand and, at the same time, take it away with the other. That will be absurd.

The second proviso to Art. 31A does not in so many words indicate the effect of its contravention. But, the Explanation simultaneously added to the 9th Schedule suggests that a law contravening the second proviso would be void. Parliament gave a substantive guarantee and conferred a fresh fundamental right by the second proviso. The legislature can enact a positive independent provision in the form of a proviso. If an Act violates the second proviso, it would be unconstitutional then and there.

U. P. Thekedari Abolition Act extinguishes the leases granted by the State Government in respect of Government Estates. The beneficiary of the determination of the leases is the State. The Act contemplates payment of compensation for the determination of the lessees' interest. It is thus plain that the determination of the lease under the Act amounts to acquisition by the State within meaning of Article 31-A. The phrase acquisition by the State of an estate in the second proviso has the same meaning it has in the main provision of Article 31A. The Thekedari Abolition Act would be a law-making provision for acquisition by the State of an estate within Article 31A as well as the second proviso. AIR 1967 SC 856, Rel. on.

(Para 32)

The land contemplated by the second proviso cannot be acquired except on payment of compensation at the market rate. The Act does not seek to provide compensation at the market rate. But before the second proviso can apply, two conditions have to co-exist. The land must be within the ceiling limit applicable to the lessee and secondly, that land must be under personal cultivation. (Para 33)

Government Grants Act 1895, was made applicable to the leases granted by the Govt. on their estate by virtue of the amendment of Ss. 2 and 6 of the Govt. Grants Act by Government Grants (U. P. Amendment) Act 1960. A lease made by the Government under the Government Grants Act was made subservient to the effect of any enactment relating to land reforms or the imposition of ceiling on agricultural land. It is, therefore, not correct to say that the law relating to the imposition of ceiling was not to apply to the lands leased out under the Government Grants Act. Consequently, the effect of the second proviso of Article 31A of the Constitution cannot be avoided on this ground. (Para 36)

Under clause (b) of section 4 of the Thekedari Abolition Act, a maximum of 30 acres of such portions of the leased land as have been brought by the lessee under his personal cultivation are left with him and the lessee becomes the hereditary tenant of such land. It is obvious that this provision is not correlated to the ceiling limit of the lessee. No amendment was introduced in it after the coming in force of the Ceiling Act in 1961. It still provides for a maximum 30 acres only. Under the Imposition of Ceiling On Land Holdings Act, the minimum ceiling area of a tenure holder is 40 acres of fair quality land (vide section 4(2)(a) of the Act). Under clause (b) of section 4(2) if the tenure holder has a family having more than five members, the ceiling area shall be 40 acres together with 8 acres of fair quality of land for every additional member of the family, subject to the maximum of 24 such acres. Thus the ceiling area varies between 40 and 64 acres for every tenure holder. Moreover, the provision in section 4(b) of the Act for leaving up to 30 acres in the shape of a hereditary tenancy really does not go to feed the second proviso. Under the Act, the lease as a whole is extinguished and the entire land including that under personal cultivation is acquired. The conferring of hereditary tenancy rights for a part of the acquired land is not providing for compensation at the market rate. The hereditary tenancy is not of the same value as the rights under the original lease. It is thus clear that the Thekedari Abolition Act seeks also to acquire land under personal cultivation and within the ceiling limit of the lessees, with-

out providing for payment of compensation at the market rate. (Paras 37, 38)

The provision of the U. P. Thekedari Abolition Act which contravenes Art. 31A, is not severable. Its application or enforcement cannot be restricted to valid part only viz. the part of leased lands which are not within ceiling limits. The Act makes a single scheme which is intended to be operative as a whole, then it cannot be predicated that the legislature would have passed this Act, if it had considered that lands under personal cultivation and within ceiling limit cannot be acquired under the existing provisions for compensation. AIR 1957 SC 628, Rel. on. (Para 39)

The Act thus violates the second proviso to Article 31-A. That proviso came into force on 20th June 1964. With effect from that date, the U. P. Thekedari Abolition Act became void and inoperative. The State Government hence had no power to determine the leases after 20th June 1964, under that Act. The impugned notification dated 30th June, 1966, does not therefore have the force of law and is void. (Para 40)

(E) Tenancy Laws — U. P. Thekedari Abolition Act (1958) (1 of 1959) — Act cannot be challenged on the ground that it does not profess to pay what may be called compensation at all, that the compensation for the determined leases was nothing but illusory and that the Act infringed Art. 31A. The Act is completely protected by Art. 31A from being affected by Arts. 14, 19, or 31 — Constitution of India, Arts. 31, 31A, 14, 19. (Para 41)

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Ambika Pd. and Mohanji Verma, for
 Petitioners; Standing Counsel and Advo-
 cate General, for Opposite Parties.

ORDER :— This and the two compan-
 ion writ petitions challenge the consti-
 tutional validity of the U. P. Government
 Estates Thekedari Abolition Act, 1958,
 and seek to quash the notification dated
 June 30, 1966, issued by the State Gov-
 ernment under Sec. 3 of that Act, deter-
 mining the lease held by the petitioners.

2. The material and the relevant facts
 and the questions which arise for deter-
 mination are common in all the three
 writ petitions. They can be disposed of

by a common judgment. The earliest of
 them, namely, G. S. Chooramani v. State
 of Uttar Pradesh, (Civil Misc. Writ No.
 3043 of 1966) is treated as the leading
 case.

3. The Government of Uttar Pradesh
 owned many villages in the area known
 as Tarai and Bhabar in the district of
 Naini Tal. The Tarai and Bhabar area
 was undeveloped, covered with dense
 forest and infested with wild animals.
 The State Government was anxious to
 develop this area by settling tenants
 thereon and introducing stable cultiva-
 tion. It offered attractive terms and faci-
 lities to persons who were prepared to
 invest capital and effect improvement in
 it. The Government of Uttar Pradesh
 agreed to lease plots of land totalling
 1188.82 acres situate in two villages
 Bangawam and Radhulia in favour of
 the petitioner's father Dr. Rameshwar
 Singh. The Deputy Commissioner, Naini
 Tal, on behalf of the Government, execut-
 ed a deed of lease on 12th February, 1951
 of the aforesaid plots of land in
 favour of Dr. Rameshwar Singh for a
 term of 30 years beginning with 1st
 July, 1950, with option of renewal for
 further terms of 30 years, provided that
 such renewed terms together with the
 original term of the lease shall not exceed
 90 years in the aggregate. The deed laid
 down the principles upon which the rent
 payable was to be calculated per bigha,
 as also the various rights and liabilities
 inter se between the parties. The lease
 was governed by the Government Grants
 Act XV of 1895. The petitioners allege
 that actual possession was delivered over
 1107 acres only. An area of 270 acres was
 utilised for planting groves of various
 kinds of trees. The rest of the land was
 put to cultivation. All this was done after
 clearing the land of the forest and devel-
 oping it so as to make it cultivable. The
 petitioners installed several tubewells,
 inducted labourers to the farm, construct-
 ed pucca buildings and sheds for them
 and animals, bought tractors, tools and
 other instruments for mechanised farm-
 ing. The petitioners allege that they spent
 over Rs. 5,00,000.00 in building up the
 farm on the leased land.

4. On 20th January, 1959 the U. P.
 Government Estates Thekedari Abolition
 Act, 1958, (U. P. Act No. 1 of 1959) (here-
 inafter called the Thekedari Abolition Act)
 came into force. By a notification dated
 17th June, 1965 the State Government
 extended the Thekedari Abolition Act to
 the district of Naini Tal. On 30th June
 1966 the State Government issued the im-
 pugned notification in exercise of the
 powers conferred by sec. 3 of the Theke-
 dari Abolition Act determining all leases
 in respect of Government Estates in 35
 villages including villages Bangawam and
 Radhulia, in the Tarai and Bhabar area.

As a result the petitioners' lease stood determined prematurely, the Collector, Naini Tal issued a notice to the petitioners intimating them that the lease in their favour having come to an end, he will take possession of the land covered by the lease with effect from 1-7-1966. This action of the respondents led the petitioners to this Court under Art. 226 of the Constitution. The constitutional validity of the Thekedari Abolition Act and the validity of the impugned notification was challenged in the petition on many grounds, but, at the hearing the learned counsel pressed the following points :—

(i) That the Act applies to thekedari leases alone and is not attracted to cultivatory leases; in any event, applying the Act without introducing land reforms was a mala fide exercise of power.

(ii) The Act in substance acquires the lessees' rights, title and interests within the ceiling limit, but does not provide for the payment of constitutionally prescribed compensation at the market rate; and as such, it violates Article 31-A of the Constitution.

(iii) The Act provides for payment of illusory compensation and infringes Art. 31 of the Constitution.

4A. The preamble of the Thekedari Abolition Act states that it was an Act to provide for the Abolition of Thekedari system in Government Estates with a view to facilitate the introduction of land reforms therein. Under sub-section (2) of Section 1, the Act extends to such districts of Uttar Pradesh as may be notified from time to time. Under sub-section (3) of Section 1, the Act is to come in force on such date as the State Government may notify and different dates may be notified for different areas in the State. Under Section 3 the State Government was authorised to determine any lease with effect from a date to be called the date of determination. By clause (5) of section 2 'lease' was defined to mean a theka or patta in respect of a Government Estate made by or on behalf of the State Government. Clause (6) of Sec. 2 defined a 'lessee' to mean a thekedar or pattedar under a lease by whatever name called. Section 4 mentioned the consequences of the determination of leases. With the determination of the lease, all rights, title and interest of the lessee under the lease were to cease, as though the term of the lease had then expired. The lessee was to become the hereditary tenant of such land as he had brought under his personal cultivation upto a maximum area of 30 acres. Any area in excess of 30 acres in his personal cultivation was deemed to be vacant land and the lessee was liable to ejection from such an area. Under clause (g) of section 4 every mortgage, sub-lease or

other transfer of lessee rights also determined "as if the lands included in the lease had been acquired under an enactment providing for compulsory acquisition." Under section 6 the Collector was to take charge and possession of the land included in the lease. Section 7 provided for payment of compensation to the lessee for the determination of the lease, in accordance with the principles laid down in the Act. The amount payable as compensation was to be determined by multiplying the net income as determined under section 10 by the number of years for which the lease had yet to run, subject to a maximum of five.

5. For the State it was urged that the Act applies to all leases made in respect of the Government estates. It was pointed out that the definitions of the words "lease" and 'lessee' are general and wide, the amplitude of their language covers a purely cultivatory lease also; i. e. to say a lease which may not strictly speaking be of thekedari rights, assuming that the word 'Thekedari' was used in the Act in the sense prevalent in the revenue law of the State. The petitioners joined issue on this point. They urged that the Act was not intended to uproot cultivators, but only to abolish the thekedari system. The definition clauses in section 2 operate "unless there is anything repugnant in the subject or context." They must be read subject to the avowed object, the various provisions of the Act and the impact of other enactments relating to land reforms, for facilitating the introduction of which alone the impugned Thekedari Abolition Act was expressly enacted.

6. Learned counsel for the petitioner sought to rely upon the statement of objects and reasons and the debates in the State Legislature to show what matters and problems were in the minds of the sponsors of the bill and the law makers while enacting this Act. For the respondents, however, this was objected to. It was urged that the statements of objects and reasons or the parliamentary debates were inadmissible in construing the provisions of a section. The Privy Council consistently refused to refer to the proceedings of the legislature as legitimate aids to the construction of a section of an Act, see Administrator General of Bengal v. Premal Mullick, (1895) ILR 22 Cal 783 at p. 799 (PC), and Krishna Ayyanger v. Nallaperumal, AIR 1920 PC 56. The Supreme Court has similarly rejected the aid of debates in construing a section, see State of Trav. Co. v. Bombay Co. Ltd., AIR 1952 SC 366, Aswini Kumar v. Arbinda Bose, AIR 1952 SC 369 at p. 378. S. K. Dass, J. in Central Bank of India v. Their Workmen, AIR 1960 SC 12 at p. 21 proclaimed that the statement of objects and reasons was not admissible

for construing the section, far less can it control the actual words used. The same view was expressed by Venkatarama Aiyar, J. in *Jialal v. Delhi Administration*, AIR 1962 SC 1781 at p. 1787 and by Hidayatullah, J. in *Ranjit Singh v. State of Punjab*, AIR 1965 SC 632 at p. 637. These formidable array of authorities are, in my opinion, a little besides the point.

7. The golden rule of construction established since the ages was reiterated by S. R. Dass, J. in *Bengal Immunity Co. v. State of Bihar*, AIR 1955 SC 661. This rule of construction was first propounded by Lord Coke in *Heydon's case*, (1584) 3 Co Rep 7a (V). In 1898 Lindley M. R. in the case, *In re, Mayfair Property Co.* (1898) 2 Ch. 28 at p. 35 found the rule "as necessary now as it was when Lord Coke reported *Heydon's case*, (1584) 3 Co Rep 7a. S. R. Dass, J. stated (paragraph 22):

"It is a sound rule of construction of a statute firmly established in England as far back as 1584 when *Heydon's case*, (1584) 3 Co. Rep 7a(V) was decided that:

"... for the sure and true interpretation of all Statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered.

1st. what was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Common-wealth, and

4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and 'pro privato commodo' and to add force and life to the cure and remedy according to the true intent of the makers of the Act, 'pro bono publico'".

For finding the true intention it is admissible to see what was the State of the law before the Act was made, and, what was the mischief and defect to cure which the Act was passed. In *Chiranjit Lal v. Union of India*, AIR 1951 SC 41 at p. 45 Fazl Ali J., admitted that parliamentary history including the speech of the minister introducing the bill was admissible as evidence of "the circumstances which necessitated" the passing of the Act. This view was approved by the Supreme Court in subsequent cases. In *T. K. Musaliar v. Venkatachalam*, AIR 1956 SC 246 at p. 265 and *State of Gujarat v. Shyam Lal*, AIR 1965 SC 1251 at p. 1255 statement of objects and reasons or the legislative debates were held permissible to ascertain the 'historical set-

ting' of an enactment. In *Gopalan v. State of Madras*, AIR 1950 SC 27 at p. 38, Kania, C. J. expressed the view that the debates can be referred to show that the use of a particular word was up for consideration at all before the legislature or not. Similarly, Sinha C. J. in *Vajravelu v. Deputy Collector*, AIR 1965 SC 1017 at p. 1021 observed that the statement of objects and reasons can be used for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation. So also S. R. Dass J. in *State of West Bengal v. Subodh Gopal*, AIR 1954 SC 92 held that reference to Statement of Objects and Reasons was permissible for ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy.

8. For the petitioner reliance was placed upon the Statement of Objects and Reasons and the speech of Sri Charan Singh, the Finance Minister, who piloted the Bill in the legislature, to show the historical setting of the problems and the assurances on which the Act was sought to be introduced. For this purpose the statement and the speech would be relevant and admissible. The Statement of Objects and Reasons of the Bill (as published in U. P. Gazette Extra-ordinary dated October 21, 1957 p. 14) was:

"The existence of thekedars in Government Estates in nine districts of Uttar Pradesh makes it difficult to introduce the scheme of land reforms enunciated in the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, in those areas. With a view to bring the rights of people in those areas in line with the rest of the State and to enable them to reap the full benefits of their efforts and investment in the land under their cultivation, it is necessary to abolish the rights and interests of such thekedars first. This Bill therefore, provides for the abolition of thekedari system in Government Estates."

The Finance Minister while introducing the bill before the legislature stated that the Government had estates in 41 districts of the State out of which land reforms have been effected in 32 districts. In 9 districts of the State i. e. to say Ballia, Bijnor, Farrukhabad, Gonda, Jhansi, Varanasi, Kheri, Pilibit and Unnao, Government Estates were in possession of Thekedars and for that reason land reforms could not be carried out in the Government Estates in those districts. Before the land reforms measures could be introduced, it was necessary to abolish the thekedari system. On the abolition of the thekedari system land reforms would be enforced in those districts. Thus there was no intention to uproot culti-

THE
All India Reporter
1969

Andhra Pradesh High Court

AIR 1969 ANDHRA PRADESH 1
(V 56 C 1)

P. JAGANMOHAN REDDY, C. J. AND
OBUL REDDI, J.

P. Mastanaiah, Appellant v. Delimitation Commissioner, New Delhi represented by its Secretary and others, Respondents.

Writ Appeal No. 144 of 1966, D/-25-8-1966, against order of Gopalrao Ekbote J., in W. P. No. 1898 of 1965, D/-23-6-1966.

Delimitation Commission Act (1962), Ss. 9 and 10 — Allotment of reserved seats after compliance with Sec. 9 — Decision of Commission cannot be challenged in Court of law, unless arbitrary — (Constitution of India, Art. 329).

When the Delimitation Commission constituted under the Delimitation Commission Act has followed the procedure prescribed in the Act, particularly that referred to in Sec. 9 (2) and determined the question of allotment of reserved seats after hearing public representations and objections, its act cannot be called in question in a Court of law unless it can be said that it has not taken into consideration the factors specified in Sec. 9 or its decisions are arbitrary.

(Para 2)

P. A. Chowdary, for Appellant; K. Ramachandra Rao, Standing Counsel for Central Govt., for Respondents.

JAGANMOHAN REDDY, C. J.: This is an appeal against the judgment of our learned brother, Gopalrao Ekbote, J., dismissing a Writ Petition filed by the appellant challenging a notification of the Delimitation Commission issued under Section 10 of the Delimitation Commission Act, 1962. It appears that three seats had to be reserved for the Nellore District, and the question that the Delimitation Commission had to decide was as to which of the constituencies

these seats have to be allotted or assigned. Prior to the present delimitation, it is stated that Gudur, Sulerpet, and Venkatagiri each had one reserved seat for scheduled castes. This time, the Delimitation Commission instead of assigning or allotting one reserved seat to Gudur, has allotted the same to Sarvepalli, which has a general population of 1,33,140 and a scheduled castes population of 30,483 while Gudur has a general population of 1,27,566 and a scheduled castes population of 32,481.

The challenge is with regard to this change in the allotment of the reserved seat to Sarvepalli in preference to Gudur which admittedly has a slightly higher proportion of scheduled castes population compared to the general population. We may state that the difference in the proportion of scheduled castes population in the constituencies of Gudur and Sarvepalli is 2.3 per cent, Gudur having 25.46 per cent and Sarvepalli having 23.16 per cent. It may also be noticed that as compared to Venkatagiri which has 23.07 per cent of scheduled castes population, Sarvepalli has a slightly higher percentage of 23.16. The Commission under S. 5 of the Act has to associate with itself for the purpose of assisting it in its duties in respect of each State, nine persons, four of them shall be members of the House of the People representing that State and five shall be members of the Legislative Assembly of that State. Once the allotment of seats has been made for each State, Constituencies are delimited in that State and the process of allotting reserved seats to those constituencies has to be taken up by the Commission.

Section 9 of the said Act deals with the delimitation of these constituencies in the following terms:—

“(1) The Commission shall, in the manner herein provided then distribute the seats in the House of the People allocated to

each State and the seats assigned to the Legislative Assembly of each State to single-member territorial constituencies and delimit them on the basis of the latest census figures, having regard to the provisions of the Constitution and the following provisions, namely:—

(a) all constituencies shall, as far as practicable, be geographically compact areas, and in delimiting them regard shall be had to physical features, existing boundaries of administrative units, facilities of communication and public convenience;

(b) every Assembly constituency shall be delimited as to fall wholly within one parliamentary constituency;

(c) constituency in which seats are reserved for the Scheduled Castes shall be distributed in different parts of the State and located, as far as practicable, in those areas where the proportion of their population to the total is comparatively large; and

(d) constituencies in which seats are reserved for the Scheduled Tribes shall, as far as practicable, be located in areas where the proportion of their population to the total is the largest.

(2) The Commission shall—

(a) publish its proposals for the delimitation of constituencies, together with the dissenting proposals, if any, of an associate member who desires publication thereof, in the Gazette of India and official Gazettes of all the States concerned and also in such other manner as it thinks fit;

(b) specify a date on or after which the proposals will be further considered by it;

(c) consider all objections and suggestions which may have been received by it before the date so specified, and for the purpose of such consideration, hold one or more public sittings at such place or places as it thinks fit; and

(d) thereafter by one or more orders determine—

(i) the delimitation of parliamentary constituencies, and

(ii) the delimitation of Assembly constituencies, of each State."

The order made by the Commission under S. 9 (2) (d) is to be published in the Gazette of India and in the official Gazette of the State under S. 10 (1) of the Act. Under sub-sec. (2) of Sec. 10, upon publication in the Gazette of India, every such order shall have the force of law and shall not be called in question in any Court. Sub-sec. (3) of Sec. 10 provides that every such order after publication in the respective Gazettes, shall be laid before the House of the People and the Legislative Assembly of the State.

2. It has not been denied that the procedure laid down under S. 9 has not been followed. The Delimitation Commission held its public sittings, heard the objections, and took into consideration the factors enumerated under S. 9 in assigning the Scheduled Castes seats to the respective constituencies. Mr. Chowdary's main contention is that our learned brother, Gopal-

rao Ekbote, J., was in error in holding that an order published as a notification under S. 10 (2) of the Act would have the force of law under Art. 329 of the Constitution. He submits that Art. 329 only gives immunity to that law which deals with allotment of seats and nothing else. The reservation of seats according to him is not an allotment of seats within the meaning of Art. 329 of the Constitution. Consequently, the decision that an order of reservation of seats is not an order of allotment of seats within the meaning of Art. 329 and could be called in question. In our view, it is unnecessary to go into this question because our learned brother, Gopalrao Ekbote, J., has also on merits held against the appellant.

It is undisputable that when an Authority has been constituted under an Act, the provisions of which have not been challenged, and that Authority has followed the procedure prescribed, particularly that referred to under Sec. 9 (2) of the said Act, and having heard the public representations and objections, determined the question, its acts cannot be called in question unless it can be said that it has not taken into consideration the factors specified in Sec. 9 or its decisions are arbitrary. But none of these objections have been alleged against the Commission. All that Mr. Chowdary contends is that when Gudur has a higher percentage of Scheduled Castes population, it should not have been deprived of having a reserved constituency in preference to Sarvepalli which has a lesser percentage of Scheduled Castes population. Mr. Ramachandra Rao contends that this is not the position. If the contention of Mr. Chowdary is upheld, what it amounts to is that in all cases where there is a higher percentage of Scheduled Castes population, though the margin of percentage may be negligible, the Delimitation Commission must of necessity choose only that constituency and nothing else. This interpretation would leave no discretion to the Commission, a position which Mr. Chowdary does not contend for.

It will be observed that the language of Sec. 9 (1) (c) itself shows that, as far as practicable, the proportion of their population to the total population should be taken into consideration. What is practicable in the circumstances is a matter which is within the jurisdiction of the Delimitation Commission with which are associated members of the Assembly. We cannot accept the contention that more higher percentage of Scheduled Castes in any constituency alone should be a guiding factor, which, if adopted, would be defeating the very object of the provisions of Sec. 9 of the said Act. One of the factors that has been taken into consideration by the Commission is that if Gudur is given the reserved constituency, all the three reserved constituencies would be contiguous. If percentage factor is taken, Gudur, Sarvepalli and Sulerpet will have to be given, leaving

out Venkatagiri Constituency, which will be completely separated. From a perusal of the plan, it would appear that even if Gudur is excluded, these three constituencies are staggered round Gudur itself making an equitable distribution of the reserved seats. We do not think that it is within the purview of this Court to go into the questions of merit, the jurisdiction of which has been exclusively vested by the law in the Delimitation Commission.

3. For these reasons, we dismiss the writ appeal. Advocate's fee Rs. 100.
VPP/GGM Appeal dismissed.

AIR 1969 ANDHRA PRADESH 3
(V 56 C 2)

P. JAGANMOHAN REDDY, C. J. AND VENKATESAM, J.

Commissioner of Income-tax, Andhra Pradesh, Hyderabad, Applicant v. Bharat Trading Co., Nizamabad, Respondent.

Case Ref. No. 75 of 1963, D/-26-10-66.

Income-tax Act (1922), Ss. 3 and 34 — Scope — Income-tax Officer can either assess income of association of persons or of individuals constituting it — Burden of proving that option was not consciously exercised is on Income-tax Officer.

There is absolutely no doubt that under S. 3 of the Act, the Income-tax Officer could either assess the income of an association of persons or individuals with regard to their respective shares earned by that association of persons. If the Income-tax Officer assessed the individuals, he could not later claim to assess the association of persons, but it may be that in some cases, he would not be aware that there was an association of persons consisting of several individuals because these individuals may have been assessed by different Income-tax Officers and at different places. In these circumstances, it is for the Income-tax Officer who proposes to reopen the assessment to show that the previous Income-tax Officer did not consciously exercise the option with the knowledge that the association of persons consisting of these individuals existed: AIR 1966 SC 1536 (1538), Foll. (Para 2)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 1536 (V 53) =
1966-60 ITR 95, Commr. of Income-tax, Bombay South v. Murli-dhar Jhawar and Purna Ginning and Pressing Factory, Dharmabad 2
(1959) AIR 1959 All 456 (V 46) =
1959-37 ITR 107, Joti Prasad Agarwal v. Income-tax Officer, B Ward, Mathura 2
(1955) AIR 1955 Bom 340 (V 42) =
1955-27 ITR 658, J. C. Thakkar v. Commr. of Income-tax 2

C. Kondaiah, Standing Counsel for the Income-tax Dept., for Applicant; K. Madhava Reddy, for Respondent.

P. JAGANMOHAN REDDY, C. J.: The Income-tax Appellate Tribunal has, at the instance of the Commissioner of Income-tax, referred under Sec. 66 (1) of the Indian Income-tax Act, 1922, the following question, viz.—

“Whether on the facts and in the circumstances of the case, the assessment made on the association of persons as such, is bad in law?”

Six persons constituted themselves into an association of persons for carrying on business in turmeric. For the assessment year 1950-51, for which the previous year is Diwali year ended on 21-10-49, an assessment was made under Sec. 23 (3) read with Sec. 34 of the Act on 31-1-56 on the association of persons. But it turned out that the notice was wrongly issued and, in fact, the Income-tax Officer intended to reopen the assessment for the year 1950-51. The Appellate Assistant Commissioner set aside the assessment on 31-10-56 and thereafter proper notices were issued. It was contended before the Income-tax Officer that he had no jurisdiction to reopen the assessment and then assess the association of persons when he had in fact assessed five out of six persons individually in respect of the share of each of them earned by the association of persons. This contention was negated by the Income-tax Officer. In appeal, the Appellate Assistant Commissioner upheld that contention on the ground that once individuals were assessed, the option must be deemed to have been exercised by the Income-tax Officer, and thereafter the association of persons cannot be assessed. The Tribunal confirmed the view taken by the Appellate Assistant Commissioner.

2. It was argued before the Tribunal that the Appellate Assistant Commissioner was wrong in so holding because it was not shown by the assessee that the Income-tax Officer had consciously exercised the option to assess the individuals instead of the association of persons. The Tribunal has stated that there was no material placed before it from which it could come to that conclusion. There is absolutely no doubt that under Sec. 3 of the said Act, the Income-tax Officer could either assess the income of an association of persons or individuals with regard to their respective shares earned by that association of persons. If the Income-tax Officer assessed the individuals, he could not later claim to assess the association of persons, but it may be that in some cases, he would not be aware that there was an association of persons consisting of several individuals because those individuals may have been assessed by different Income-tax Officers and at different places. In the circumstances, it is for the Income-tax Officer who proposes to reopen the assessment to show that the previous In-

come-tax Officers did not consciously exercise the option with the knowledge that an association of persons consisting of these individuals existed. That there is no such material on record cannot be gainsaid. Neither before the Appellate Assistant Commissioner nor before the Tribunal did the Department place any evidence to show that the Income-tax Officers who had assessed the individuals earlier were not aware that these individuals constituted an association of persons. The Tribunal has stated in its order that there was no material before them to show what was the true position. On identical facts, their Lordships of the Supreme Court in Commissioner of Income-tax, Bombay South v. Murlidhar Jhawar and Purna Ginning and Pressing Factory, (1966) 1966-60 ITR 95 (99)=AIR 1966 SC 1536 (1538), negatived an attempt made by the Income-tax Officer to reopen the assessment. In that case, their Lordships observed that the Income-tax Officer who made the assessment under challenge did not state that when the first assessment was made, the facts which had a bearing on the true relationship between the three parties were not placed, and it was not even argued before the Appellate Assistant Commissioner and the Tribunal that these facts were not placed before the Income-tax Officer. In that case, the Tribunal held, relying upon J. C. Thakkar v. Commissioner of Income-tax, 1955-27 ITR 658 = AIR 1955 Bom 340 and Joti Prasad Agarwal v. Income-tax Officer, B Ward, Mathura, (1959) 37 ITR 107 = (AIR 1959 All 456), that once the option is exercised for assessing the individual partner and including his share of profits in the firm in his assessment, it is not open to the department to assess the same income as income of the unregistered firm. The reasoning and the observations of their Lordships of the Supreme Court in the case cited above equally apply to the facts and circumstances of this case.

3. In this view, we answer the question in the affirmative and in favour of the assessee with costs, Advocate's fee Rs. 250. VGW/D.V.C. Answered accordingly.

AIR 1969 ANDHRA PRADESH 4
(V 56 C 3)

P. JAGANMOHAN REDDY, C.J. AND
VENKATESAM, J.

Hyderabad Stock Exchange Ltd., Hyderabad, Applicant v. Commissioner of Income-tax, Andhra Pradesh, Hyderabad, Respondent.

Case Referred No. 84 of 1963, D/- 9-11-1966.

Income-tax Act (1922), S. 4 (3) (i) — Exemption under — Held that Hyderabad Stock Exchange Ltd. was entitled to exemption.

BK/AL/600/67

In a modern complex society, particularly in a country like ours which is fast trying to be industrialised, the need for Stock Exchanges which provide business and industry attracting investors and providing employment to millions in such industries cannot be over-emphasised.

Held, considering the provisions of the Memorandum of Articles of Association of the Hyderabad Stock Exchange Ltd. that there could be little doubt that the object of the Stock Exchange was not only to serve a general public utility but had also a charitable purpose and that it satisfied the conditions for exemption under S. 4 (3) (i) of the Income-tax Act. AIR 1965 SC 1281, Foll. (Para 6)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 1281 (V 52)=
1965-55 ITR 722, Commr. of

Income-tax, Madras v. Andhra
Chamber of Commerce, Madras

(1961) 1961-42 ITR 503 = ILR

(1961) Mad 999, Andhra Cham-
ber of Commerce v. Commr. of

Income-tax

N. Narasimha Iyengar, for Applicant;
C. Kondiah, Advocate, for Respondent.

P. JAGANMOHAN REDDY, C.J.: The question that has been referred to us by the Income-tax Appellate Tribunal is as follows:—

"Whether on the facts and in the circumstances of the case, the assessee company was entitled to exemption of the sum of Rs. 8,937 under Sec. 4 (3) (i) of the Indian Income-tax Act."

The assessee is a stock exchange company, limited by guarantee and registered under S. 26 of the Hyderabad Companies Act (Act 4 of 1920 F.), which corresponds to S. 26 of the Indian Companies Act (Act 7 of 1913).

2. The assessment year with reference to which this question has been postulated is 1961-62 for which the accounting year is the financial year ending 31-3-1961. The company has been assessed to income-tax from 1952-53 onwards. In all the years up to 1960-61, it filed returns of income showing therein the income from interest on securities and it was accordingly assessed. In connection with its assessments for the years 1953-54, 1954-55, 1955-56 and 1956-57, it made a claim that its income was exempt under the provisions of S. 4 (3) (i) of the Act, which claim was not accepted by the Income-tax Officer or the Appellate Assistant Commissioner or the Tribunal in appeals. Thereafter until the assessment year 1960-61, the income continued to be returned and assessed. For the accounting year ended 31-3-1961 relevant for the assessment year 1961-62, the company's income and expenditure account showed a net income of Rs. 6,764. In response to a notice under Sec. 22 (2), the company filed a return declaring an income of Rs. 8,896 made up of two items, namely, Rs. 6,092.78

being interest on securities and Rs. 2,803.51 being dividends from other sources.

3. During the course of the assessment proceedings, a claim was again put forward by the company that the income shown in the return was exempt under the provisions of Sec. 4(3) (i) of the Act, and was, therefore, not liable to tax. It relied on a decision of the Madras High Court in the case of *Andhra Chamber of Commerce v. Commissioner of Income-tax, 1961-42 ITR 503 (Mad)*. But the Income-tax Officer rejected this claim on the ground that a similar claim had been disallowed in the earlier years, and this was approved by the Appellate Assistant Commissioner as well as the Tribunal.

4. On appeal, the Appellate Assistant Commissioner agreed with the assessee that the decision of the Madras High Court referred to above is on all fours with the facts of the case before him and held that in respect of its income, the Exchange must be held to be under a legal obligation to spend it wholly or accumulate for an object of general public utility and since it is held for charitable purposes it is exempt under Sec. 4 (3) (i) of the Act.

5. In appeal, the Tribunal examined the provisions of Section 4(3) (i) as also the definition of "charitable purpose" as given in the Explanation at the end of the section, and held that in order to qualify for exemption, the assessee should satisfy the following conditions:—

"(i) The property should be held under trust or other obligation;

(ii) It should be held for charitable purposes, i.e., for advancement of any object of general public utility; and

(iii) The income should be applied or accumulated for application to such charitable purposes."

It was found that condition (i) was satisfied and that condition (iii) would also be satisfied, if it satisfied the condition regarding "charitable purpose", i.e., whether it was established for the advancement of any object of general public utility. After examining the objects of the Andhra Chamber of Commerce as mentioned in the decision of the Madras High Court referred to earlier and the objects of the assessee company as mentioned in Clause III (i) of Memorandum of Association, it came to the conclusion that the main objects of the Chamber of Commerce and of the assessee company were different. This is what the Tribunal has stated:

"Whereas in the case of the Chamber of Commerce the aim was to promote and protect trade, commerce and industries of India in the province of Madras and in particular in the Andhra country, in the case of the assessee, it was to support and protect the character and status of brokers and dealers and to further the interest both of brokers and dealers and the public interested in securities, etc. It seems to us

to be too far-fetched to say that the object of the Stock Exchange was to facilitate the participation of the public in joint stock companies. The activities of a Stock Exchange are well known. It provides a meeting place for the brokers and dealers to transact their business in shares and securities. The public comes into the picture only in an indirect manner in so far as the dealers and brokers have in turn to deal with the public."

The Tribunal, therefore, came to the conclusion that the services rendered by the Stock Exchange were primarily for the benefit of the exclusive set of members and that it was only indirectly that the public was benefited; such indirect benefit of the public would not satisfy the requirements of Section 4(3) (i), which refers to "property held under trust or other legal obligation wholly for religious or charitable purposes".

6. We are unable to accept the view of the Tribunal or that of the Income-tax Officer that Stock Exchanges are only meant for the benefit of the brokers. This view which, in our opinion, is too narrow, does not really appreciate the significance or purpose of such bodies. As Mr. W. T. C. King, the well-known author on Economics, has said, "without the stock exchange, the savings of the community—the sinews of economic progress and productive efficiency—would be used much less completely, and much more wastefully, than they are now". In a modern complex society, particularly in a country like ours which is fast trying to be industrialised, the need for stock exchanges which provide business and industry attracting investors and providing employment to millions in such industries cannot be over-emphasised. As we have seen, the Memorandum of Association itself shows that the object of the Exchange is not only to further the interests both of the brokers and dealers but also of the public interested in securities, to assist, regulate and control the trade or business in securities, to maintain high standards of commercial honour and integrity, to promote and inculcate honourable practices and just and equitable principles of trade and business, to discourage and to suppress malpractices, to settle disputes and to decide all questions of usage, custom or courtesy in the conduct of trade and business. The profits which this Exchange earns are not to be distributed between the members but are to be utilised for the public as provided in Cl. V (b) of the Memorandum of Association. It provides as follows:—

"The property, capital and income of the Exchange whensoever derived shall be applied solely towards the promotion of the objects of the Exchange and no portion thereof shall be paid by way of bonus or otherwise to the members; in case of dissolution or winding up, any property or assets which remain after satisfying all the

debts and liabilities of the Exchange, including the deposits of members, and after returning to the members the face value of their card fee, shall be devoted to any activity having the same or similar objects as Exchange or be distributed in charity as may be determined by the Exchange and in the event of their failure to do so by the High Court of Judicature."

There could be little doubt from what we have said above that the object of the Stock Exchange is not only to serve a general public utility but has also a charitable purpose. In a recent decision of the Supreme Court in *Commissioner of Income-tax, Madras v. Andhra Chamber of Commerce, Madras*, 1965-55 ITR 722=(AIR 1965 SC 1281), Shah, J., delivering the judgment of their Lordships, held that the advancement or promotion of trade, commerce and industry leading to economic prosperity enured for the benefit of the entire community and that prosperity would be shared also by those who are engaged in trade, commerce and industry but on that account the purpose was not rendered anytheless an object of general public utility. It was further held that the Legislature had used language of great amplitude in defining "charitable purpose" and the definition was inclusive and not exhaustive or exclusive. It was also held that the expression "object of general public utility" was not restricted to objects beneficial to the whole of mankind. An object beneficial to a section of the public was an object of general public utility. To serve as a charitable purpose, it was not necessary that the object should be to benefit the whole of mankind or even all persons living in a particular country or province. It was sufficient if the intention was to benefit a section of the public as distinguished from specified individuals. The section of community sought to be benefited must undoubtedly be sufficiently defined and identifiable by some common quality of a public or impersonal nature; where there was no common quality uniting the potential beneficiaries into a class, it might not be regarded as valid. Applying this test to the aims and objects of the Stock Exchange, the assessee not only serves a general public utility but also has a charitable purpose. It is unnecessary to further examine all the cases that have been referred to in the above judgment of the Supreme Court in the view we have taken, namely, that the assessee satisfies the conditions for exemption under Sec. 4 (3) (i) of the Indian Income-tax Act.

7. Our answer to the question is, therefore, in the affirmative and in favour of the assessee with costs. Advocate's fee Rs. 250. VGW/D.V.C. Answered accordingly.

AIR 1969 ANDHRA PRADESH 6 (V 56 C 4)

P. JAGANMOHAN REDDY, C. J. AND
VENKATESAM, J.

Messrs. Anna Nagedram and Bomma-reddi Venkayya and Co., Duggirala, Applicant v. The Commissioner of Income-tax, Andhra Pradesh, Hyderabad, Respondent.

Case Ref. No. 65 of 1963, D/- 6-10-1966.

(A) Income-tax Act (1922), S. 34 (1) (a), (b) — Scope and applicability — Income-tax Officer considering cash-credits, accepting them and allowing interest — Subsequent discovery that those cash-credits were false and were not genuine — Held provision of S. 34 (1) (a) could be invoked as it was non-disclosure fully or truly of all material facts necessary for assessment: AIR 1960 Andh Pra 92 and AIR 1964 Andh Pra 443 and AIR 1966 SC 1148, Foll.; AIR 1961 SC 372, Disting. (Paras 3, 5)

(B) Income-tax Act (1922), S. 34 — Notice to reopen assessment — Contents — It need not specify whether it is under Sec. 34 (1) (a) or (b).

A notice to reopen the assessment need not specify whether it is given under S. 34 (1) (a) or S. 34 (1) (b) of the Income-tax Act. This position is well settled: AIR 1954 Mad 872 and AIR 1956 Cal 197, Rel. on.

It is only after the facts are investigated that the question would arise whether the Income-tax Officer would act under S. 34 (1) (a) or S. 34 (1) (b) of the Income-tax Act. (Para 6)

Cases Referred:	Chronological	Paras
(1966) AIR 1966 SC 1148 (V 53)=		
(1966) 60 ITR 74, Income-tax Officer v. Bachu Lal Kapoor		3
(1964) AIR 1964 Andh Pra 443 (V 51) = 1964-2 Andh WR 61, Sowdagar Ahmad Khan v. Income-tax Officer, Nellore		3
(1961) AIR 1961 SC 372 (V 48)=		
(1961) 41 ITR 191, Calcutta Discount Co. Ltd. v. Income-tax Officer		4
(1960) AIR 1960 Andh Pra 92 (V 47) = (1960) 39 ITR 575, Manikonda Venkata Narasimham v. Commr. of Income-tax, Hyderabad		3
(1956) AIR 1956 Cal 197 (V 43)=		
(1956) 30 ITR 535, P. R. Mukherjee v. Commr. of Income-tax		6
(1954) AIR 1954 Mad 872 (V 41)=		
(1954) 25 ITR 447, Presidency Talkies Ltd. v. First Addl. Income-tax Officer		6

P. Rama Rao, for Applicant; C. Kondiah, for Respondent.

P. JAGANMOHAN REDDY, C. J.: The Income-tax Appellate Tribunal has referred this case to this Court under Sec. 66 (2) on the following questions, viz.:—

"Whether on the facts and the circumstances of the case it is S. 34 (1) (a) or 34

(1) (b) of the Indian Income-tax Act that is applicable to the case."

This question will no doubt depend upon the facts of this particular case. The assessee, who is a firm, consisted of six partners, and the assessment is for the year 1948-49, the previous year of which is the year ended 9-4-48. The assessment for this year was made on 22-8-49, and the income as returned by the assessee, namely, Rs. 56,886 was virtually accepted except for an addition of Rs. 200.

During the course of the assessment proceedings for the assessment year 1950-51, the previous year whereof is the year ended 31-3-1950, the Income-tax Officer found certain cash credits in the accounts to be not genuine, and he held them to be the income of the assessee from undisclosed sources. Along with the inquiries made for the assessment year 1950-51, he made inquiries regarding the cash credits that appeared in the books for the assessment year 1948-49 which had not come to the notice of the Income-tax Officer who made the original assessment. The result of this investigation was he came to the same conclusion, namely, that they were not genuine. In view of this, he took proceedings for reopening the assessment under Sec. 34 and after obtaining the Commissioner's permission, notice was issued to the assessee under Sec. 34 which was served on him on 12-11-54. It may be noticed that the service of the notice was beyond four years and within eight years from the date of the assessment.

The assessee challenged the jurisdiction of the Income-tax Officer to reopen the assessment as, according to him, the case was one which fell within the ambit of S. 34 (1) (b) which prescribed the reopening of assessments within four years from the date of the assessment while the contention of the Department was that it fell under S. 34 (1) (a) which gave jurisdiction to reopen the assessment within eight years.

The contention of the assessee was negated by all the authorities including the Income-tax Appellate Tribunal, which also refused to state a case because in its view no question of law arose for consideration. The simple question, therefore, is whether it is S. 34 (1) (a) or S. 34 (1) (b), that is applicable in this case. It is thus necessary to set out that provision. Clauses (a) and (b) of sub-sec. (1) of Sec. 34 of the Act read as follows:—

"If—

(a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under Section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, or

have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or (b) notwithstanding that there has been no omission or failure as mentioned in Clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year or have been under-assessed, or assessed at too low a rate or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed, he may in cases falling under Clause (a) at any time within eight years and in cases falling under Clause (b) at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22 and may proceed to assess or reassess such income, profits or gains or recompute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section."

2. It may be stated that the term "within eight years" has been omitted by S. 18 of the Finance Act with effect from 1-4-1956, and certain provisos were added prescribing the period of limitation to vary with the amount of escapement of income, namely, whether it is below one lakh of rupees or above. We are, however, not concerned with these provisos as the assessment year related to years prior to 1956. The above two provisions while vesting the jurisdiction in the Income-tax Officer, to reopen assessment, have prescribed two different periods of limitation depending on whether there has been a suppression of income by the assessee not fully or truly disclosing the material facts necessary for the assessment of that year or whether in spite of fully disclosing by the assessee the material facts necessary for the assessment, the income has escaped assessment. If the former is the case, the assessment can be reopened within eight years, and in the latter case within four years. The consequence of the presence of an omission to disclose material facts necessary in one case and the absence thereof in the other is that in the first case the period prescribed for reopening the assessment is longer and in the second case it is shorter. The question, therefore, would be whether the assessee has not fully or truly disclosed the material facts necessary for the assessment for that year whereby the income escaped assessment.

3. Mr. Rama Rao has strenuously contended that there is a finding in his favour that the Income-tax Officer, who had made the original assessment after examining the account books thought that the cash credits were genuine but the latter Income-tax

Officer came to a different conclusion which means and implies that there has been a change of opinion on the part of the second Income-tax Officer. At any rate, he contends that this is a jurisdictional fact which attracts provisions of Clause (4), sub-sec (1) of Sec. 34 enabling the Income-tax Officer to reopen an assessment under that provision and not under Section 34 (1) (a). He also says that Income-tax Appellate Tribunal has proceeded on the same assumption. If so, Section 34 (1) (b) alone should be made applicable to his case. The Income-tax Officer had, therefore, no jurisdiction to reopen the assessment. We cannot accept this contention firstly because the original assessment order itself shows that whatever the assessee has declared has been simply accepted except for two items of Rs. 100 each, one relating to the estimation of personal expenses of partners included in travelling charges and the other relating to railway supplies estimate. There is no mention in the order anywhere that the accounts were examined or that the interest paid on the cash credits which are debited in his accounts had been allowed on the basis of that the cash credits were genuine. The statement of the Appellate Assistant Commissioner to which he had adverted cannot be read in isolation and must be considered in the context of the paragraph in which it appears. While, no doubt, the Appellate Assistant Commissioner said that the Income-tax Officer, who made the original assessment thought that the credits were genuine, he, however, concluded with these words, viz.:—

“It is obvious that the Income-tax Officer who made the original assessment did not suspect the genuineness of the credits.” If both these passages are read together, the conclusion of the Appellate Assistant Commissioner becomes clear in that what he held was that the Income-tax Officer who made the original assessment did not suspect the genuineness of the credits though in fact they were not genuine. There is nothing to imply that he examined the books or that he accepted the accounts after a close scrutiny. The Tribunal did not accept the contention that the cash credits were genuine and once that fact went against the assessee, the assessee did not contest that the assessment could be reopened under S. 34 (1) (a) of the Act. The Tribunal has observed:

“We have absolutely no doubt in our mind, as will be presently shown that the Income-tax Officer had reasonable grounds to believe that cash credits in certain accounts did not purport to be what they prima facie appeared and as such the interest therein was not an admissible deduction. Hence, the assessment in the present case has to be completed within a period of 8 years, and if this is so, then the assessee urged no other ground to challenge the validity of the assessment so far as the provisions of Sec. 34 were concerned.”

Where the Income-tax Officer in our view after considering the cash credits accepted them and allowed interest when it is subsequently discovered that these cash credits are false and not genuine, the provisions of S. 34 (1) (a) can be invoked because that would be a non-disclosure fully or truly of all material facts necessary for the assessment. In *Manikonda Venkata Narasimham v. Commr. of Income-tax, Hyderabad*, 39 ITR 575 = (AIR 1960 Andh Pra 92), a Bench of this Court consisting of one of us held that neither the fact that the loans appeared in the account books for the fact that the Income-tax Officer had inadvertently made an order under S. 18 of the Income-tax Act in regard to the interest claimed to be paid thereon precluded their being brought to re-assessment under S. 34 (1) (a). Another Bench of this Court in *Sowdagar Ahmad Khan v. Income-tax Officer, Nellore*, (1964) 2 Andh WR 61 = (AIR 1964 Andh Pra 448), consisting of *Chandra Reddy, C. J.*, and *Sharfuddin Ahmed, J.*, had held that mere production of accounts or other evidence from which material facts with due diligence could be discovered will not amount to disclosure of material facts. If subsequent to the assessment the entries or cash credits which were overlooked in the original assessment were detected, it was open to the department to reopen the proceedings. When once an assessment is reopened under Sec. 34, the Income-tax Officer proceeds de novo under the relevant sections of the Income-tax Act and is obliged to follow the same procedure as in the case of a first assessment. The proceedings under Section 34 must be deemed to relate to proceedings which commenced with the publication of notice under Sec. 22 (2) of the Act. In *Income-tax Officer v. Bachulal Kapoor*, 60 ITR 74 = (AIR 1966 SC 1148), their Lordships of the Supreme Court were dealing with a case where under a compromise a Hindu family was divided and was being assessed. The Income-tax Officer accepted the claim of partition under Section 25-A of the Income-tax Act, and for the assessment years 1953-54, 1954-55 and 1955-56, the members of the family were assessed as individuals. Subsequently, it appeared to the Income-tax Officer that the family in fact was not divided and he issued a notice under Section 34 to the respondent in regard to the assessment year 1955-56. The respondent thereupon moved the Allahabad High Court under Art. 226 of the Constitution for quashing the notice on the ground that the income for the assessment year in question had already been assessed, that it could not be assessed again as the income of the family and that as the family had ceased to exist and the partition was recognised, no valid notice could be issued to the respondent in his capacity as the karta of the family. In his counter-affidavit the Income-tax Officer stated that he had information that, notwithstanding the compromise decree, the mem-

bers of the family were living together and had a jointness and the business was run by the respondent and that, therefore, the compromise was a make believe one and the family in fact continued to be a joint Hindu family. It was held by the High Court that the notice issued by the income-tax officer was invalid but on appeal the Supreme Court held that the provisions of S. 34 (1) (a) were justifiably invoked and that the notice was valid. Subba Rao J., as he then was, observed at p. 79 (of ITR) = (at p. 1151 of AIR):

"In short the case of the revenue was that the compromise was a make believe one and the family in fact continued to be a joint Hindu family. If the case of the revenue was true on which we do not express any opinion and the fact of the continuance of the joint Hindu family was kept back from the knowledge of the Income-tax Officer, it would be a clear case of the said family escaping assessment during the relevant year. If that be so, Section 34 (1) would immediately be attracted and the notice issued would be good".

4. This was a case of deliberate suppression and consequently attracted the provisions of Sec. 34 (1) (a), though that question did not arise because the assessment was reopened within four years. Mr. Ramarao appearing for the assessee relies upon a decision of the Supreme Court in *Calcutta Discount Co., Ltd. v. Income Tax Officer*, 41 ITR 191 = (AIR 1961 SC 372), which is however, a case where the majority held that even though all the primary facts were disclosed the assessee had on those facts treated the income as an investment which contention was accepted by the Income Tax Officer. The subsequent change of opinion on the part of the next Income-tax Officer that it is not an investment was merely a change of opinion. It is an inference based upon facts for which the assessee cannot be held responsible. That case cannot be of assistance to the assessee. Das Gupta JJ., delivering the judgment of the majority of their Lordships observed at p. 201 (of ITR) = (at p. 376 of AIR):

"Once all the primary facts are before the assessing authority he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody also far less the assessee to tell the assessing authority what inferences, whether of facts or law, should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences whether of facts or law he would draw from the primary facts.

If from primary facts more inferences than one could be drawn it would not be possible to say that the assessee should have

drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference which he might or might not have drawn".

5. On the facts in the circumstances of the case and the application of the law as disclosed by the decisions referred to above we have no hesitation in coming to the conclusion that the assessee did not fully and truly disclose all the material information necessary for the assessment. Even where the cash credits were examined by the Income-tax Officer, who accepted his explanation and we are not to be understood as accepting the contention of the learned advocate that he in fact did, the provisions of Sec. 34 (1) (a) can be properly invoked if it is subsequently discovered by the income-tax officer that those cash credits were got up ones and not genuine.

6. We also reject the contention that a notice to reopen the assessment must itself specify whether it is given under Sec. 34 (1) (a) or Sec. 34 (1) (b) of the Income-tax Act. This position is well settled and a Bench of the Madras High Court in *Presidency Talkies Ltd. v. First Addl. Income Tax Officer*, 25 ITR 447 = (AIR 1954 Mad 872) as well as another Bench in *P. R. Mukherjee v. Commr. of Income Tax*, 30 ITR 535 = (AIR 1956 Cal 197), have held that this is not necessary. It is only after the facts are investigated that the question would arise whether the income-tax officer would act under Sec. 34 (1) (a) or Sec. 34 (1) (b) of the Indian Income Tax Act.

7. In the result our answer to the reference is that Sec. 34 (1) (a) is applicable to the facts and circumstances of this case. The department will have its costs. Advocate's fee Rs. 250.

VGW/D.V.C.

Answered accordingly.

AIR 1969 ANDHRA PRADESH 9
(V 56 C 5)

CHANDRASEKHARA SASTRY AND
KRISHNA RAO, JJ.

State of Andhra Pradesh and another,
Petitioners v. Digiadarsan Rajendra Ram
Dasjee Varu Mahant of Sri Swamy Hathi-
ramjee Mutt, Tirupati, Respondent.

S. C. L. P. No. 97 of 1966, D/-25-11-1966.

Constitution of India, Art. 133 (1) (b) and (c) — High Court quashing order of suspension of R from office of Mahant of S Mutt and directing Government to restore to R possession of Mutt and its properties — Properties worth several lakhs of rupees — Petition for leave to appeal against order — Held, petition did not fall under Art. 133 (1) (c) but under Article 133 (1) (b) as it involved indirectly claim or question respect-

BK/KK/582/67

ing property of Mutt which was worth several lakhs of rupees. (Paras 5 and 6)

3rd Govt. Pleader, for Petitioners; T. V. Ranga Charya, for Respondent.

CHANDRASEKHARA SASTRY, J.: This is a petition under Article 133 of the Constitution of India for leave to appeal to the Supreme Court against our judgment in W. P. 1589 of 1965. By our judgment we allowed the Writ Petition and quashed the order of the Government suspending the respondent from the office of Mahant of Sri Swamy Hathiramjee Mutt, Tirupati. We held that the Government had no power to suspend the respondent from the office of Mahant in the manner they did and their only power was to proceed to take action under the provisions of the Madras Hindu Religious and Charitable Endowments Act. Pending disposal of the Writ Petition it appears that pursuant to the order suspending the respondent from the office of Mahant he was dispossessed from the properties belonging to the Mutt and he was sent out of Mutt Premises. The Mutt and its properties are now in the possession of the Assistant Commissioner of Hindu Religious and Charitable Endowments, Tirupati. Therefore, we directed the Government to restore to the respondent the possession of Mutt and its properties. It is this order that is sought to be appealed against to the Supreme Court. This petition for leave to appeal is strenuously opposed by the respondent's learned counsel.

2. Originally the petition for leave was filed only under sub-clauses (a) and (c) of Clause (1) of Article 133 of the Constitution of India but when the petition was called on for hearing, the learned Government Pleader stated that due to oversight he omitted to mention sub-clause (b) also in the petition and requested us to permit him to amend the petition by mentioning sub-clause (b) of Clause (1) also and we permitted him to do so.

3. The learned Third Government Pleader did not attempt to bring this under sub-clause (a) but he sought it to bring only under sub-clauses (b) and (c) of Cl. (1) of Art. 133 of the Constitution of India.

4. We are unable to hold that this case is a fit one to appeal so as to entitle the petitioner to appeal to the Supreme Court under sub-clause (c) but we think that the petitioner is entitled to appeal under sub-clause (b) of Art. 133 on the ground that our judgment involves directly or indirectly some claim or question respecting the property worth twenty thousand rupees. It is common ground that the properties belonging to the Mutt are worth several lakhs of rupees. Now the objection on behalf of the respondent is that this case does not involve either directly or indirectly any question or claim respecting the property itself, but the question involved is only one relating to the right of the Government to pass the order of suspension which was quashed by us in this Writ Petition.

5. Before the order of suspension was passed, the respondent was in possession of Mutt and Mutt properties and pursuant to the order of suspension he was dispossessed. By our judgment the respondent was directed to be restored to possession of the Mutt and the Mutt properties. The respondent claimed to be the lawful Mahant of the Mutt but the Government disputed his right to be Mahant. They claimed that the respondent was in possession only as per the order passed by the Government to act only as interim Mahant pending settlement of the dispute between the rival claimants to the Mahantship and pending disposal of the dispute the Government claims to manage the Mutt and its properties.

6. As a result of our judgment the respondent will have to be restored to possession of the Mutt and its properties. Thus the case involves indirectly the claim or question respecting the property of the Mutt which is admittedly worth several lakhs of rupees. It follows that the case falls under sub-clause (b) of Clause (1) of Article 133 of the Constitution. Hence the petitioner will have leave to appeal to the Supreme Court.

7. Having regard to the facts of the case, we think it is unnecessary to consider any of the cases cited by the learned counsel on both sides.

8. The petition is allowed.

AJ/D.V.C.

Petition allowed.

AIR 1969 ANDHRA PRADESH 10
(V 56 C 6)

BASI REDDY J.

Yousuf Begam, Petitioner v. The State of Andhra Pradesh and others, Respondents.

Writ Petn. No. 2163 of 1966, D/-16-10-1967.

Land Acquisition Act (1 of 1894), Ss. 9 (3), 18 — Failure to serve notice under — Effect — Award neither illegal nor void — Party entitled to seek reference to Civil Court.

It is well settled that the absence of notice to a person interested in land compulsorily acquired under any of the provisions of the Act does not render an award made by the Land Acquisition Officer a nullity. It is equally well settled that unless and until a reference is made to the Civil Court by the Land Acquisition Officer, the Civil Court has no jurisdiction to entertain the claims of parties who have not sought reference and whose claims are not the subject-matter of a reference. (Para 7).

An award passed by the Collector cannot be quashed, only because an interested person is not served with notice under Section 9 (3) and that he comes to know about the same after the passing of the award. Nevertheless, though such a person was not

a party to the land acquisition proceedings, he is entitled to seek a reference to the Civil Court on an application to be made by him to the Collector under Sec. 18. In the case of such an application, no question of limitation arises, when a notice under Sec. 9 (3) is not served on the party who was entitled to it. AIR 1963 Patna 201, Relied on.

(Paras 7 and 11)

Cases Referred: Chronological Paras
(1963) AIR 1963 Pat 201 (V 50) =
1963 BLJR 254, Shivdev Singh v.
State of Bihar 8

Hussein Ali Khan, for Petitioner; Govt. Pleader, (for Nos. 1 and 2), Jahangir Ali, (for No. 3) and Sardar Ali Khan, (for No. 4), for Respondents.

ORDER: This is an application under Article 226 of the Constitution, filed by Yousuf Begum, seeking an appropriate writ, order or direction for quashing the award made on 18-3-1966 by the Special Deputy Collector, Land Acquisition, Hyderabad District (the 2nd respondent to this writ petition) in Case No. O/1136/LA/66, with a further prayer that the petitioner may be made a party to the proceedings before that authority and a direction be issued to that authority to pass a fresh award, and further to pass any order or direction as this Court may deem fit.

2. The main grievance of the petitioner is that although she is "a person interested in the land", which was compulsorily acquired by the Government under the provisions of the Land Acquisition Act, 1894 for construction of offices and staff quarters for their new Railway Zone, and as such, was entitled to a notice of the land acquisition proceedings under sub-section (2) of Sec. 9 of the Land Acquisition Act, yet the 2nd respondent proceeded with the enquiry without giving any notice to her and made the aforesaid award on 18-3-1966. Consequently, her contention is that the award is a nullity and should be quashed, and the 2nd respondent should be directed to pass a fresh award, after giving due notice to the petitioner along with others who may be interested in the land.

3. The brief history of this case is as follows: The lands in question were the inam lands granted in favour of late Syed Shah Ali Raza Hussaini, who was the Sajjada of Dargah Mir Mohammed Saheb, and the inam lands measuring 248 bighas were granted as Maded Maash in favour of the Sajjada through the Muntaqab dated 21st Shahrewar, 1324 Fasli. The petitioner claims to be the grand-daughter of late Syed Rahmatullah Hussaini, the brother of late Syed Shah Ali Raza Hussain. Her case is that after the death of Syed Shah Ali Raza Hussain and Rahmatullah Hussaini, the succession enquiry pertaining to the said inam lands was initiated and the lands were taken under the supervision and management of the Collector, District Atraf Balda, Sarf-e-Khas pending disposal of the enquiry. Later

on the lands were alleged to have been transferred by mistake to the Muslim Wakf Board, Andhra Pradesh, for management. After the completion of the succession enquiry, the succession to the inam lands at Malkajgiri village was granted in the names of Faizunnisa Begum, the daughter of Shah Ali Raza Hussain and the petitioner as successor of late Rahmatullah Hussaini, and his daughter Tajunnisa Begum was held entitled only to a share in accordance with the personal law. Faizunnisa Begum died issueless on 31-7-1959 and the petitioner filed a claim for succession which was allowed on 26-6-1961 and she was held to be the inamdar as the heir of the deceased Faizunnisa Begum. However, on appeal by her maternal aunt Fajunnisa Begum, the case was remanded for re-trial and the lands remained under the supervision of the Muslim Wakf Board. After remand, the question was decided in favour of Tajunnisa Begum. The petitioner filed a writ petition in the High Court (Writ Petition No. 211 of 1966) and the writ petition was disposed of on the basis of a compromise entered into between the petitioner and Tajunnisa Begum. By that order of this Court dated 12-8-1966, the petitioner herein was held to be the main inamdar in respect of the inam lands in question and Tajunnisa Begum was held to be a shareholder. Thus, so far as the rights between the petitioner and Tajunnisa Begum were concerned, the order of the High Court decided the rights inter se.

4. Thereafter, according to the petitioner, she came to know that some time in the month of October, 1966, an area of 69 acres and 16 guntas of the said inam lands forming S. Nos. 392/1, 393/1, 396 to 400 situated in Malkajgiri village, Hyderabad East Taluk, had been acquired by the Government and an award had been passed by the 2nd respondent fixing the amount of compensation at Rs. 1,10,176-55 P. It would appear that before the 2nd respondent, Syed Nadeemuddin (3rd respondent herein) and the Wakf Board, Andhra Pradesh (4th respondent herein) had put in their claims. While Syed Nadeemuddin claimed compensation in respect of 12 acres and 20 guntas as a permanent lessee under the original inamdar, the Wakf Board claimed compensation in respect of the lands including these 12 acres and 20 guntas. The Land Acquisition Officer made two references to the City Civil Court, Hyderabad at Secunderabad — O. P. No. 2 of 1967, which is a reference under Sections 30 and 31 (2) of the Land Acquisition Act for apportionment, and O. P. No. 6 of 1967, which is a reference under Section 18 of the Land Acquisition Act, and the amount of compensation was sent to the Civil Court.

5. The petitioner's case is that she came to know about this award only in October and so she made an application to the 2nd Respondent on 28-10-1966, enclosing with the application a copy of the order passed by the High Court in Writ Petition No. 211 of 1966 and

requesting the 2nd respondent to pay the compensation amount to her and to her shareholder Tajunnisa Begum. Subsequently an application with full details was filed before the 2nd respondent on 23-11-1966 with the same prayer. The 2nd respondent, however, sent a memo dated 30-11-1966 to the petitioner intimating to her that the request could not be acceded to as she was not a party to the land acquisition proceedings. She was informed that the compensation amount could not be paid to her; nor could a reference be made to the Civil Court under section 18 at her instance regarding the quantum of compensation. She was also informed that a reference had already been made to the Civil Court and the matter was pending there in respect of the claims put forward by respondents 3 and 4 herein.

6. Thereafter, the petitioner filed an application before the Chief Judge, City Civil Court, Hyderabad at Secunderabad, under Order 1, Rule 10 read with Section 151, Civil P. C. and under Section 53 of the Land Acquisition Act praying that she may be impleaded as a party in O. P. Nos. 2 and 9 of 1967, which were pending before that Court. That application was dismissed by the Chief Judge, City Civil Court, by an order dated 12-4-1967, on the ground that a person who had not appeared before the Land Acquisition Officer and whose name was not mentioned in the reference made to the Civil Court, could not be added as a party to the proceeding before the Court; nor could she urge her claim to compensation in that reference. Before filing the above application, the petitioner had filed the present writ petition with the prayers mentioned above.

7. There is considerable force in the contention of the petitioner that by virtue of the order passed by the High Court in Writ Petition No. 221 of 1966, the petitioner is indubitably a person interested in the lands in respect of which compensation had been awarded by the 2nd respondent. The petitioner's case is that had the Land Acquisition Officer made reasonable enquiries, he could have found out that the petitioner and Tajunnisa Begum were interested in the lands and as such were entitled to notice under Section 9 (2) of the Act. However that be, as things now stand, the petitioner is certainly a person entitled to be heard in the matter of apportionment of the compensation, as also in the matter of enhancement of compensation when the matter reaches a Civil Court. But it is well settled that the absence of notice under any of the provisions of the Land Acquisition Act, does not render an award made by the Land Acquisition Officer a nullity. It is equally well settled that unless and until a reference is made to the Civil Court by the Land Acquisition Officer, the Civil Court has no jurisdiction to entertain the claims of parties who have not sought a reference and whose claims are not the subject-matter of a reference. In such cases while the award itself

is not void, it is open to the person interested in the land to move the Collector to make a reference to the Court under Sec. 18 of the Act; further, where no notice under Section 9 (3) of the Act was served on such a person, the period of limitation prescribed by Section 18 (2) (b) does not stand in the way. In the present case, however, no question of limitation can arise because it is the petitioner's case that she came to know about the award only in October 1966 and she filed an application before the Collector shortly thereafter.

8. In this connection a decision of a Divisional Bench of the Patna High Court consisting of Ramaswami C. J. and Untwalia J., in *Shivdev Singh v. State of Bihar*, AIR 1963 Pat 201 at p. 206, is apposite. Dealing with the contentions similar to the one raised in this Writ Petition, the learned Judges observed as follows:

"Coming to the third and the last point urged on behalf of the petitioner, it is to be noticed at the outset that it is not disputed that the requirements of the provisions of Sections 4, 5-A and 6 of the Land Acquisition Act were complied with. The argument put forward on behalf of the respondents is that even assuming that the petitioner was a person who was entitled to a special notice under Section 9 (3) of the Land Acquisition Act, the proceeding for the acquisition of the land and the award cannot be held to be illegal and ultra vires for the mere failure of the Collector to serve such a notice on the petitioner. The order of acquisition or the act of taking possession cannot be challenged in a reference to Court either under Section 18 or Section 30 of the Land Acquisition Act. This also finds support from the rules as to the amount of compensation provided in Section 25 of the Act. In my opinion, the petitioner, even if not served with a notice under Section 9 of the Land Acquisition Act, could claim such compensation if he was entitled to any, by asking the Collector to make a reference to the Court under Section 18 of the Act. He could do so within 6 months from the date of the Collector's award as provided for under Sec. 18 (2) (b).

I may also observe that on proof of the fact that he was not served with a formal notice under Section 9 (3) of the Act or had no notice or knowledge of any proceeding under the Land Acquisition Act, he would not be bound by the period of limitation provided for in Clause (b) of sub-section (2) of Section 18".

9. That being the true legal position, in the present case the award passed by the 2nd respondent on 18-3-1966 cannot be quashed by this Court by a certiorari. The award stands, although the petitioner is entitled to seek a reference to the Civil Court on an application to be made by her to the 2nd respondent under Section 18 of the Land Acquisition Act in that regard.

10. As already noticed, the two references made by the 2nd respondent are now

pending before the Chief Judge, City Civil Court, Hyderabad at Secunderabad as O. P. Nos. 2 and 6 of 1967.

11. I would, therefore, allow this writ petition only to this extent, namely, that a direction will issue to the 2nd respondent (Special Deputy Collector, Land Acquisition, Hyderabad District) to entertain the application to be filed by the petitioner under Section 18 of the Act, if it is made within two months from this date and make a reference thereon to the Chief Judge, City Civil Court, Hyderabad at Secunderabad, within two weeks thereafter. In the case of such an application, no question of limitation arises in this case, firstly because the statement of the petitioner that she came to know of the passing of the award only in October 1966 remains uncontradicted, and secondly, as pointed out by the Division Bench of the Patna High Court, no question of limitation arises when a notice under Section 9 (3) of the Act was not in fact given to a party who is entitled to it. Moreover, the instant case is eminently a just and proper one for the Collector to entertain the application and make a reference under Section 18 of the Land Acquisition Act so far as the petitioner is concerned.

12. A direction will issue to the Chief Judge, City Civil Court, Hyderabad at Secunderabad, not to proceed with the enquiry in O. P. Nos. 2 and 6 of 1967 for three months from this date, so that the petitioner may have reasonable time to approach the 2nd respondent and the latter may make a reference to the Court under Section 18 of the Land Acquisition Act. If such a reference is made, all the three matters will be heard together by the learned Judge. The writ petition is allowed to the extent indicated above; but, in the circumstances, there will be no order as to costs.

DVT/D.V.C. Petition partly allowed.

AIR 1969 ANDHRA PRADESH 13 (V 56 C 7)

OBUL REDDI J.

Kerla Ankamma Devasthanam Vinnakota Represented by the trustee, Sayani Sambasiva Rao, Appellant v. Manikonda Venkata Ratnama and others, Respondents.

Second Appeals Nos. 412, 471 and 731 of 1963, D/-11-4-1967, from decree of Sub-J., Gudivada in Appeal Suit Nos. 23, 61 and 22 of 1961.

(A) Limitation Act (1908), Arts. 134-B and 144 — Hereditary trustee of temple property alienating it as his own—Removal of such trustee and appointment of another trustee by Endowment Department — Suit by such another trustee to set aside alienation — Article 134-B and not Article 144 is applicable — Even if Art. 144 would apply

starting point for adverse possession would be the date of removal of previous trustee. AIR 1941 Mad 449 (FB), Relied on; AIR 1938 Mad 60, Disting. (Para 7)

(B) Limitation Act (1908), Arts. 142-144 — Trustee of temple property alienating it as his own — Suit by successor trustee to set aside alienation — Former trustee cannot claim adverse possession against temple — Alienation by him was breach of duty on his part to safeguard properties and interests of temple and he could not make claim hostile to the interests and title of the temple. AIR 1954 SC 69, Relied on. (Para 7)

Cases Referred: Chronological Paras

(1954) AIR 1954 SC 69 (V 41) =

1954 SCR 407, Sree Sree Iswar

Sridhar Jew v. Sushila Bala Dasi

(1941) AIR 1941 Mad 449 (V 28) =

ILR 1941 Mad 599 (FB), Venkateswara v. Venkatesa

(1938) AIR 1938 Mad 60 (V 25),

Venkatasubramania v. Sivagurunatha

(1917) AIR 1917 Mad 706 (1) (V 4) =

4 Mad LW 369, Manikkam Pillai v. Thanikachalam Pillai

(1916) AIR 1916 Mad 1001 (1) (V 3) =

2 Mad LW 723, Palaniandi Malavarayan v. Vadamalai Odayan

I. Balaiah, for Appellant; K. Chalapathi Rao, for Respondents (2 to 6 in S. A. No. 412 of 1963).

JUDGMENT: The sole question that arises for consideration in these second appeals is when does limitation start to run in case where a trustee alienates the property of the temple or the deity.

2. To appreciate the point involved in these second appeals, it may be necessary to state the relevant facts. The plaintiff (appellant) laid three connected suits O. S. 1/59, O. S. 33/59 and O. S. 34/59 in the Court of the District Munsif, Gudivada for recovery of the temple lands which are in the possession of the defendants. The case of the plaintiff in all the three suits is that the lands in question belonged to the temple and the previous trustees described as 'Maikonda family' were in possession of the suit lands of the temple on behalf of the temple and were utilising the net income derived from the lands for Dhoopa Deepa Naivedyam and for other festivals concerning the temple. While acting as hereditary trustee the members of the Manikonda family some of whom are now defendants, alienated the properties to the defendants on the ground that the lands were their own private property. They were alienated under three sale deeds (1) Ext. B-6 dated 5-3-1942, (2) Ext. B-8 dated 29-3-45, (3) Ext. B-11 dated 31-8-42. The alienations are admitted by the defendants. But, their case is that the properties do not belong to the temple but were the private properties of the trustees in Manikonda people, and as such the temple is not entitled to recover possession of the property

from them as the temple had no title to or possession of these lands. The defendants also raised the question that the suits are barred by limitation for the reason that their predecessors-in-title had perfected their title by adverse possession.

3. The trial Court framed several issues the relevant issue being issue No. 3 "whether the defendants perfected their title to the suit property by adverse possession". On a consideration of the evidence placed before the trial Court, it found on the principal issues that the suit property was endowed to the temple, that the members of the Manikonda family were the hereditary trustees in possession and management of the properties on behalf of the temple, that they had no right to alienate the property and that the defendants had not perfected their title by adverse possession and therefore decreed the suits of the plaintiff. It is against this decree that the defendants preferred appeals and the Subordinate Judge allowed the appeals A. W. Nos. 22/61, 23/61 and 61/61 on the sole ground that the suits were barred by limitation as they were not filed within 12 years after the respective dates of alienation. The three suits were filed on 8-7-58 and the alienations in respect of the three properties in question concerning the three suits were on 5-3-42, 29-3-45 and 31-8-42 respectively.

4. The plaintiff was appointed as the trustee by the Endowments Department on 10-4-57 and he laid these three suits on 8-7-58. Therefore, the question is whether these suits are time-barred as found by the lower Appellate Court having regard to the

dates of alienation. It is not in dispute that the members of Manikonda family were the hereditary trustees managing the temple properties and utilising the income derived from the properties for Dhoopa Deepa Naivedyam and for the festivals of the temple. Prior to the appointment of the plaintiff, the members of the Manikonda family were either the hereditary or de facto trustees and they ceased to act as trustees only with effect from 10-4-57 when the plaintiff took over charge as the trustees of the temple. The finding of both the Courts below is that the members of the Manikonda family were either dharmakartas or hereditary trustees of the temple till the plaintiff took over charge. The trial Court has also given a finding that "it is needless to say that a trustee, whether he is de son tort or a regular trustee or any person in management of endowed property, cannot prescribe hostile title adverse to the deity in whatever manner he treated the property".

5. Mr. Balaiah, the learned counsel appearing for the appellant (plaintiff) contended that Article 134-B of the Limitation Act is the relevant article applicable to this case and that the suits are not barred by limitation. Mr. K. Chalapathi Rao, the learned counsel appearing for the respondents, contended that Article 144 is the relevant article and not Article 134-B of the Limitation Act. It is necessary to extract both the articles.

6. Article 134-B of the Limitation Act runs in the following terms:—

134-B. By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.

Twelve years. The death, resignation or removal of the transferor.

Article 144 reads as follows :

144. For possession of immovable property or any interest therein not hereby otherwise specially provided for.

Twelve years. When the possession of the defendant becomes adverse to the plaintiff.

Therefore, the question is whether the starting point of limitation runs from the date of alienation or from the date when the plaintiff took over as the trustee of the temple.

7. The Madras High Court in Palaniyandi Malavarayan v. Vadamalai Odayan, 2 Mad LW 723=(AIR 1916 Mad 1001 (1)), held that it is a recognised principle of law that the statute of limitation would not run where there is no person competent to sue. Bakewell and Phillips, JJ., in Manikkam Pillai v. Thanikachalam Pillai, 4 Mad LW 369 = (AIR 1917 Mad 706 (1)), dealing with case where title was pleaded by adverse possession, held that "since there were no properly constituted trustees of the

plaintiff temple till 1900, and there was, therefore, no person with knowledge of the acts of the defendants or capable of taking the necessary steps for the protection of the plaintiff properties, adverse possession commenced to run only from the year 1900 when the trustees were appointed and that the present suit of 1911 was not barred by limitation". A Full Bench of the Madras High Court per majority in Venkateswara v. Venkatesa, AIR 1941 Mad 449 (F.B.), held that "where a manager of a Hindu religious institution makes an alienation of the property of the institution for valuable consideration and the succeeding manager seeks to impeach that alienation by suit, Art. 134-B, and not Art. 144, applies even

when there is an interval of time between the death, resignation or removal of the previous manager and the election or appointment of the subsequent manager. Even if Art. 144 does apply, the date of the starting point of adverse possession in such a case is the date of the death, resignation or removal of the manager who effected the alienation, and not the date of election or the appointment of his successor". The lower Appellate Court relied upon a decision of the Madras High Court in *Venkatasubramania v. Sivagurunatha*, AIR 1938 Mad 60, where it is held:

"Adverse possession of an alienee dates from the moment the alienee is without lawful title. That time is, in the case of a void transfer, the date of the transfer; in the case of a voidable transfer the date of the avoidance and in the case of the transfer effective for a period (whether because of estoppel or otherwise), the date of the termination of the period.

A trustee of a choultry alienated property belonging to the choultry as his own. He did not purport to pass title as manager of the choultry:

Held, that the alienation was ab initio and possession of the alienee became adverse from the date of the alienation and not from the death of the trustee".

It is on the basis of this ruling that the lower Appellate Court held that the starting point of limitation is the date of alienation and not the date of removal or the date when the new trustee took charge. This is not a decision rendered under Article 134-B of the Limitation Act and the Full Bench of the Madras High Court referred to above is binding as the question referred to the Full Bench was 'when does the starting point of limitation begin under Articles 134-B and 144 of the Limitation Act'. The Supreme Court in *Sree Sree Iswar Sridhar Jew v. Sushila Bala Dasi*, AIR 1954 SC 69, dealing with a case of adverse possession held:

"If a shebait by acting contrary to the terms of his appointment or in breach of his duty as such shebait could claim adverse possession of the dedicated property against the idol, it would be putting a premium on dishonesty and breach of duty on his part and no property which is dedicated to an idol would ever be safe. The shebait for the time being is the only person competent to safeguard the interests of the idol, his possession of the dedicated property is the possession of the idol whose shebait he is, and no dealing of his with the property dedicated to the idol could afford the basis of a claim by him for adverse possession against the idol."

Therefore, there is no doubt from what is laid by the Supreme Court that if a trustee acting contrary to the terms of his appointment or in breach of his duty as the trustee could claim the dedicated property against the idol, it would be certainly putting a premium on dishonesty and breach

of duty on his part and no property which is dedicated to an idol would ever be safe. The trustee is a person appointed to safeguard the properties and interests of the temple and he is in possession of the property on behalf of the temple and, therefore, no claim can be made by him hostile to the interests or title of the temple. A trustee, as long as he continues to act as a trustee, cannot claim adverse possession against the temple. Therefore, having regard to the Full Bench decision of the Madras High Court referred to above, there is absolutely no doubt that it is Art. 134-B that applies and the limitation starts from the date of the removal of the previous trustees, viz., the members of the Manikonda family. In this case, as has been found by the lower Appellate Court, the members of the Manikonda family were trustees till the appointment of the plaintiff, and, therefore, the limitation begins to run only from the date when a regularly appointed trustee takes charge and the plaintiff has taken charge on 10-4-1957 and filed the suits on 8-7-1958. Therefore, the suits are within time.

8. In the result, the finding of the lower Appellate Court in the three concerned suits that they are barred by limitation is reversed. The judgment and the decree of the lower Appellate Court are, therefore, set aside and the appeals are allowed and the suits are decreed as prayed for with costs here and in the lower Appellate Court.

HGP/DVC

Appeals allowed.

AIR 1969 ANDHRA PRADESH 15
(V 56 C 8)

GOPALRAO EKBOTE, J.

Paturi Veeranna and another, Appellants
v. Pathuri Seethamma, Respondent.

Second Appeal No. 720 of 1962, D/-15-9-1966, from decree of Dist. Court, West Godavari at Eluru in Appeal Suit No. 251 of 1961.

(A) Hindu Adoptions and Maintenance Act (1956), Preamble and S. 4 — Act codifies law relating to maintenance — Object of codification — Act has overriding effect against any text, rule, etc., of Hindu Law.

The Act is intended not merely to amend but also to amend and codify the law relating to maintenance among Hindus. The object of such codification is that, on any matter specifically dealt with by the Act, such law would be sought for in the codified enactment itself. It must provide self-contained provisions in regard to that branch of law. Where a statute is expressly said to codify the law, the Court, as a general rule, is not at liberty to go outside the four corners of law simply because, before the existence of the enactment, another law

BK/BL/586/67

prevailed. This is made clear by S. 4 of the Act. That section gives an overriding effect to the provisions of the Act as against any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act. Nevertheless, the Act would apply only to those Hindus whose relationship in regard to maintenance is specified in the Act.

(Paras 10 and 11)

(B) Hindu Adoptions and Maintenance Act (1956), Ss. 22 and 25 — Applicability — Surrender of estate by widow in favour of reversioners prior to Act — Agreement by reversioners to pay maintenance with condition against enhancement — Sec. 22 not being retrospective held did not apply — Suit under S. 25 for enhancement of maintenance not maintainable — Widow's only claim could be on basis of agreement.

Section 25 confers ample powers on the Court to vary, modify or even discharge any order fixing the amount of maintenance made by a decree of Court or alter the agreement, if entered into by the parties. This can be done even in a case where there is an agreement that no enhancement would either be demanded or be given. Section 25 relates only to such decrees or agreements which are in favour of persons who either under the traditional Hindu law or under the Act, are entitled to maintenance and such decrees or agreements are suffered by persons who are obliged to maintain them. Any other agreement will obviously fall outside the scope of S. 25.

(Para 7)

Before the commencement of the Act, a widow surrendered her deceased husband's estate in favour of the reversioners who by a separate agreement agreed to pay a certain amount to the widow by way of maintenance with a condition that no enhancement would be asked for by the widow. After the coming into force of the Act, the widow filed a suit for enhancement of maintenance:

Held, that (i) the widow, after surrender, effaced herself and was not entitled to be maintained under the old Hindu Law. AIR 1957 Andh Pra 156, Rel. on. (Para 7)

(ii) that after the commencement of the Act, S. 22 of the Act not being retrospective, the widow could not have instituted any suit under that section for maintenance against the reversioners in whose favour she had already surrendered the estate: AIR 1961 Andh Pra 131 (FB) and AIR 1965 SC 1970, Rel. on.

Although S. 25 is retrospective, that section does not relate to an agreement between the reversioners and the widow who was neither entitled to be maintained under the old law because of surrender nor was entitled to be maintained under S. 22 of the Act, as it is not retrospective, from the estates in the hands of the reversioners.

(Para 11)

(iii) that her only claim could be on the footing of the contract. Since the contract itself embodied the term that no enhancement would be possible, she could not institute a suit for any enhancement at all.

(Para 11)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 1970 (V 52) =

(1966) 2 Andh WR (SC) 17, Raja

Gopala Rao v. Sitharamamma

11

(1961) AIR 1961 Andh Pra 131

(V 48) = ILR (1961) 1 Andh Pra

143 (FB), A. Ramamoorthy v.

Sitharamamma

11

(1957) AIR 1957 Andh Pra 156

(V 44) = 1956 Andh WR 415

(FB), Kondamma v. Seshamma

7

T. H. B. Chalapathi for V. P. Parthasarathi, for Appellants; R. V. Vidyasagar, for Respondent.

JUDGMENT: The defendants are the appellants before me. The second appeal arises out of a suit instituted by Pathuri Seethamma, the respondent-plaintiff, who is the widow of Butchi Ramanna. Butchi Ramanna died in 1933 having divided from his brothers, Veeranna and Venkanna. On the death of Butchi Ramanna, his properties devolved on Seethamma, the widow. She, however, executed a surrender deed after four years of her husband's death in favour of Venkanna and Veeranna who were the nearest reversioners to the estate. They, in turn, executed a maintenance deed promising to pay Rs. 25 per year besides promising to supply some chillies and redgram. The first defendant is the wife of Venkanna and the second defendant is the daughter. The third defendant is the brother-in-law of Veeranna. The fourth defendant is his son. The plaintiff contended that the maintenance amount is too meagre in view of the rise in prices and, therefore, pleaded that the amount be enhanced. She, therefore, wanted Rs. 300 per year apart from the supply of chillies and redgram fixed in the maintenance deed.

2. In the written statement, it was contended that the plaintiff is not entitled to enhancement of maintenance. An objection was raised that, under the law, she cannot claim any enhancement. It was also pleaded that there is a recital in the maintenance deed to the effect that no claim for enhancement or reduction could be entertained. The defendants also denied that there are circumstances which warrant increase in the maintenance amount.

3. Upon these pleadings, the trial Court framed appropriate issues. The plaintiff marked one document while the defendants marked one other document. No oral evidence was adduced on either side.

4. Upon this material, the trial Court decreed the plaintiff's suit negating the contentions raised by the defendants. It was found that the plaintiff would be entitled at Rs. 150 per annum to be paid in two instalments, one from Asvayuja Bahula

30 and the other on Magha Bahula 30. The trial Court also granted arrears at the same rate from the date of the suit.

5. Dissatisfied with that judgment, the two sets of defendants filed two separate appeals, A. S. Nos. 251 and 270 of 1961. The District Judge, Eluru, disallowed the appeals agreeing with the view of the trial Court. It is this decision of the learned District Judge that is the subject-matter of the second appeal, which is preferred by one set of defendants.

6. The principal contention of the learned counsel for the appellants is that, after the execution of the surrender deed, the widow was not entitled to any maintenance under the traditional Hindu Law, that she was given maintenance only under an agreement and that no suit, therefore, can lie for the enhancement of such a maintenance fixed by the contract. It was further contended that S. 25 of the Hindu Adoptions and Maintenance Act, 1956 (No. 78 of 1956) (hereafter called 'the Act') is not applicable because the widow would not be entitled to maintenance under S. 22 of the Act in view of the fact that her husband died before the Act came into force.

7. It is not in doubt that a widow, who surrenders the estate in favour of her immediate reversioners, thus effaces herself cannot have claims to maintenance from the reversioners. In *Kondamma v. Seshamma*, 1956 Andh WR 415 = (AIR 1957 Andh Pra 156), a Full Bench of this Court held that "if there is an agreement between the widow who surrenders the estate of her deceased husband and the next reversioner who takes the estate on such surrender that the widow should be provided maintenance out of the estate, either by the allotment of a specific part of the property or by payment of a specific sum or otherwise, the widow would be entitled to maintenance in accordance with such agreement. She cannot get enhanced maintenance in excess of the agreed stipulation if the reversioner objects. If, however, the widow surrenders the estate in favour of the next reversioners without any stipulation for maintenance, she is not thereafter entitled to be maintained out of the estate in the hands of the reversioners and that the latter cannot be compelled to pay her maintenance". It will thus be clear that, immediately after she surrendered, she accelerated the inheritance and effaced herself and was, therefore, not entitled to be maintained from the estate. Consequently, the reversioners in whose favour she had surrendered or their successors cannot be compelled to maintain her from the estate. She was of course entitled to receive the amount of maintenance as agreed by the reversioners in a separate agreement executed in favour of the widow. The agreement incorporates a condition that no enhancement will be asked by the widow. That being a term of the contract, it is binding upon the parties. No suit, therefore, in the circum-

stances could lie for the enhancement of the amount agreed to be paid by a contract. It was, therefore, not possible for the widow to institute a suit under the traditional Hindu Law or under the contract for enhancement of the amounts thus fixed.

8. What was, however, successfully contended in the Courts below was that, under S. 25 of the Act, a suit seeking enhancement of the maintenance under an agreement can lie. The same argument is advanced before me by Shri R. Vidya Sagar, the learned counsel for the respondent.

9. In order to appreciate this contention, it is necessary to read S. 25 of the Act which runs as follows:—

"The amount of maintenance, whether fixed by a decree of Court or by agreement, either before or after the commencement of this Act, may be altered subsequently if there is a material change in the circumstances justifying such alteration."

A careful reading of that section would reveal that the section confers ample powers on the Court to vary, modify or even discharge any order fixing the amount of maintenance made by a decree of Court or alter the agreement, if entered into by the parties. This can be done even in a case where there is an agreement that no enhancement would either be demanded or be given. Of course, the alteration would be made only if there are material changes in the circumstances justifying such alteration. What, however, must be remembered is that S. 25 of the Act relates only to such decrees or agreements which are in favour of persons who either under the traditional Hindu law or under the Act, are entitled to maintenance and such decrees or agreements are suffered by persons who are obliged to maintain them. In other words, in order to take advantage of S. 25 of the Act, the maintenance agreement must be in favour of a person who, either under the old Hindu Law or under the Act, is entitled to claim maintenance from a person who is a party to such an agreement. Any other agreement will obviously fall outside the scope of Sec. 25 of the Act. It is true that S. 25 is retrospective in its operation. It applies even to a case where the agreement of maintenance is entered into between the parties either before the Act or it is entered into after the commencement of the Act. The plain language of the section makes that position abundantly plain. The section however cannot apply to a case where there is an agreement in favour of a person who need not be maintained either under the old Hindu Law or under the Act by a person who has undertaken the obligation to maintain. For example, a person who is of charitable disposition, if he enters into a contract to maintain a person, whose maintenance is not an obligation of his either under the old Hindu Law or under the Act, can such an agreement fall within the ambit of S. 25? Obviously, not.

10. In this connection, it must be remembered that Chapter III of the Act codifies the law of maintenance applicable to Hindus. It is clear from the Preamble to the Act that the Act is intended not merely to amend but also 'to amend and codify the law relating to maintenance among Hindus'. The object of such codification is that, on any matter specifically dealt with by the Act, such law would be sought for in the codified enactment itself. It must provide self-contained provisions in regard to that branch of law. Where a statute is expressly said to codify the law, the Court as a general rule is not at liberty to go outside the four corners of law, simply because, before the existence of the enactment, another law prevailed. This is made clear by S. 4 of the Act. That section gives an overriding effect to the provisions of the Act as against any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act.

11. Nevertheless, the Act would apply only to those Hindus whose relationship in regard to maintenance is specified in the Act. Now under S. 20 of the Act, a Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters and his aged parents, whether he possesses any property or not. The obligation to maintain these relations is personal and legal in character and arises from the very existence of the relationship between the parties. Likewise, S. 18 of the Act creates a right in a wife for maintenance as it is an incident of the status of matrimony and the husband is under a legal obligation to maintain his wife. Sec. 22 of the Act relates to the maintenance of dependants. For the purpose of Chap. III, Section 21 defines who the dependants are. According to S. 22, subject to the provisions of sub-section (2), the heirs of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased. The liability of each of the persons who takes the estate shall be in proportion to the value of the share or part of the estate taken by him or her. It is conceded that it is under this section that the husband's brothers, in whose favour the widow had surrendered the estate, would be entitled to be maintained from the estate if S. 22 applies to her case. But, S. 22 does not apply to the case of the plaintiff as that section is not retrospective. Admittedly, the husband of the plaintiff died long before the Act came into force. It is now fairly well settled that Section 22 of the Act is not retrospective. see *Ramamoorthy v. Sitharamamma*, AIR 1961 Andh Pra 131 and *Raja Gopala Rao v. Sitharamamma*, (1966) 2 Andh WR (SC) 17 = (AIR 1965 SC 1970). This position is not controverted. What has been however argued was that the right to be maintained being a continuing right she

could claim enhancement. What is however ignored in advancing such an argument is that the plaintiff after surrender was not entitled to be maintained under the old Hindu Law. After the commencement of the Act, Sec. 22 of the Act not being retrospective, she could not have instituted any suit under that section for maintenance against the reversioners in whose favour she had already surrendered the estate. It would thus be clear that she, not being a person who is entitled to be maintained under Section 22 of the Act, cannot file a suit under Sec. 25 of the Act for the enhancement of the maintenance, based on an agreement executed in her favour prior to the commencement of the Act. Although Sec. 25 is retrospective but that Section does not relate to such an agreement between the plaintiff, who was neither entitled to be maintained under the old Law because of surrender nor is entitled to be maintained under S. 22 of the Act, as it is not retrospective, from the estates in the hands of the reversioners. Her only claim can be on the footing of the agreement, that is to say, the contract. Since the contract itself embodies the term that no enhancement would be possible, she cannot institute a suit for any enhancement at all.

12. I am, therefore, satisfied that the lower Courts have erred in holding that the plaintiff could institute the present suit for the enhancement of the maintenance under Sec. 25 of the Act. In my view, Sec. 25 is not applicable to the plaintiff's agreement.

13. The result is that the second appeal is allowed and the plaintiff's suit is dismissed. I leave the parties to bear their own costs throughout. Leave granted. Court-fee to be collected from the petitioner.

GMJ/D.V.C.

Appeal allowed.

AIR 1969 ANDHRA PRADESH 18
(V 56 C 9)

KUMARAYYA, J.

Sri Venugopalaswamy Temple, Tenali represented by its Managing Trustee, Petitioner v. Kakumarree Anjaneyulu (died) and others, Respondents.

Civil Revn. Petn. No. 876 of 1962, D/- 26-4-1967.

Constitution of India, Article 227 — Supervisory jurisdiction of High Court — Scope and exercise of — Case before Tenancy Tribunal — Tenancy Laws — Andhra Tenancy Act (18 of 1956), S. 13.

The supervisory jurisdiction of the High Court extends over all the tribunals in the State including the tribunals constituted under the Andhra Tenancy Act; but this extraordinary jurisdiction has to be exercised sparingly and only in cases where there is manifest error of law which has resulted in injustice or where the tribunals have

HK/JK/C458/67.

acted with such material irregularity in exercise of their jurisdiction as to render their orders invalid in law.

In an application under S. 13 of Andhra Tenancy Act, the onus of proving grounds justifying termination of tenancy and eviction of the cultivating tenant is on the petitioner and if he can establish any of the grounds in Clauses (a) to (f) of Sec. 13 of the Act against his cultivating tenant, he will be necessarily entitled to an order in his favour. In that event, considerations of hardship or expediency or any other consideration will not at all stand in his way. Nor can the right conferred on him under the specific provisions of Sec. 13 in any way be whittled down or adversely affected by the application of any principles of general law. Provision of Sec. 13 is mandatory, and has to be obeyed in full. Of course it must be strictly construed and rights granted thereunder will be fully enforced. 1960 Andh LT 227, and (1961) 2 Andh WR 312, Relied on. (Para 6)

Cases Referred: Chronological Paras

- (1963) 1963-2 Andh WR 235, Aniseti Ramachandra Rao v. Addepalli Venkata Lakshminarayana Sastri 6
- (1961) 1961-2 Andh WR 312 = 1961 Andh LT 865, Majji Parasuramulu v. Simhadri Suryanarayanamurthy 6
- (1960) 1960 Andh LT 227 = (1960) 1 Andh WR (NRC) 18 (3), Veerabhadrayya v. Tahsildar 6
- (1949) AIR 1949 Cal 571 (V 36) = ILR (1945) 2 Cal 591, Kanto M. Mullick v. Jyotish Ch. Mukherjee 6B
- (1923) AIR 1923 Cal 227 (V 10) = 26 Cal WN 678, Jetha Bulchand v. F. C. Grace 6
- T. Veerabhadraiah, for Petitioner; Y. G. Krishnamurthy, for Respondent No. 3, Respondent No. 1 died and Respondents Nos. 3 and 4 in person.

ORDER: This is a petition under Article 227 of the Constitution of India seeking to revise the orders of the Tahsildar and the Revenue Divisional Officer, Tenali, made under Section 13 of the Andhra Tenancy Act (hereinafter referred to as the Act) refusing to evict the respondent as the cultivating tenant of the petitioner.

2. The petitioner is Sri Venugopalaswami Vari temple, Tenali represented by the Managing Trustee. The said temple leased out some of its lands to the respondent Kakamanu Anjaneyulu with a stipulation of annual rent of 13 bags of paddy. The respondent had his own lands acres 50 in extent around this leased land, which he is in possession of ever since 1922. The case of the petitioner is that the 1st Respondent having disposed of his own lands to others, had sub-leased the temple land to Adusumalli Anjayya for higher rent. Besides he committed default in timely payment of rent for the year 1959-60 and paid the same on 15-2-1960 long after the expiry of the due date. The petitioner sought on these

grounds termination of his tenancy and his eviction from the leased lands by making an application under Section 13 of the Act to the Tahsildar. He made Anjayya, the sub-lessee a party respondent to the said petition. That petition was resisted by the 1st respondent who denied that he ever sub-leased the land or committed default in payment of rent. His contention was that ever since the present Managing Trustee took charge, he was demanding higher rent and on his refusal he made attempts to sell the lease-hold rights in the lands by public auction. As he failed to gain his object by reason of timely intervention of the 1st respondent he now conceived the idea of eviction by filing an application under Section 13. The 2nd Respondent denied that he was a sub-lessee.

3. The Tahsildar on the material brought on record which consisted of evidence both oral and documentary found that the grounds on which eviction was sought are ill-founded, that the lands were being cultivated under the supervision of the lessee, that the allegation of sub-lease is untrue, and the oral evidence in support thereof is unworthy of credence; and that the petitioner has failed to establish default on part of the lessee in payment of rent. He was of the view that the stipulation as to the date of payment is not at all proved, that the receipt Ext. R-1 in relation to rent payable for the year 1959-60 which shows that the rent was accepted under protest without prejudice to the temple's contention for fixation of higher rent does not show that the rent was paid after the due date. The Tahsildar having thus found that the petitioner had failed to establish both the sub-lease and default as alleged by him dismissed his petition. On appeal, the Revenue Divisional Officer, was inclined to the view that the lease was a permanent lease, that the alleged sub-lease has not been established inasmuch as P. Ws. 4 and 5 denied all knowledge about it and there was conflict between the testimony of P. W. 1 on one hand and P. Ws. 2 and 3 on the other, in relation to the term of sub-lease and that the default in payment has not been proved. He found that the usual date of payment of rent in that area was Magha Bahula Amavasya; that the rent for the year 1959-60 was paid earlier on 15-2-1960 itself and that according to P. W. 5 this rent was to be paid by Radhotsavam which fell on 13-3-1960, and further the previous years' receipts of 15-4-1954 and 17-4-1935 (sic) showed that the amount used to be paid as per the arrangements in the months of April from time to time, and that as against this, the petitioner did not produce the accounts of the temple to rebut the stand taken by the first respondent. In this view he upheld the order of the Tahsildar.

4. Aggrieved by these orders, the petitioner has come to this Court involving supervisory jurisdiction of this Court.

5. Mr. T. Veera Bhadrappa, learned counsel for petitioner contends that both the Tahsildar and the Revenue Divisional Officer failed to correctly appreciate the evidence in relation to sub-lease, that the Revenue Divisional Officer failed to take into account the 1st respondent's personal inability to carry on cultivation while considering the probabilities of sub-lease, that both the tribunals have failed to appreciate that the due date of payment of rent was much earlier than the date of receipts on which reliance has been placed, that Ext. P-1 itself shows that it was a late payment, that the other receipts referred to by the Revenue Divisional Officer related to arrears of rent paid in one lump sum, and that both the tribunals have failed to appreciate the true impact of Sec. 13 (a) and thus having committed error of law apparent on the face of the record and this Court should therefore quash the said orders in exercise of its powers under Art. 227 of the Constitution.

6. It is indisputable that the supervisory jurisdiction of this Court extends over all the tribunals in the State including the tribunals constituted under the Act; but this extraordinary jurisdiction has to be exercised sparingly and only in cases where there is manifest error of law which has resulted in injustice or where the tribunals have acted without or in excess of their jurisdiction or acted with such material irregularity in exercise of their jurisdiction as to render their orders invalid in law. It is obvious in the instant case that the onus of proving grounds justifying termination of tenancy and eviction of the cultivating tenant was on the petitioner and it admits of little doubt that if he can establish any of the grounds in Clauses (a) to (f) of Sec. 13 of the Act against his cultivating tenant, he will be necessarily entitled to an order in his favour. In that event, considerations of hardship or expediency or any other equitable consideration will not at all stand in his way. Nor can the right conferred on him under the specific provisions of Sec. 13 in any way be whittled down or adversely affected by the application of any principles of general law. Provision of Sec. 13, it may be noted, is mandatory, and has to be obeyed in full. Of course it must be strictly construed and rights granted thereunder will be fully enforced. That has been the consistent view of this Court. In *Veerabhadrayya v. Tahsildar*, 1960 Andh LT 227, at p. 229, Seshachelapati J., observed in relation to the Act at p. 229 thus:

".....The provisions of this Act are mandatory. While conferring certain rights on the tenants, they, to a large extent, abridge the rights of the landlord. In such a case rights and liabilities of the landlords and tenants alike must be strictly construed. Section 13 (a) gives the landlord a right to ask for the eviction of a tenant, who defaulted in the payment of the rent due". Jaganmohan Reddy J., (as he then was) cited this dictum with approval in *Majji*

Parasuramulu v. Simhadri Suryanarayana-murthy, (1961) 2 Andh WR 312 at p. 315. While deciding the question whether acceptance of rent even after the grace period has expired can be of any avail to the tenant and whether he can invoke the doctrine of estoppel or waiver against the landlord on account of the same to defeat his right under Sec. 13; the learned Judge observed thus:

"It (Section 13) only permits eviction subject to the conditions prescribed for eviction in Sec. 13, one of which is the failure to pay rent due by the tenant within a period of one month from the date on which the rent is due according to the usage of the locality. There is, therefore, sufficient indication in the Act itself which will show that the provisions of any existing law are not applicable to the conditions prescribed for eviction in Section 13. Acceptance of rent even after the grace period has expired, therefore, can be of no avail to the tenant and it will not be open to him to say that the landlord is estopped because he has accepted rent".

The learned Judge, in support of this view, referred to two cases decided by the Calcutta High Court in *Jetha Bulchand v. F. C. Grace*, AIR 1923 Cal 227, and *Kanto M. Mullick v. Jyotish Ch. Mukherjee*, AIR 1949 Cal 571. Again in a Divisional Bench case in *Aniseti Ramachandra Rao v. Addepalli Venkata Lakshminarayana Sastri*, (1963) 2 Andh WR 235 at p. 238, the same learned Judge speaking for the Court referring to case law on the point observed thus:—

"...having regard to the specific provisions of the section which confers a right upon the landlord to get the tenant evicted if the tenant fails to pay the rent within the time specified in Section 13 (a), the acceptance of rent after the time specified in Section 13 (a) does neither make the acceptance a payment within the meaning of Section 13 (a), nor can that by itself be construed as a waiver entitling the tenant to continue in possession. Even in cases where default is committed which furnishes a ground for the landlord to get the tenant evicted, the right to recover rent from the tenant would entitle the landlord to take proceedings against the tenant notwithstanding the fact that he had already been evicted due to omission to pay the amount in time. The tenant's obligation to pay the rent being a subsisting one, the acceptance by the landlord of the rent after the default in payment within the time specified in Section 13 (a) does not by itself amount to a waiver. It may be that the period of limitation is running out and the landlord is obliged to accept it. The payment of rent by the tenant and its acceptance by the landlord even after the date stipulated may be beneficial to both as they may be saved the costs of litigation. Whatever may be the considerations for accepting the payments of rent after the default, it cannot

by itself justify a conclusion that it amounts to a waiver and estops the landlord from taking steps to evict the tenant?.

The learned Judges held that the Tahsildar has no discretion to refuse to evict the tenant if the conditions specified in S. 13(a) to (f) have been established. Thus it would be seen that the statute has given the right of eviction to the landlord during the currency of the lease in case certain grounds specified in Sec. 13 have fulfilled. These grounds must be strictly construed and clearly established to entail the penalty of termination of tenancy and eviction. The legislature in its wisdom has thought that mere failure to pay the rent within the period of one month from the date stipulated in the lease deed or in the absence of such stipulation within a period of one month from the date on which the rent is due according to the usage of the locality and in case the rent is payable in the form of a share in the produce, failure to deliver the produce at the time of harvest, would entail the penalty of eviction. The same would be the consequence if the lessee has sub-leased the land. Default in payment of rent, whether wilful or not, is sure to entail that penalty. So also the sub-lease on any grounds whatsoever. The landlord gets the right as soon as the ground is made out and the tenancy tribunal has no choice but to grant the relief. The question therefore is whether any of the prescribed authorities under the Act have overlooked these mandatory provisions of S. 13. As already observed, default or sub-lease has to be satisfactorily established by the material on record. It is not the case of the parties that the rent was payable in the form of a share in the produce. Of course, the rent may be in kind but certainly not as a particular share in the produce and admittedly the lessee has been paying not in kind but in cash, after the grains are sold in the market. The due date of payment as stipulated has not been established by the material on record. The respondent's contention was that rent was to be paid on the Radhotsavam day which falls in the month of March. P.W. 5 admitted that the lease amount was intended for the Radhotsavam. That must support the case of the lessee. Even otherwise if it cannot be established that there was any stipulation as to the due date of payment of rent the provision says that it should be paid within a period of one month according to the usage in the locality. The onus of proving default was on the petitioner. Obviously he has failed to discharge that onus. Reliance on Ext. P-1 is of no avail when it does not categorically state the due date of payment. The endorsement on the same also does not advance his case. Acceptance of rent, as the endorsement shows, was only without prejudice to his right to apply for determination of higher rate of rent. There is nothing to suggest that the endorsement referred to the right of eviction which it would have if the payment was out of time

or was not prior to the due date. The petitioner would have been entitled to the relief of eviction, if he could establish that the rent was paid after due date. That he has failed to prove. Similarly the case of sub-lease as held by the Tribunals has not been made out by the evidence on record. The finding is one of fact based on appreciation of evidence and cannot merit interference in exercise of supervisory jurisdiction of this Court. In this state of record, it is not possible to hold that the tribunals have committed any error of law on the face of the record or that the orders of the said tribunals merit interference. The petition, therefore, fails and is dismissed with costs. Advocate's fee Rs. 100.

7. This case coming on for being mentioned this day upon the letter of the Advocate for the petitioner dated 27-4-1967 and upon hearing the further arguments, the Court made the following:—

ORDER

It is made clear here that it was found unnecessary to deal with the question of permanent tenancy in the judgment as both the authorities purported to act and decide the question under the Andhra Tenancy Act and have refused relief only under that Act. Any observation made by the Revenue Divisional Officer in relation to the permanent tenancy is not germane to the proceeding before me when as a matter of fact he purported to act under the Andhra Tenancy Act. Therefore, his observation in that behalf will have no legal effect.
HGP/D.V.C. Order accordingly.

AIR 1969 ANDHRA PRADESH 21
(V 56 C 10)

BASI REDDY, J.

Poonamalli Ramayya and another, Petitioners v. The State of Andhra Pradesh and others, Respondents.

Writ Petition No. 314 of 1963, D/-27-4-67.

Constitution of India, Art. 226 — Natural justice — Orders passed by Government not strictly called judicial or quasi-judicial — Even then before order in favour of party is set aside, he should be given chance to make his representation: (1967) 1 All ER 226, Rel. on. (Para 4)

Cases Referred: Chronological Paras
(1967) 1967-1 All ER 226 = (1967)
2 WLR 962, In re H. K. (an infant) 4

P. Babul Reddy, M. V. Ramana Reddy and M. N. Rao, for Petitioners; Haridathareddy, for 3rd Govt. Pleader (for Nos. 1 and 2) and N. Subbareddy, for Respondents.

ORDER: The petitioners herein applied to the Tahsildar, Nellore, for assignment of lands bearing S. Nos. 229, 230 and 231 in

HK/LK/C459/67

Venkannapalem village, Nellore Taluk, of an extent of 4 acres 82 cents on the ground that they are landless poor and they belong to a backward community called Palle Kapu. Objections to their applications were filed by some Harijans (Chinna Rangaiah and others) of Venkannapalem, but the Tahsildar, after due enquiry, granted pattas to the petitioners in his proceedings F. Dis. No. 480/71. The petitioners were given possession of the lands on 30-11-1961.

2. Aggrieved by the orders of the Tahsildar, the Harijans preferred an appeal to the Revenue Divisional Officer, Nellore, who in his proceedings L. Dis. No. 6205/61 dated 28-4-1962 rejected the appeal and confirmed the pattas granted in favour of the petitioners. Thereafter the Harijans preferred a revision petition to the Government against the order of the Revenue Divisional Officer. The Government in their Memorandum No. 2396/62-6 dated 5-2-1963 passed the following order:

"The Government have carefully examined the revision petition filed by Sri Ch. Rangaiah and two others, Harijans of Venkannapalem village, Nellore Taluk, Nellore District, against the orders of the Revenue Divisional Officer, Nellore, issued in his L. Dis. 6205/61 dated 28-4-1962 regarding assignment of S. Nos. 229, 230 and 231 of Venkannapalem village in favour of Sri P. Ramaiah and other of Eothapalem village. They observe that the Harijans (i.e., the petitioners) should get preference over others, especially when they are natives of Venkannapalem village. They further observe that the petitioners say that they are in possession of the lands. The Government therefore direct that the assignment made by the Revenue Divisional Officer in his L. Dis. 6205/61 dated 28-4-62 in favour of Sri Ramaiah and Sri P. Rajaiah of Kothapalem village be set aside and the Sirvoijama cultivation of the Harijans be continued if they are under occupation of the land in question.

2. The stay ordered in Government memorandum is hereby vacated.

3. The revision petitioners are referred to the Collector of Nellore for orders.

(Sd.) K. G. Desikan,
Deputy Secretary to Government".

3. It will thus be seen that the Government purported to exercise their revisional power and cancelled the pattas granted to the petitioners and instead, directed that the Harijans be allowed to continue 'siveijama' cultivation of the lands if they are occupying them. In thus reversing the orders of the Tahsildar and of the Revenue Divisional Officer, the Government did not think it necessary even to give notice to the petitioners in whose favour pattas had been granted.

4. In a matter like this, even if the order passed by the Government cannot be strictly called judicial or quasi-judicial, there is a duty to act fairly, which means that before

an order in favour of a party is set aside, he should be given a chance to make his representation. In this connection the observations made by Lord Parker, Chief Justice of England, in a recent case in *Re. H. K. (an infant)*, (1967) 1 All ER 226 at p. 231, are instructive. The Lord Chief Justice observed as follows in a case in which the action taken by the immigration authorities against an immigrant who, they thought, was a minor, came up for consideration:

".... I doubt whether it can be said that the immigration authorities are acting in a judicial or quasi-judicial capacity as those terms are generally understood. At the same time, however, I myself think that even if an immigration officer is not acting in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub-section, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or bona fide decision must, as it seems to me, require not mere impartiality, nor merely bringing one's mind to bear on the problem, but of acting fairly, and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly".

I would respectfully adopt the above view and hold that in a matter like the present, the Government were under a duty to act fairly, which means that before they set aside the order of the Revenue Divisional Officer affirming that of the Tahsildar, they should have given notice to the petitioners and given an opportunity to them to present their case. Since that was not done, this writ petition is allowed, the impugned order of the Government in Memorandum No. 2396/B-2/62-6 dated 5-2-1963 is set aside and the Government are directed to determine the revision petition preferred by Chinna Rangaiah and others, after giving notice to the petitioners herein in whose favour pattas had been granted. In the circumstances of the case, there will be no order as to costs.

MBR/D.V.C.

Petition allowed.

AIR 1969 ANDHRA PRADESH 22
(V 56 C 11)

CHINNAPPA REDDY, J.

Bandi Naidu, Petitioner v. Pavuluri Ramanujiah and others, Respondents.

Writ Petn. No. 478 of 1967, D/-23-11-1967.

BL/EL/A646/68

Constitution of India, Art. 226 — Quo warranto, writ of — Writ alleging that duly elected member was subsequently disqualified from holding office under S. 20, Andhra Pradesh Gram Panchayats Act (35 of 1959) — Proper remedy is to move under S. 22 — Writ of Quo Warranto is most inappropriate. (Para 2)

P. A. Choudhary, for Petitioner; Govt. Pleader on behalf of the Govt., for Respondents Nos. 2 and 3; K. Krishna Rao, for Respondent No. 1.

ORDER: The petitioner who is a member of the Gram Panchayat of Carnipudi seeks information from the 1st respondent as to the authority on which he is now holding the office of President and member of the Gram Panchayat of Carnipudi. It is admitted that the respondent was first elected as a member, later Upa Sarpanch and still later Sarpanch of the Gram Panchayat. The petitioner's contention is that the first respondent has not paid property-tax for the year 1965-66 and he is therefore disqualified from holding office by reason of Sec. 20 of the Andhra Pradesh Gram Panchayats Act. It is stated by him that the Panchayat Extension Officer who inspected the records of the Panchayat has also submitted a report to the Commissioner of Panchayats to that effect and yet no action has been taken. Consequent on the failure of the authorities to take action he has invoked the jurisdiction of the High Court under Art. 226 for the issue of a writ of Quo Warranto.

2. A duly elected member does not cease to be a member merely because some one alleges that he has incurred a disqualification. The Act has provided a machinery for determination of questions regarding disqualification. Section 22 which prescribes the machinery runs as follows:

"22. (1) Where an allegation is made that any person who is elected or nominated as a member of a gram panchayat is not qualified or has become disqualified under Section 16, Section 17, Section 18, Section 19 or Section 20 by any voter or authority to the executive authority in writing and the executive authority has given intimation of such allegation to the member and such member disputes the correctness of the allegation so made, or where any member himself entertains any doubt whether or not he has become disqualified under any of those sections, such member or any other member may, and the executive authority, at the direction of the gram panchayat or the Commissioner shall, within a period of two months from the date on which such intimation is given or doubt is entertained, as the case may be, apply to the District Munsif having jurisdiction over the area in which the office of the gram panchayat is situated for decision.

(2) Pending such decision, the member shall be entitled to act as if he is qualified or were not disqualified.

(3) Where a person ceases to be the Sarpanch or Upa Sarpanch of a gram panchayat as a consequence of his ceasing to be a member of the gram panchayat under Cl. (k) of S. 20 and is restored later to his membership of the gram panchayat under sub-section (2) of Section 21, he shall, with effect from the date of such restoration, be deemed to have been restored also to the office of Sarpanch or Upa Sarpanch, as the case may be".

3. It is seen from S. 22 that any voter or authority may make an allegation in writing to the Executive Authority of a Panchayat that a member of the Panchayat has become disqualified. On receipt of such an allegation in writing the Executive Authority shall give intimation of such allegation to the member concerned. The member may admit the allegation in which case he will cease to be a member or he may dispute the correctness of the allegation in which case a reference has to be made to the District Munsif for determining the question of disqualification. This reference may be made by the member concerned or any other member or the Executive Authority at the instance of the Gram Panchayat or Commissioner. Where the Executive Authority is directed to make a reference by the Gram Panchayat or the Commissioner he is bound to do so. Sub-sec. (2) further provides that pending decision by the District Munsif the member shall be entitled to act as if he was not disqualified. It is therefore clear that it is open to any member who alleges that another member has incurred a disqualification to invoke the jurisdiction of the District Munsif to decide the question of disqualification. The question of disqualification can only be decided on evidence and a writ proceeding is obviously a most inappropriate proceeding for deciding such a question. The writ petition is therefore, dismissed with costs. Advocate's fee Rs. 100.

BDB/D.V.C.

Petition dismissed.

AIR 1969 ANDHRA PRADESH 23
(V 56 C 12)

SHARFUDDIN AHMED, J.

Samanthapudi Surannamukhi, Plaintiff,
Petitioner v. Samanthapudi Virupakshamma,
Defendant, Respondent.

Civil Revn. Petn. No. 576 of 1967, D/-27-2-1968, to revise decree of Sub-J., Kavali, D/-16-12-1967.

Provincial Insolvency Act (1920), S. 28 (5) — Insolvent's right to sue for contribution — Vests in Official Receiver as not exempted under Sec. 60 (e) of Civil P. C. (1908) — Suit on such right by insolvent not maintainable.

DL/EL/B777/68

The right of an insolvent to sue for contribution is not a right or property mentioned in Sec. 60 (e) of the Civil P. C. exempting it from vesting in the official receiver under S. 28 (5) of the Provincial Insolvency Act. Therefore such right vests in the official liquidator and the insolvent is incompetent to bring a suit on such right. Consequently the question of adding the official liquidator as party does not arise in such suit, and the question of applicability of Proviso to Section 21 (1) of Limitation Act (1963) also does not arise. (Para 4)

N. Sabbu Reddi, Advocate, for Petitioner;
Mr. P. V. K. Sarma for G. Venkatarama Sastry, for Respondent.

ORDER: The short question that falls for determination in this Civil Revision Petition is whether the petitioner-plaintiff has a right to sue on the date of the institution of the suit.

2. The petitioner-plaintiff filed a Small Cause suit No. 362 of 1965 for recovery of a sum of Rs. 700/- and odd being half the share payable to him by the defendant in the suit. It was her case that she and the defendant were co-judgment-debtors in O. S. 88 of 1961 on the file of the Court of the Subordinate Judge, Kavali, in which a joint and several decree was passed against them. In the execution of the decree in E. P. 230 of 1962, the plaintiff's property was brought to sale and she was compelled to pay the entire amount totalling Rs. 1400 and odd in full satisfaction of the decretal amount. She, therefore, brought a suit for contribution against the co-judgment-debtor, the defendant, on 24-9-1965. Unfortunately for her she was adjudged insolvent on 1-8-1964 i.e., nearly one year prior to the filing of the suit. She then filed a petition under Order 1 Rule 10 C. P. C. for impleading the official receiver as defendant in the suit. This petition was resisted by the respondent-defendant on the ground that it was barred by limitation and that the plaintiff had no locus standi to institute the suit. The learned Subordinate Judge, Kavali, on a consideration of the arguments advanced before him, held that the present petition was not within time and, therefore, dismissed the I. A. and consequently dismissed the suit also on the same day. The revision is filed against this order.

3. The learned counsel for the petitioner, Sri N. Subba Reddy contends that the lower Court did not consider the provisions of the new Limitation Act which provides that "where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted at any earlier date". He submits that the case is fit for remand to the lower Court for a re-consideration of the issue in the light of the proviso to Section 21 of the Limitation Act.

4. On the other hand the learned counsel for the respondent contends that as the petitioner had been adjudged insolvent on 1-8-1964, she was not competent to institute the suit on 24-9-1965 as the right to sue for contribution had vested in the official receiver under Section 28 of the Insolvency Act. Section 28 (5) of the Insolvency Act provides "that the property of the insolvent for the purposes of this section shall not include any property which is exempted by the Code of Civil Procedure, 1908 or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree". Under Section 60 (e) of the Civil Procedure Code, "a mere right to sue for damages", is exempted from attachment. As such it is only a right to sue for damages that does not vest in the official receiver being a right in personam. In the instant case, the suit was for contribution which does not find a place in the list mentioned under Section 60 of the Civil Procedure Code. I think the contention of the learned counsel for the respondent that the plaintiff-petitioner had no right to sue on 24-9-1965 is in accordance with law. Therefore the question of the application for amendment being within time or not does not arise in the present case. No doubt if the suit had been filed by the official receiver beyond the period of limitation, the Court would give the benefit of proviso to Sec. 21 of the Limitation Act, to the official receiver if it was found later that the right vested in the insolvent. But in the instant case, the position being that the suit has been filed by a person who was not competent to institute a suit, the question of applicability of the proviso to Section 21 of the Limitation Act does not arise.

5. I, therefore, see no reason to interfere with the finding of the lower Court. The revision is accordingly dismissed. No orders as to costs.

VGP/D.V.C.

Revision dismissed.

AIR 1969 ANDHRA PRADESH 24
(V 56 C 13)

GOPALRAO EKBOTE, J.

Sri Venugopalaswamy Varu Temple represented by its trustees, Appellants v. V. Visweswara Prasad and another, Respondents.

Second Appeals Nos. 521 of 1963 and 1047 of 1964, D/-13-2-1967, against decree of First Addl. Sub-J., Vijayawada, in A.S. Nos. 21 and 22 of 1962, respectively.

(A) Limitation Act (1908), S. 6 and Art. 126 — Setting aside of alienation of ancestral property — Suit by after-born son and his brother who was in existence but minor at the time of alienation — No fresh cause of action for after-born son — Benefit of S. 6 available to existing son is available to him also — (Hindu Law—Aliena-

DK/EL/A385/67

tion by father — Setting aside of — Suit by after-born son — Starting point for limitation).

The law is fairly settled that a son born in a joint Hindu family acquires by birth interest in ancestral property, but does not acquire any interest in any right to sue. The cause of action for setting aside his father's alienation accrues only on an alienation and only when the purchaser takes possession under the alienation. No new cause of action accrues upon the subsequent birth of a son in the family. Consequently, a fresh period of limitation does not start from the date of his birth. When he was not born on the day of the transfer, he could not be said to be suffering from any disability on that date and eventually cannot take any advantage of Section 6.

(Para 9)

But, where a suit is instituted by a son who was in existence but was minor at the time of alienation, the extension of time under S. 6 is available to him. Such a suit would be a representative suit. If he succeeds, the property goes back to the family and enures for the benefit of all existing as well as future members of coparcenary excluding the father who has alienated the property. When the son who was in existence but minor at the time of his father's alienation can sue for the benefit of his family, the after-born son should not be deprived of the right to sue within the limitation which is available to the former under Section 6 of the Limitation Act. AIR 1943 Mad 378, Rel. on. Case-law discussed. (Paras 10, 11)

(B) Hindu Law — Alienation — Validity — Sole trustee of temple collecting amounts due to temple from others — Misappropriation of such amounts by him — Such a debt would not be an avyavaharika debt and the sale to satisfy such a debt would not suffer from any infirmity — (Hindu Law — Debts — Avyavaharika debt). AIR 1963 Andh Pra 425 (FB), Foll. (Point conceded). (Para 26)

Cases Referred: Chronological Paras

- (1963) AIR 1963 Andh Pra 425 (V 50) = 1963-1 Andh WR 308 (FB), Sri Venkateshwara Temple v. Radhakrishna 26
(1957) AIR 1957 Andh Pra 386 (V 44) = 1956 Andh WR 1067, Seshamma v. Venkayya 18
(1943) AIR 1943 Lah 281 (V 30) = 45 Pun LR 345 (FB), Dharu Indar Pal v. Firm Badri Das Sohan Lal 16, 18, 22
(1943) AIR 1943 Mad 378 (V 30) = 1943-7 Mad LJ 157, Srinivasalu v. Munisami 17, 18
(1938) AIR 1938 Lah 1 (V 25) = ILR (1937) Lah 769, Harnam Singh v. Aziz 15
(1937) AIR 1937 Lah 420 (V 24) = ILR (1937) Lah 395, Govind v. Ram Lal 15, 19, 20

- (1932) AIR 1932 Lah 605 (V 19) = ILR 13 Lah 520, Jowala Singh v. Sant Singh 15, 21
(1925) AIR 1925 All 54 (V 12) = 82 Ind Cas 307, Sikandar Singh v. Bachchu Pandey 14
(1924) AIR 1924 All 912 (V 11) = 79 Ind Cas 1019, Dhanraj Rai v. Ram Naresh Rai 14
(1923) AIR 1923 Oudh 52 (V 10) = 9 Oudh LJ 45, Ranodip Singh v. Rameshwar Prasad 13
(1922) AIR 1922 Lah 275 (V 9) = ILR 3 Lah 99, Ber Singh v. Hazara Singh 18, 21, 22
(1920) AIR 1920 Lah 39 (V 7) = ILR 1 Lah 558, Lachman Das v. Sunder Das 18, 20, 22
(1913) 40 Ind App 213 = ILR 40 Cal 966 (PC), Ramkishore Kedar-nath v. Jainarayan 12

I. Balaiah and A. Satyanarayana Rao, for Appellants; Y. Suryanarayana, A. Subba Rao and C. Venkata Subba Rao, for Respondents.

JUDGMENT: These two appeals arise out of O.S. No. 220 of 1959. These appeals are filed against the judgment of the First Additional Subordinate Judge, Vijayawada, given on 19th July, 1962.

2. The necessary facts in order to appreciate the contentions raised before me may be briefly stated. Late Sri Velagaloti Dasaradharamayya was an eminent advocate and Public Prosecutor at Vijayawada. He acquired considerable immovable as well as movable properties from the earning of his practice as an advocate. He executed a will on 24-11-1933 which was subsequently amended by a codicil dated 14-9-1934 whereby he disposed of his personal as well as ancestral properties. In so far as his self-acquired property was concerned, he gave life interest to his three sons and the remainder was given to the grandsons. In the ancestral property the three sons, since they were coparceners, they got the property in entirety after the death of the said Dasaradharamayya. Kodandaramayya was one of the three sons. This Kodandaramayya had taken to bad ways. He was addicted to drink and debauchery. The property which fell to the share of Kodandaramayya consisted of about 50 acres of land as well as some cash and jewellery. Within one year of his father's death which occurred on 3-5-1935, Kodandaramayya found himself in need of money. He, therefore, started selling the property. Under Exhibit A-43, dated 11-5-1938, he sold 4 acres and 4 cents of land situated in Demarcation No. 382/2 of Velagaleru village in favour of Sri Venugopalaswami Temple of Velagaleru of which Kodandaramayya himself was the sole trustee, D.W. 13 being the present trustee. The first plaintiff, who is the son of Kodandaramayya, was born on 13th May 1938. The second plaintiff was born subsequently on 23rd August 1954. Kodanda-

ramayya died on 31-12-1958. Dasaradha-ramayya had already died on 3-5-1935.

3. The plaintiffs, who are the sons of Kodandaramayya, instituted the present suit for a declaration that the alienation made by their father in favour of the temple under Exhibit A-43 was for an avyavaharika debt and therefore the sale deed is voidable. It was alleged that Kodandaramayya who was trustee for the temple had misappropriated the temple's monies which he used for his illegal and immoral purposes and in consideration of this misappropriated amount, he executed the sale deed, Exhibit A-43. It is on those facts that the plaintiffs contended that the sale is not binding upon them. They, therefore, wanted two-thirds share of theirs from the property conveyed to the temple under Exhibit A-43.

4. The defendants denied that the sale is voidable. They further alleged that the suit is time-barred in so far as the second plaintiff was concerned. They further claimed that the consideration for the sale was not avyavaharika debt. The sale is binding upon the plaintiffs.

5. Upon these pleadings, the trial Court framed several issues. Along with the present suit, these very plaintiffs instituted another two suits, O.S. Nos. 218 and 219 of 1959, to avoid the other alienations made by their father. These three suits were tried together by the Second Additional District Munsif, Vijayawada. Although issues were separately framed, with the consent of the parties, evidence was recorded in one suit, O.S. No. 218 of 1949 and was agreed to be treated as evidence in the other two suits also.

6. Upon this material, the trial Court held that the sale is not binding on the plaintiffs because in consideration of the misappropriated amount the father of the plaintiffs had executed Exhibit A-43. The trial Court also found that the suit, in so far as the first plaintiff is concerned, is within time, but it is barred in so far as the second plaintiff is concerned. In view of the finding in regard to the limitation, the trial Court dismissed the suit as against the second plaintiff but gave a decree in favour of the first plaintiff to the extent of his one-third share.

7. The defendants aggrieved by that decision preferred A.S. No. 21 of 1962. The plaintiffs, who were also not satisfied with the judgment, preferred A.S. No. 22 of 1962 to the Additional Subordinate Judge, Vijayawada. The learned Subordinate Judge held that the suit is not time-barred even in regard to the second plaintiff. He further found that the alienation made under Exhibit A-43 was made for avyavaharika, i.e., illegal and immoral purposes, and hence it is not valid and binding on the plaintiffs. The learned Subordinate Judge, therefore, decreed the plaintiffs' suit in its entirety. It is this view which is now assailed in the second appeal.

8. Two contentions are advanced before me by Mr. I. Balaiah, the learned counsel for the appellants. It was firstly contended that the suit is time barred as against the second plaintiff and the learned Subordinate Judge has erroneously held that the second plaintiff's suit also is within time. The second contention was that since the sale deed was executed in lieu of the amount which Kodandaramayya as a trustee had misappropriated, it cannot be said that the money which came into the hands of Kodandaramayya was tainted with criminality at the inception. His subsequent misappropriation does not alter the nature of the amount which he had received and if in lieu of the amount which he had subsequently misappropriated which came into his hands legally he executed Exhibit A-43, the sale deed, does not become voidable at the instance of the sons because it was not an avyavaharika debt for which the transfer was effected.

9. That an after-born son can, under certain circumstances sue to set aside his father's alienation of ancestral property is not disputed. The law seems to be now fairly settled that a son born in a joint Hindu family acquires by birth interest in ancestral property, but does not acquire any interest in any right to sue. The cause of action accrues only on an alienation and only when the purchaser takes possession under the alienation. See Article 126, now 109, of the Limitation Act. It would be a mistake to think that a new cause of action occurs upon the subsequent birth of a son in the family. The after-born son does not acquire a fresh cause of action and consequently a fresh period of limitation does not start from the date of his birth. In his case, the time from which the period of limitation is to be reckoned is the date of the transfer and taking of possession under it by the purchaser. When he was not born on the day of the transfer, he could not be said to be suffering from any disability on that date and eventually cannot take any advantage of Section 6, Limitation Act. It will thus be clear that a subsequently born son has the same cause of action which accrued to another coparcener apart from the father who made the alienation and who was living at the time of alienation.

10. The question, however, which arises in this case is whether the after-born son can take advantage of the extended time under Section 6 which was available to the first plaintiff who was in existence at the time of the alienation and was minor at that time. In other words, can the second plaintiff, an after-born son, file the suit to challenge the father's alienation within the period of same limitation as was available to the minor son who was in existence at the time of alienation, in this case the first plaintiff.

11. In considering this question it should be remembered that on the basis of the cause of action which had accrued to the

first plaintiff on the date of alienation, he could have instituted the suit taking advantage of Section 6 of the Limitation Act because he was minor at that time. Such a suit instituted by him would undoubtedly be a representative suit and any relief which he claims on avoiding alienation would go to the benefit of not only himself but to the other members of the coparcenary who were either in existence or came into existence subsequently. Such a suit would, in other words, be a representative suit. If he succeeds, the property goes back to the family and enures for the benefit of all existing as well as future members of coparcenary excluding the father who has alienated the property. It may be that the right of a coparcener who is born subsequently is not based on an independent cause of action but is based on the same cause of action which had immediately accrued the day when the possession was taken under the transfer. It may also be true that such a subsequently born son is not entitled to a fresh starting point of limitation on his birth but when the first plaintiff can sue for the benefit of his family, I fail to see why the second plaintiff should be deprived of his right to sue within the limitation which is available to the first plaintiff under Section 6 of the Limitation Act.

12. That this view is correct is supported by several decisions. The first case to be noticed is the Privy Council decision in *Ramkishore Kedarnath v. Jainarayan Ramrachhpal*, (1913) 40 Ind App 213 (PC). It appears that the suit out of which the appeal had arisen related to a joint Hindu family governed by the Law of Mitakshara. The suit was filed in 1907 by the four sons of one Kedar Nath to set aside a so-called alienation of ancestral property made by him in 1889 in consenting to an adoption by his brother's widow. The defendant resisted it principally on the ground of limitation. One of the plaintiffs was born on 20th December 1896, and the other three in 1890, 1892 and 1894. Holding that the suit was barred, the District Judge dismissed it. On appeal, the Additional Judicial Commissioner held that the claim of those plaintiffs who were born subsequent to the alienation was barred by limitation, but the claim of the plaintiff who came into existence in 1886 was saved by the provisions of Section 7, Limitation Act, now corresponding to Section 6 of Act 9 of 1908. His suit was, however, dismissed as it was held that he was bound by his father's acquiescence. All the plaintiffs therefore appealed against that decision. It was contended before their Lordships of the Privy Council that if the claim of the elder son was maintained, the other appellants would not be barred but would be entitled to the relief. Their Lordships on this aspect of the case observed:

"It was, however, conceded before this Board, and, as their Lordships think, right-

ly conceded, that if the first plaintiff succeeds in the suit, his younger brothers born before a partition of the estate will be entitled to share in the relief."

13. *Ranodip Singh v. Rameshwar Prasad*, AIR 1923 Oudh 52, is the next case which takes the view that the benefit of extended limitation, if one of the sons happens to be minor and was living at the time of alienation, can be taken by a subsequently born son and he can institute the suit within the same extended limitation which was available to the minor son who was living at the time of alienation.

14. The Allahabad High Court in the following cases took the same view: *Dhanraj Rai v. Ram Naresh Rai*, AIR 1924 All 912 at p. 914 and *Sikandar Singh v. Bachhu Pandey*, AIR 1925 All 54 at p. 55.

15. *Jowala Singh v. Sant Singh*, AIR 1932 Lah 605 can be said to be the leading case in so far as the Lahore High Court was concerned. In the same train of thought it decides:

"Where in the Punjab the father has made certain alienations without necessity and where on the date of the sale only one minor son is alive, while a second son is born after the date of the sale, limitation will run from the date of the cessation of the elder son's minority and both the sons can sue to set aside that alienation so long as the cause of action is subsisting. This is so because the second son has no independent right to sue. His right is derived from his elder brothers' right to sue, he being alive on the date of the alienation."

This view was subsequently followed in *Govind v. Ram Lal*, AIR 1937 Lah 420 and *Harnam Singh v. Aziz*, AIR 1938 Lah 1.

16. This question again came up before a Full Bench of the Lahore High Court in *Dharu Indar Pal v. Firm Badri Das Sohan Lal*, AIR 1943 Lah 281 (FB) and the view expressed in the abovesaid decisions has been upheld.

17. *Somayya, J.*, in *Srinivasalu v. Muni-sami*, AIR 1943 Mad 378, decided on similar lines.

18. It will thus be clear that the Privy Council and the several High Courts have taken the view that a subsequently born son can take advantage of the cause of action which had accrued to the son who was living and who was minor at the time of the alienation and he can bring the suit within the existing same limitation as was available to the son who was existing at the time of alienation. This right to sue is obviously based upon what is known as doctrine of overlapping. Since the subsequently born son takes advantage of the cause of action accrued to the coparcener surviving he is given the same limitation as is available to the coparcener then living and who is minor.

A discordant note, however, was struck by Viswanadham Sastry, J. in *Seshamma v.*

Venkayya, 1956 Andh WR 1067=(AIR 1957 Andh Pra 386). In that case, the learned Judge referred to the two prevailing views on this question. The learned Judge observed:

"One view is that so long as the cause of action subsists, the after-born son can take advantage of the period of limitation, not because he derives his right from existing coparceners whose right to sue is not barred by limitation but because the existence of that right to sue unbarred by limitation makes the cause of action still subsisting and the after-born son can, therefore, sue within the longest period of limitation which the coparcener existing at the time of the alienation has. If the existence of a coparcener clothes an after-born son with a right to sue, though an after-born son cannot claim the benefit of Section 6 of the Limitation Act in his own right, he cannot be deprived of benefit of the extended period claimable by the coparcener in existence at the time of the alienation. The other view is that the right of the after-born son is not derived from the existence of the coparcener at the time of the alienation. An after-born son has an independent right to sue on the cause of action which arose when the alienee took possession under the father's invalid alienation and his suit must be brought within 12 years under Art. 126, unaffected by any extended period of limitation available under Section 6 of the Limitation Act to a coparcener existing at the time of the alienation."

The learned Judge referred to two decisions: AIR 1943 Lah 281 (FB) and AIR 1943 Mad 378. It is evident that both these decisions support the earlier view referred to by the learned Judge. In support of the other view, no decision has been referred to in the judgment. I, however, find from different commentators that there were only two decisions which seem to take the latter view referred to by the learned Judge. They were Lachman Das v. Sunder Das, AIR 1920 Lah 39 and Ber Singh v. Hazara Singh, AIR 1922 Lah 275. Although these decisions are not referred to in the judgment of the learned Judge, the reference obviously was only to those two decisions because no other decision could be brought to my notice which is said to take the latter view.

19. It must, however, be noted that both these decisions were considered by a Bench of the same High Court in AIR 1937 Lah 420.

20. It appears from the decision in AIR 1920 Lah 39 that four sons of a Hindu contested the sale by him of his occupancy right more than 12 years after the alienation. At the time of the alienation only one of them was in existence and was about 9 years of age. At the time of the suit, however, he was more than 21 years of age and his suit was thus clearly barred by time. It is on this ground that the Division Bench of the Lahore High Court dis-

missed the case against all the four of them obviously because if the suit is time-barred against one son who alone was in existence at the time of alienation and if the suit is dismissed as against him, the other sons could not have taken advantage of their minority because they were subsequently born. That case, therefore, cannot be taken to decide that the subsequently born son cannot take advantage of the extended period of limitation if the son who was existing at the time of alienation was himself a minor. AIR 1937 Lah 420, therefore, rightly ignored this decision by impliedly holding that it is no authority on the proposition under consideration.

21. The learned Judges in the same judgment considered AIR 1922 Lah 275. Since the judgment in that case was not clear, their Lordships sent for the original record and after going through the record, their Lordships found that the remarks made in AIR 1922 Lah 275 related to a certain aspect of the case. In view of the elaborate consideration of the facts of that case, their Lordships did not seem to have taken this case to be holding anything contrary to what is stated in AIR 1932 Lah 605.

22. These two cases came again for consideration before the Full Bench in AIR 1943 Lahore 281 (FB). These cases were considered on similar lines. It can, therefore, be safely taken that AIR 1920 Lah 39 and AIR 1922 Lah 275 do not, in view of subsequent decisions, represent the correct position of law if they decide anything contrary to what subsequent decisions decided.

23. Viswanatha Sastry, J., preferred to uphold the view that the subsequently born son cannot take advantage of the extended period of limitation, firstly on the ground that the subsequently born son has an independent right to sue and he does not derive his right to sue from the minor son who was existing at the time of the alienation and secondly, because the subsequently born son cannot take advantage of Section 6 because he was not born when the cause of action had accrued.

24. It need not be disputed that the subsequently born son cannot take advantage of Section 6, if he happens himself to be minor in view of the fact that he was born subsequent to the accrual of the cause of action, it need not also be doubted that the privilege which Section 6 confers on a minor, who happens to be suffering from that disability at the time the cause of action arose, is a personal privilege and not attached to the cause of action and, therefore, it cannot be transmitted to anyone else. It cannot, however, be ignored that a suit by the existing coparcener in such a case is a suit not only on his behalf but on behalf of all other members existing as well as those who come into existence in future. It would thus be a representative suit. Even if the suit is taken to be time-barred as against a subsequently born son, it does not get time-

barred in so far as the coparcener who was living at the time when the cause of action had accrued; and when the son present succeeds, the benefit goes to all the members of the family. When that is so, I fail to see why the subsequently born son should be denied the facility of instituting a suit within the same limitation as is available to the coparcener who was minor and was living at the time of the accrual of cause of action. I have, therefore, no hesitation in falling a line with the view expressed by the decisions of the Privy Council, the several High Courts and by Somayya, J. It must be remembered that it was not necessary for Viswanatha Sastri, J., to decide this question expressly in that suit. His Lordship observed that, whichever view was adopted, the rights of defendants 3 to 5 became barred when the plaintiffs brought the suit. The said decision, therefore, cannot be taken as deciding anything contrary to what was held by Somayya, J.

25. Since the view of Somayya, J., is consistent with the view of the Privy Council as well as several High Courts with due respect, I echo the same view. I do not, therefore, find any difficulty in agreeing with the conclusion of the lower appellate Court that the suit of the plaintiffs is within time.

26. The second contention was regarding the nature of the debt. The recitals of Exhibit A-43 denote that Kodandaramayya, who was the sole trustee of the temple, had collected the amounts due to the temple. When the amount reached his hand, it can hardly be doubted that it was lawful. If Kodandaramayya subsequently misappropriated it, the claim of the temple as against Kodandaramayya cannot be said to be on the basis of misappropriation. It would have been a claim for the refund of the money which had lawfully gone into the hands of its trustee. His subsequent misappropriation of that amount does not alter the position. The amount when it reached the hands of Kodandaramayya was not tainted with criminality or illegality. If, for the purpose of paying the amount of the temple which was misappropriated subsequently by Kodandaramayya, a sale deed, Exhibit A-43, was executed, I fail to see how it can be said that the sale deed suffers from an infirmity because it was executed for an avyavaharika debt. There might have been conflict at some time on this question. But now the law seems to be firmly settled that such a debt would not be an avyavaharika debt and the sale to satisfy such a debt would not suffer from any infirmity. See *Sri Venkateswara Temple v. Radha Krishna*, 1963-1 Andh WR 308 = (AIR 1963 Andh Pra 425) (FB). That this is so is not disputed by the learned counsel for the respondents.

27. Since no other argument was advanced, the result is that both these appeals are allowed and the plaintiffs' suit dismiss-

ed. I leave the parties to bear their own costs throughout. No leave.

HGP/D.V.C.

Appeals allowed.

AIR 1969 ANDHRA PRADESH 29
(V 56 C 14)

JAGANMOHAN REDDY, C. J. AND
VAIDYA, J.

Kambhampati Venkata Satyanarayana, Appellant v. Kambhampati Peda Subbarao and others, Respondents.

Second Appeal No. 969 of 1962, D/-10-8-1967, against decree of Principal Sub-J., Vijayawada in A. S. No. 119 of 1960.

(A) Tort — Malicious prosecution — Proceedings under Sec. 107, Criminal P. C. (1898) — Whether 'Prosecution' for maintainability of suit for damages — Requisites.

The four essential requisites in a suit for damages for malicious prosecution under Sec. 107 Criminal P. C., before the plaintiff can obtain a decree are (1) that the plaintiff was prosecuted by the defendant, in that the law was set in motion against him on a criminal charge, (2) that the prosecution was determined in his favour, (3) that it was without reasonable or probable cause and (4) that it was malicious. The onus of proving each of these is undoubtedly on the plaintiff. It is difficult to envisage a person actuated by purely public spirit and thus subject himself to the inconvenience and expense in launching a criminal prosecution. It would not be untrue to postulate some element of personal interest or dislike for the person against whom the prosecution is launched which however would not amount to malice, though when it reaches the stage of ill-will, hatred, vindictiveness or cussedness, it can be said to be actuated by malice. Case law discussed. (1903) 13 Mad LJ 370, Disting.

(Paras 6, 9)

(B) Tort — Malicious prosecution — Test whether a proceeding under Criminal P. C., amounts to prosecution — Explained.

The test as to whether a proceeding is a prosecution under the Criminal P. C. is to see whether notices have been issued to the plaintiffs and in fact whether they were asked to show cause against the proposed action to be taken under the relevant provisions under which the proceedings were started. AIR 1944 PC 1 and AIR 1947 PC 108 and AIR 1951 Mad 659, Disting.

(Para 4)

Cases	Referred :	Chronological	Paras
(1966) AIR 1966 Cal 388	(V 53),		
Bharat Commerce and Industries Ltd. v. Surendra Nath Shukla			9
(1962) 1962 AC 726	= 1962-2 WLR		
832, Glinski v. McIver			7, 8
(1957) AIR 1957 Andh Pra 347			
(V 44) = 1956 Andh WR 530,			
Seshi Reddi v. Chandra Reddi			6

- (1951) AIR 1951 Mad 659 (V 38) =
ILR (1951) Mad 838, Akkuliya v.
Venkataswamy
(1947) AIR 1947 PC 108 (V 34) =
1947-2 Mad LJ 27, Mohamed
Amin v. Jogendra Kumar
(1944) AIR 1944 PC 1 (V 31) =
1944-1 Mad LJ 40 = 45 Cri LJ
803, Braja Sunder Deb v. Ramdeb
Das
(1935) 53 CLR 343, Common Wealth
Life Assurance Society Ltd. v.
Brain
(1911) ILR 38 Cal 880 = 15 Cal WN
917, Golap Jan v. Bholanath
Khettry
(1903) 13 Mad LJ 370, Kandasami
Asari v. Subramania Pillai
(1883) 11 QBD 79, Abrath v. North
Eastern Rly. Co.
(1883) 11 QBD 674 = 52 LJQB 488,
Quartz Hill Consolidated Gold
Mining Co. v. Eyre
P. P. Surya Rao, for Appellant; V. Nara-
simharao (for A. Lakshminarayana, V. Rama-
rao and K. Mahipathirao), for Respondents
Nos. 1 to 3, 5 to 7 and 9.

JAGANMOHAN REDDY, C. J.: Our learned brother Chandrasekhara Sastry, J., has referred this second appeal to a Bench for the determination of two questions involved therein viz., (1) whether a proceeding under Sec. 107, Cr. P. C., can be held to be a prosecution for the purpose of maintaining a suit for damages for malicious prosecution and (2) whether the findings regarding the malice and want of reasonable and probable cause are findings of fact whether they are findings which can be canvassed in second appeal. These questions arise from a suit instituted by the first plaintiff, Kambhampati Peda Subbarao and plaintiffs Nos. 2 and 3, his sons, the 4th plaintiff who is the father-in-law of the 1st plaintiff's first son by name Krishna Murty, the 5th plaintiff who is the father-in-law of the 2nd plaintiff and the 6th plaintiff who is the son-in-law of the 1st plaintiff against the brother of the 1st plaintiff, Kambhampati Venkata Satyanarayana alleging inter alia that the defendant and his two brothers, Gopalarao and Venkataratnam conspired to eliminate the first plaintiff from his business and because the 1st plaintiff took necessary steps to prevent them from taking possession of the business, the 1st defendant and his brothers harboured malice against the 1st plaintiff and his sons. On the night of 17-9-57, at about 10-30 P. M., when the 1st plaintiff's son, Krishna Murty went to his shop, which was dealing in goods obtained on an agency from Charminar Cigarette Factory, there was an altercation during the course of which Krishna Murty, Venkataratnam and Gopalarao are alleged to have received injuries. All the three of them were taken to the hospital for treatment. The next day, a police constable informed the 1st plaintiff that his son, Krishna Murty was taken to police station in an unconscious con-

dition and from there to the General Hospital, Vijayawada, for treatment, and that Krishna Murty ran away from the hospital in the early hours on 18-9-57. On the inquiry of the 1st plaintiff, however, he got information that at about 4 P. M., on 18-9-57, the police reported that Krishna Murty fell into a canal. From the inquiry, the 1st plaintiff suspected some foul play on Krishna Murty at the hands of the 1st defendant's brothers. He, therefore, sent a wire, Ext. A-1 dated 18-9-57 to the D. S. P., Krishna, and also to the Inspector General of Police conveying his apprehension and praying for immediate action. Thereafter, he sent a further wire, Ext. A-2 on 21-9-57 in which he disclosed his suspicion against the 1st defendant, his brothers and some others. In view of this, it is alleged that the 1st defendant in order to save himself and his brothers from the responsibility to account for the loss of Krishna Murty, has maliciously conceived the vicious idea of implicating the 1st plaintiff and the other plaintiffs in criminal proceedings, and consequently filed proceedings under Sec. 107, Cr. P. C., in M. C. 105/57 before the Joint Magistrate, Vijayawada, on 25-9-57 making false allegations. A preliminary order under Sec. 112, Cr. P. C., was passed by the Magistrate and notices were issued to the plaintiffs. In spite of the fact that nine adjournments were given to enable the defendant to produce evidence, he did not do so, even though all the plaintiffs were regularly attending the Court on the relevant dates. Eventually the complaint was dismissed as frivolous. The plaintiffs alleged malice and want of reasonable and probable cause against the defendant for having initiated proceedings against them under Sec. 107, Cr. P. C., and claimed damages for the mental damages for the mental agony and loss of reputation, which they suffered, as well as trouble and expense they had incurred, which they valued at Rs. 2000 made up of Rs. 1000 towards compensation for the mental agony and loss of reputation suffered by them and Rs. 1000 towards expenses incurred by them.

2. The defendants denied the allegations and stated that the security proceedings were instituted bona fide due to reasonable apprehension about the security of the defendant and his brothers. In the disputes which arose out of partition, the plaintiffs bore grudge against the defendant and his brothers. On the night of 17-9-57 out of spite and with a view to kill them, Krishna Murty, stabbed Venkataratnam and Gopalarao with a big knife when they were in the shop of Charminar Agency. It is stated that the said Krishna Murty was caught red-handed and kept in the police custody in the hospital at Vijayawada. Later on, he absconded to avoid criminal prosecution. Gopalarao and Venkataratnam were treated in the hospital for some time. The defendant further stated that it is not true that Krishna Murty received stab injuries; that it was due to terror and apprehension that the defen-

dant and his brothers believed that their lives were in danger and that the plaintiffs and Krishna Murty conspired against them. To ensure their safety, the defendant and his brothers filed M. C. 105/57 before the Joint Magistrate, Vijayawada, which was terminated as unnecessary because an offence under Sec. 307, I. P. C., was pending investigation against Krishna Murty. The defendant further stated that the security proceedings were not intended to defame the plaintiffs or bring them to disrepute or to cause them wrongful loss or suffering. M. C. No. 105/57 cannot be taken as a criminal prosecution launched against the plaintiffs so as to entitle them to claim damages for malicious prosecution. Besides, it is stated, the plaintiffs were not arrested or put to any hardship nor did they spend Rs. 1000 towards expenses and consequently, they are not entitled to damages. It is also pleaded that the suit is barred by limitation, and that a single suit is not maintainable.

3. The Munsif framed two issues, viz., (1) whether the defendant instituted the proceedings in M. C. No. 105/57 on the file of the Joint Magistrate, Vijayawada, against the plaintiffs without reasonable and probable cause, and whether he was actuated by malice in doing so, and (2) to what damages, if any, are the plaintiffs entitled? He held that not only was the prosecution actuated by malice but also it was without reasonable and probable cause and awarded Rs. 1000 as damages for mental suffering and loss of reputation, Rs. 500 for legal fees and Rs. 100 towards incidental expenses. An appeal preferred against this judgment before the Subordinate Judge, Vijayawada, was dismissed.

4. Mr. Surya Rao contends that proceedings under Sec. 107, Cr. P. C., cannot be said to be criminal proceedings and cannot be the basis for a claim for damages for malicious prosecution. It is his case that no charge was framed and the plaintiffs did not suffer any mental agony or loss of reputation as they were not prosecuted. He relies upon a decision of a Bench of the Madras High Court in *Kandasami Asari v. Subramania Pillai*, (1903) 13 Mad LJ 370. We may at once say that much water has flown under the bridge since that decision in 1902, and speaking for ourselves, though it has been disapproved in one of the later decisions, that decision is clearly distinguishable on the facts and circumstances of the present case. In that case, the defendants had presented a petition to the Divisional Deputy Magistrate giving him information that it was necessary that security should be taken from the plaintiff and others under Sections 107 and 110, Cr. P. C. The Deputy Magistrate referred the matter to the Sub-Magistrate for inquiry and report as to the truth of the allegations. The Deputy Magistrate recorded his opinion and no further action was taken. It may be observed that no notice was issued to the plaintiffs under Section 107 or Sec. 112, Cr. P. C., and they were not asked to show cause against the

proposed action. In these circumstances, the Bench held that whatever other remedy the plaintiffs may have, an action for damages for malicious prosecution will not lie. They further observed that "to sustain such an action there must have been a prosecution by the defendants of the plaintiffs for an offence". This sentence has given rise to the contention that proceedings under Ss. 107 and 110, Cr. P. C., cannot be termed to be a prosecution. It will be observed that the above decision is a very short and cryptic one, and the Bench did not feel the necessity to closely examine the scope and ambit of the proceedings under S. 107 or S. 110, Cr. P. C. All they were concerned with was whether on the facts and circumstances of that case, it was a prosecution, and indeed, there can be no two opinions in this respect that it is not a prosecution because the plaintiffs were not called upon to show cause, they were not subjected to any harassment or expenses nor was there any likelihood of their reputation being involved. In fact, they never need have known that such proceedings were ought to be initiated but perhaps they discovered it. This case was considered by another Bench of the Madras High Court consisting of Satyanarayana Rao and Raghava Rao, JJ., in the case of *Akkuliya v. Venkataswamy*, AIR 1951 Mad 659. Satyanarayana Rao, J., after referring to the facts of that case, observed at page 660 of the report:

"In that case, which arose out of proceedings under Sections 107 and 110, Cr. P. C. the proceedings were dropped at the initial stage after a report from the Sub-Magistrate was received. In view of that fact the observation of the learned Judges in that case is undoubtedly 'obiter'."

As we have said earlier, the case is clearly distinguishable and there is no need for us to consider that any observations made go beyond the scope of the facts and circumstances of that case. The learned Judges in *Akkuliya's* case, AIR 1951 Mad 659, referred to above have, on the other hand, held that proceedings under Sec. 145, Cr. P. C., constitute a prosecution in respect of which a suit for damages for malicious prosecution would lie. In the case before them, the respondents were served and they had to answer the complaint. It appears to us that the test as to whether a proceeding is a prosecution under the Code of Criminal Procedure is to see whether notices have been issued to the plaintiffs and in fact whether they were asked to show cause against the proposed action to be taken under the relevant provisions under which the proceedings were started. Reliance was placed by the learned Advocate for the appellant in *Braja Sunder Deb v. Ramdeb Das*, (1944) 1 Mad LJ 40=(AIR 1944 PC 1). It may be observed that their Lordships of the Privy Council in that case were again dealing with a case where the 1st appellant, though his name was included in the complaint, was not sent up for trial. It was, in fact, dropped and, there-

fore, the proceedings against him were not considered to be a criminal prosecution. Lord Porter at page 43 of the report answered the question viz., "has the Rajah of Aul any cause of action for malicious prosecution?" in these words: "In their Lordships' view clearly he has not; the simple answer is that he was never prosecuted". We may, however, refer to another judgment of their Lordships of the Privy Council in *Mohamed Amin v. Jogendra Kumar*, (1947) 2 Mad LJ 27 = (AIR 1947 PC 108), which supports the view we have taken. The following question was posed by Sir John Beaumont delivering judgment of their Lordships of the Privy Council, viz.,

"At what stage will criminal proceedings instituted falsely and maliciously before a Magistrate under the provisions of the Indian Code of Criminal Procedure, lay the foundation for a suit for damage for malicious prosecution?"

It may be observed that the complaint in that case was filed under Sec. 420, Cr. P. C. The Magistrate took cognizance of the complaint, and forwarded it for inquiry under S. 202, Cr. P. C. The Magistrate gave notices to the appellants after the receipt of which the appellants attended the inquiry with the counsel in open Court, and incurred expenses. Later, however, the complaint was dismissed. In considering the question, their Lordships found it necessary to examine the case of *Golap Jan v. Bholanath Khettry*, (1911) ILR 38 Cal 880, which held that in the circumstances of that case, in law, there was no prosecution. That was a case where a complaint was filed against the plaintiff for criminal breach of trust and the Magistrate had referred the matter to the police under Sec. 202, Cr. P. C., for inquiry and report. The complaint was finally dismissed without issuing process, under Section 203, Cr. P. C. It was held that in those circumstances no prosecution had commenced and accordingly no suit for malicious prosecution would lie. Reliance was placed in that case on the heading to Chapter 17, namely "the commencement of proceedings before Magistrates", and it was held that that stage had never been reached. Not only this case but also several other cases were considered by their Lordships. After an examination of these cases, Sir John Beaumont observed at page 31 of the report as follows:—

"That the word 'prosecution' in the title of the action is not used in the technical sense which it bears in Criminal Law is shown by the fact that the action lies for the malicious prosecution of certain classes of Civil Proceedings, for instance falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company (*Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1883) 11 QBD 674

5. From this consideration of the nature of an action for damages for malicious prosecution emerges the answer to the problem before the Board. To found an action for damages for malicious prosecution based

upon criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution; the test is whether such proceedings have reached a stage at which damage to the plaintiff results. Their Lordships are not prepared to go as far as some of the Courts in India in saying that the mere presentation of a false complaint which first seeks to set the criminal law in motion will per se found an action for damages for malicious prosecution. If the Magistrate dismisses the complaint as disclosing no offence with which he can deal, it may well be that there has been nothing but an unsuccessful attempt to set the Criminal Law in motion, and no damage to the plaintiff results.

In that case, it was considered that as cognizance of the complaint was taken and after examining the complainant on oath, notice was issued to the plaintiff, it was certainly a prosecution within the meaning of malicious prosecution giving rise to a claim for damages.

6. A Bench of this Court consisting of Subba Rao, C. J., and Satyanarayana Raju, J., as they then were, in the case of *Seshi Reddi v. Chandra Reddi*, 1956 Andh WR 530 = (AIR 1957 Andh Pra 347), laid down a similar test that in an action for malicious prosecution, the plaintiff must show first that he was prosecuted by the defendant, that is to say, the law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause, and fourthly that it was malicious. The emphasis is on the setting in motion of the law against the person aggrieved. In our view, therefore, as far as the facts of this case are concerned, notices were issued against the plaintiff-respondents under Sec. 112 and at least nine adjournments were taken during which all the plaintiffs in this case were present as respondents and were defended by counsel. In view of the fact that no evidence was adduced, on the request of the appellant himself, case diaries were perused, and the complaint was dismissed on the ground that "there is no case made out at all against the respondents before the Court and the petition is frivolous in nature". This finding by the Criminal Court, however, is not conclusive. What has to be established is as repeatedly stated the four essential requisites in a suit for damages for malicious prosecution before the plaintiff can obtain a decree, namely (1) that the plaintiff was prosecuted by the defendant in that the law was set in motion against him on a criminal charge, (2) that the prosecution was determined in his favour, (3) that it was without reasonable or probable cause, and (4) that it was malicious. It is needless to say that the onus of proving each of these requisites is upon the plaintiff. In this case, the first two requisites have been established, namely, that the plaintiffs were prosecuted by the defendant

THE All India Reporter 1969

Assam & Nagaland High Court

AIR 1969 ASSAM AND NAGALAND 1
(V 56 C 1)

S. K. DUTTA, C. J. AND K. C. SEN, J.

Manihar Singh, Petitioner v. Superintendent of Police, United Khasi-Jaintia Hills, Shillong and others, Respondents.

Civil Rule No. 453 of 1966, D/-20-5-1968, from order of Deputy Inspector General of Police, Range Assam, Gauhati, D/-24-6-1966.

(A) Constitution of India, Art. 311 (2) — Assam Police Manual Part III Rule 66 — Disciplinary enquiry — Power to frame charge cannot be delegated by disciplinary authority in absence of statutory provisions.

The framing of charges, the holding of an enquiry into them, the suspension of the civil servant during the enquiry, the notice to show cause, are all steps in the exercise of the disciplinary powers. All these steps are required to be taken by the disciplinary authority and not by a delegate of that authority. In the absence of a statutory provision permitting expressly or impliedly delegation of disciplinary powers, an authority other than the disciplinary authority has clearly no power to frame, on its own initiative, charges against a civil servant and hold an enquiry into them. AIR 1966 Madh Pra 193, Foll. (Para 6)

(B) Constitution of India, Art. 311 — Departmental enquiry — Doctrine of bias — Principles.

The authorities entrusted with departmental enquiry are bound by the principles governing the "doctrine of bias". The principles are: (i) no man shall be judge in his own cause; (ii) justice should not only be done but manifestly and undoubtedly seem to be done. The two maxims yield the result that if a member of a judicial body is sub-

ject to a bias (whether financial or other) in favour of, or against, any party to a dispute, or is in such a position that a bias must be assumed to exist, he ought not to take part in the decision or sit on the tribunal. AIR 1960 SC 468 and AIR 1956 Cal 662, Foll. (Paras 8 and 9)

Cases Referred: Chronological Paras

(1966) AIR 1966 Madh Pra 193	
(V 53) = 1966 MPLJ 145, Shardul Singh v. State of Madhya Pradesh	6
(1960) AIR 1960 SC 468 (V 47) = 1960-2 SCR 609, Mineral Development Ltd. v. State of Bihar	8
(1959) AIR 1959 SC 1376 (V 46) = Civil Appeals Nos. 198 to 200 of 1959, Nageswara Rao v. State of Andhra Pradesh	8
(1956) AIR 1956 Cal 662 (V 43) = 60 Cal WN 933, A. R. S. Choudhury v. Union of India	9

J. P. Bhattacharjee, S. N. Medhi and D. N. Choudhury, for Petitioner; A. M. Majumdar, Jr. Govt. Advocate, for Respondents.

SEN, J.: This is an application filed by Manihar Singh for a Writ of Certiorari or a writ of like nature for quashing the impugned order dated the 29th January 1960 passed by the respondent No. 1 the Superintendent of Police, United Khasi-Jaintia Hills, Shillong and the order passed in appeal by the respondent No. 3 the Deputy Inspector General of Police, Range Assam, Gauhati dated the 24th June, 1966. He has also prayed that a Writ of Mandamus or a writ of like nature should be issued directing the respondents to cancel, recall or otherwise forbear from giving effect to the impugned orders as aforesaid.

2. It appears from the petition that Constable No. 405 Manihar Singh of Laban Beat House at Shillong was charge-sheeted for commission of alleged offences as men-

tioned in the charge-sheet and ultimately after evidence was taken, the Superintendent of Police dismissed the Constable.

3. The main charge was that he instigated a number of Constables to approach the Secretary of the Head Constables and Constables Association, Shillong to represent their grievances for delay in receipt of pay packets for the month of June, 1959. Further the Constable also did an act of indiscipline by ringing up directly the Superintendent of Police, Shillong to represent their grievances. There are various other charges to which no reference need be made for disposal of this petition, but at this stage it may be pointed out that he was also indicted for infringement of the Government Servants' Conduct Rules by the Additional Circle Inspector of Police. It will be found from Annexure A that the entire charge-sheet was drawn up by the Additional Circle Inspector of Police, Shillong and the evidence as against the Constable was recorded by him as well. On the basis of this report the Superintendent of Police, however, dismissed the petitioner from service and stressed in his order that he had violated the Government Servants' Conduct Rules in committing the offences charged with. Although an important charge was framed for an disciplinary act of ringing up the Superintendent of Police with the obvious purpose of having a conversation with him, the latter, however, with fairness did not enter into this charge for punishing the Constable as he was a witness to such an event.

4. The Assam Government Servants' Conduct Rules, 1937 as amended up to 1st October, 1952 do not bring in the acts as mentioned in the charge sheet as acts of indiscipline, within their purview. In the later Rules of 1965 it has been however provided in R. 3 (1) (iii) that "Every Government servant shall at all times do nothing which is unbecoming of a Government servant." The appropriate authority has undoubtedly jurisdiction to punish any member of the subordinate staff for any delinquency and other acts of indiscipline without reference to the Government Servants' Conduct Rules, 1937, and, therefore, in the absence of any provision as mentioned in the Rules of 1965, resort to the former rules appears to be inappropriate. We have, without entering into the merits of the impugned order, reasons to say so, as the aggrieved persons are prone to catch hold of any loophole for criticism as appearing in the order complained of.

5. The main point as urged by Mr. Bhattacharjee appearing for the petitioner is that the charge in this case ought not to have been framed by the Additional Circle Inspector of Police, as he is not the dismissing authority. Under the Assam Police Manual, Part III, Rule 66 (latest amendment) it is not clearly stated whether an officer subordinate to the appointing and dismissing authority has any power to

frame charge against a delinquent Government servant. Clause IV of the said rule provides as to what authority can inflict punishment and the nature thereof. In the schedule under Cl. IV it appears that an Inspector of Police cannot inflict the punishment of dismissal on a constable. Such punishment under the said clause can only be inflicted by a Superintendent of Police. In the instant case it appears that charges against the constable were framed by the Circle Inspector of Police and, therefore, a matter for serious consideration arises whether in the absence of delegation for framing charges an order of dismissal can be passed by the Superintendent of Police on the basis of charges framed by the Circle Inspector.

6. We have already stated that in Rule 66 of the Assam Police Manual, Part III, no provision for delegation has been made, so far as dismissal is concerned. In spite of it, no material has been placed before us to show that any delegation for framing charge was ever made and, therefore, the averment in the counter-affidavit that the Additional Circle Inspector of Police was duly authorised by the Superintendent of Police by a D. O. letter No. 1604 dated 7-7-1959, in the absence of any such provision in Rule 66 *ibid*, and consequently the entire proceedings against the constable were valid, cannot be invoked in aid of the respondents' contention. In this connection Mr. Bhattacharjee has first of all referred us to a decision reported in AIR 1966 Madh Pra 193, Shardul Singh v. State of Madhya Pradesh. In this decision it has been held *inter alia* that the factum of the framing of charge cannot be delegated by a dismissing authority to any of its subordinates, and their Lordships observed as follows:—

"The exercise of disciplinary powers, or the field of disciplinary action, is not restricted merely to the passing, by the appointing authority, of an ultimate order imposing disciplinary punishment against the employee. It extends also to the very initiation of disciplinary action against a civil servant or employee by framing charges against him and holding or directing the holding of an inquiry into those charges. The framing of charges, the holding of an inquiry into them, the suspension of the civil servant during the enquiry, the notice to show cause, are all steps in the exercise of the disciplinary powers. All these steps are required to be taken by the disciplinary authority and not by a delegate of that authority. In the absence of a statutory provision permitting expressly or impliedly delegation of disciplinary powers, an authority other than the disciplinary authority has clearly no power to frame, on its own initiative, charges against a civil servant and hold an enquiry into them."

With great respect we agree with the view expressed by the Madhya Pradesh High Court and in the instant case we find that there being no authoritative delegation

under the relevant rules, the framing of charge by the Additional Circle Inspector, even assuming that there was such direction, is against the fundamental principles of law stated above and the rules, and as such the petitioner can claim that his fundamental rights have been invaded. Regard being had to this aspect of the matter, we are of opinion that both the Superintendent of Police and the Appellate Authority built the structure on a very shaky foundation, which must result in its collapse. On this ground alone the petitioner is entitled to succeed.

7. The last point as made by Mr. Bhattacharjee is that the Superintendent of Police being a witness to one of the impugned dereliction of duties or delinquency of the constable, who is the petitioner before us, viz., having telephonic conversation with him, he ought not to have taken up the inquiry at all, as in any event the question of bias in such circumstances may arise. We have already said that the Superintendent of Police with sufficient amount of fairness has refused to take any notice of this charge as he was a witness thereof, yet on the principle of propriety and for preventing any loophole as to apprehension of prejudice in the mind of the petitioner, the Superintendent of Police would have done better if he did not take up the case at all.

8. In this connection Mr. Bhattacharjee has referred to a decision reported in AIR 1960 SC 468, *Mineral Development Ltd. v. State of Bihar*. In para 10 of the judgment their Lordships have observed as follows:—

“Tribunals or authorities who are entrusted with quasi-judicial functions are as much bound by the relevant principles governing the ‘doctrine of bias’ as any other judicial tribunal. This Court in a recent decision in *Nageswara Rao v. State of Andhra Pradesh*, Civil Appeals Nos. 198 to 200 of 1959: AIR 1959 SC 1376, observed:

“The principles governing the ‘doctrine of bias’ vis-a-vis judicial tribunals are well settled and they are: (i) no man shall be judge in his own cause; (ii) justice should not only be done but manifestly and undoubtedly seem to be done. The two maxims yield the result that if a member of a judicial body is ‘subject to a bias (whether financial or other) in favour of, or against, any party to a dispute, or is in such a position that a bias must be assumed to exist, he ought not to take part in the decision or sit on the tribunal’”

As already pointed out, this principle of law, as enunciated by the Supreme Court, justifiably applies to the instant case.

9. Lastly, we may mention a Calcutta decision reported in AIR 1956 Cal 662, *A. R. S. Choudhury v. Union of India*, in which it has also been pointed out that a departmental enquiry consists of four main stages, namely, (a) charge (b) investigation of the charge (c) finding, punishment, and

(d) appeal. So far as the charge is concerned, his Lordship Mr. Justice Sinha (as he then was) has stated that a departmental enquiry is not conducted with the rigidity of a judicial trial. Hence, the charge which is to be framed need not be framed with the precision of a charge in a criminal proceeding. But it must not be vague or so general as to make it impossible of being traversed. So far as the investigation of the charge is concerned, his Lordship has said that a departmental enquiry is not a judicial proceeding and the law and procedure applicable to judicial proceedings are not applicable. But the proceedings cannot be held in an arbitrary manner and the rules of natural justice must still be applied.

10. Regard being had to the matters discussed above, we find that the impugned orders were lacking in observance of the law and rules and were also against the rules of natural justice.

11. On these main points we are of the opinion that the petition must succeed and the rule must be made absolute. The order passed by the Superintendent of Police and the impugned appellate order passed by the Deputy Inspector-General of Police are hereby quashed and let a writ in the nature of certiorari be issued against them with a direction to forbear from giving effect to the orders passed by them.

12. Be it noted, however, that in spite of the order passed by us as aforesaid, it is open to the appropriate authority to start a fresh proceeding against the constable, namely, the petitioner, strictly in accordance with law and the rules and procedure prescribed.

13. The petition is accordingly allowed and the rule is made absolute, but there will be no order as to costs.

14. S. K. DUTTA, C.J.:—I agree.
CWM/DVC Rules made absolute.

AIR 1969 ASSAM AND NAGALAND 3
(V 56 C 2)

C. SANJEEVA ROW NAYUDU, C. J.
AND P. K. GOSWAMI, J.

Smt. G. Vasantha, Petitioner v. The State of Nagaland and others, Respondents.

Civil Rule No. 206 of 1967, D/-4-3-1968, from order of Deputy Director of Education, Nagaland, Kohima, D/-16-2-1967.

(A) Constitution of India, Art. 311 — Removal from service — Termination of service by an authority subordinate to appointing authority — Assistant Teacher appointed by Chief Secretary to State — Termination of Service after 5 years by Deputy Director of Education, an authority subordinate to Chief Secretary — Termination, held, amounted to removal since the

IL/IL/D847/68

incumbent was no longer in a position to serve. (Para 6)

(B) Central Civil Services (Temporary Service) Rules, 1949, Rr. 3 and 2 (b) — Quasi-permanency — Incumbent petitioner holding a temporary post continuously for five years — Termination without any cause being shown against petitioner — Held, on facts that as the petitioner ought to be treated as quasi-permanent employee termination amounted to removal of service attracting Art. 311 of the Constitution. AIR 1958 SC 36, Ref. (Paras 10 and 12)

Cases Referred: Chronological Paras (1958) AIR 1958 SC 36 (V 45) =

1958 SCR 828, Parshotam Lal Dhingra v. Union of India

T. C. Das, for Petitioner; D. M. Sen, Advocate General for the State of Nagaland and A. R. Barthakur, Govt. Advocate for State of Nagaland, for Respondents.

NAYUDU, C. J.: In this petition under Article 226 of the Constitution the termination of the services of the petitioner Shrimati G. Vasantha, who was employed with the State of Nagaland as an Assistant Teacher in Zunheboto High School, with effect from 1st April 1967 by an order dated 16th February, 1967 issued by the Deputy Director of Education, Nagaland, Kohima is questioned.

2. The petitioner claims that she was first entertained in service in the month of June 1962 and was appointed to the post of Assistant Teacher in Zunheboto High School by the Chief Secretary to the Government of Nagaland. According to the petitioner, she served faithfully and discharged her duties quite efficiently and to the satisfaction of the authorities concerned. The petitioner, who is a B. A. (Hons.) Graduate of the Madras University, which is equivalent to an M. A. degree, appears to have earned a good reputation as an assistant teacher, as she claims in the petition and she served in the same school till the last date of March 1967 for a period of nearly five years. She claimed that in the seniority list of the Education Department, her name appeared in the 11th position.

In view of her efficient service, the Government of Nagaland in the year 1963, rewarded her with inauguration of the State of Nagaland Medal in view of her loyal and valuable service to the State. She further alleged that all of a sudden and to her great surprise the Deputy Director of Education, Nagaland, Kohima, respondent No. 4 to the petition, served a notice to the petitioner dated 16th February, 1967, terminating her services on and from 1st April 1967 without giving any reason or mentioning any grounds for the action taken. The petitioner further claimed that no information of any kind was given to her, nor was any reason shown for the termination of her services, no charge or charges have been framed against her nor was she given an opportunity to show cause before the termination of her services. The

petitioner further claimed that during the relevant period, that is, 1966-67, there were five assistant teachers in Zunheboto Government High School, Nagaland, where the petitioner was serving as one of the graduate assistant teachers and that in view of Notification No. EDS/1/29/65 dated 10-10-66 issued by the Joint Secretary to the Government of Nagaland, the service as well as the post of the petitioner became permanent.

The petitioner has claimed that she being in her permanent post in view of the said notification, any termination of her service in the manner aforesaid is against the principle of natural justice and in violation of the provisions of Article 311 of the Constitution. The petitioner points out that she made representations against the action taken against her but received no answer. The petitioner accordingly prays for the issue of a writ in the nature of mandamus or like nature to quash and cancel the impugned order dated 16-2-67 terminating her services and to direct the respondents including the State of Nagaland to forbear from giving effect to their order terminating her services as mentioned above.

3. The State of Nagaland represented by the learned Advocate General of the State contended that the post held by the petitioner was a temporary post, which according to the contract of service is terminable with one month's notice, that one month's notice had accordingly been given to her, that her services were terminated in conformity with the terms and conditions of the contract of service under which the petitioner was serving and that there was no mala fides or other cause for terminating her services. As the petitioner, according to the respondent, had no permanent footing, she cannot claim the benefit of Article 311 of the Constitution as a precursor to removal from service. It is also claimed that the termination of the services of the petitioner was in order and no exception can be taken to it. It is also contended by the learned Advocate General that the petitioner was not a quasi permanent servant and, therefore, the benefits of that service are not attracted in her case and the services of the petitioner having been rightly terminated, she could have no cause for complaint and the petition should be dismissed.

4. It is clear from the submissions made in the case and the affidavits filed, that the petitioner was in service for a period of nearly five years as a graduate teacher in the employment of the Nagaland Government, and that she had been appointed by the Chief Secretary to the Government of Nagaland, although in a temporary post. It is also clear that the appointment letter Annexure 'A' to the petition dated 23-10-62 did say that the service may be terminated by one calendar month's notice in writing on either side. But the point for consideration is as to whether the services of the petitioner have been validly terminated in the circumstances of the case.

5. Two main points have been urged before us by Mr. Das, the learned counsel for the petitioner. He claimed that as she was appointed by the Chief Secretary to the Government and as the termination of her appointment was by the Deputy Director of Education, who is a subordinate to the Chief Secretary or an inferior officer to the Chief Secretary, the termination is in violation of Article 311 (1) of the Constitution and, therefore, is bad. The second point taken by Mr. Das is that although she was initially recruited to a temporary post, the post itself had been made permanent by the Government orders and that according to the instructions issued by the Chief Secretary to the Government of Nagaland, the holders of the posts that had been declared permanent must be declared to have been appointed on a permanent basis to those posts. Such being the case, the petitioner must be deemed to be a permanent Government servant and, therefore, could not be removed from service without following the procedure envisaged by Article 311 of the Constitution.

6. On the first point we are satisfied that the petitioner was appointed by the Chief Secretary, which is made clear from Annexure A to the petition, the genuineness of which is not disputed. It is also clear that the services of the petitioner were terminated by the notice issued by the Deputy Director of Education, vide Annexure D to the petition dated 16th February, 1967, and it is not also disputed that the Deputy Director is an inferior officer to the Chief Secretary to the Government. But the only point that the learned Advocate General urged in this behalf is that mere termination of service does not amount to one of the three actions contemplated by Article 311 of the Constitution, namely, dismissal, removal or reduction in rank. On this point, under the circumstances of the instant case, we feel that termination of service has the direct effect of a removal from service, because the incumbent serving the State is no longer in a position to serve, and, therefore, no special meaning attaches to the word 'removal'. We are satisfied that what is contemplated by Article 311 of the Constitution is an exclusion from service, whether it is by way of an order of removal or by way of an order of termination of the service. Hence we are satisfied that in the instant case the authority, namely the Deputy Director of Education, who sought to terminate the service of the petitioner, had no jurisdiction to terminate the services of the petitioner.

In this connection reliance was sought to be placed on the order dated the 3rd January 1967 issued by the Joint Secretary to the Government of Nagaland, Education Department, which contained delegation of financial and cognate powers to the Deputy Director of Education to exercise the powers of the head of the Department during the absence of the Director of Education or

during such period as the post of the Director of Education may be vacant. Our attention has been drawn to paragraph 9 of the affidavit-in-opposition of Mr. K. Jethro Angami, Assistant Director of Education to the effect that at the time the Deputy Director of Education was holding charge of the office of the Director of Education. We are satisfied that even assuming that the delegation were true, that would not be sufficient to empower the Deputy Director of Education to exercise all the powers of the Director of Education in regard to the order quoted above and in the instant case it cannot take away the rights of the petitioner under Article 311 (1) of the Constitution. The objection still remains that the removal was not effected by the Chief Secretary, who was superior to the Director of Education. In the circumstances, therefore, we hold that the removal in the instant case is contrary to Article 311 (1) of the Constitution and, therefore, is unconstitutional and invalid.

7. The next point to consider is whether the petitioner could be said to be in permanent service, and even otherwise, whether Article 311 of the Constitution is attracted to the case.

8. It is true that the termination appears to be innocuous and not on any disciplinary or punitive grounds, but the question that arises for consideration is whether it is so innocent as it appears to be. If the claim in the petition that her services were greatly appreciated and that she was rewarded on account of her services were to be accepted as true, particularly when the same are not denied specifically in the counter-affidavits, one would like to know what exactly the reason for the termination of her services is. Of this there are absolutely no indications in the record. That the petitioner had been holding this post for a period of nearly five years is not disputed and nothing is alleged against her either as to her conduct or to her ability and efficiency. On the date of termination of her services, she was holding a permanent post and five posts of assistant teachers were declared permanent under Schedule 9 at page 19 of the paper book read with Government Notification No. EDS/1/29/65 dated 10-10-66 referred to above, which is Annexure E to the petition. It is also claimed by the petitioner that she was the seniormost of the five assistant teachers.

9. Our attention has been invited in this connection to the circular letter dated 1-11-66 at page 46 of the paper book issued by the Joint Secretary to the Government of Nagaland, Home Department, Kohima to all heads of departments. The heading of this letter is as follows:—

"Sub: Making of posts under the Nagaland Government permanent and grant of permanency to Nagaland Govt. employees. Framing of permanency Rules". In this circular letter the Joint Secretary states as follows:—

"In connection with the above I am to mention that the Government of Nagaland will shortly be issuing rules regarding grant of permanency and confirmation of individuals against permanent posts. Until these rules are promulgated no persons should be made permanent against any post under the Nagaland Government".

As against this we find at page 47 of the paper book a letter dated 7th January, 1967 issued by the Joint Secretary to the Government of Nagaland, Education Department, Kohima to the Director of Education, Nagaland, Kohima, Annexure II (a) which lays down that incumbents are to be declared permanent in order of seniority in the cadre in accordance with the scale of pay prescribed for such posts and not according to the seniority of the incumbents in their respective establishment even though distribution of the permanent posts have been made School/Establishment-wise in the Education Department's sanctioning letter No. EDS 1/29/65 dated 10-11-66. Then we have Annexure III at page 48 of the paper book which is a memorandum dated 22-6-67 issued by the Home Department, Government of Nagaland, which states that all concerned are to take immediate action in declaring their respective employees permanent against posts already made permanent by the Government. What is more important to be noticed in this connection is Annexure A to the counter-affidavit filed by the petitioner at page 57 of the paper book, which is 'minutes of a meeting' held by the Chief Secretary to the Government of Nagaland on 17th August, 1966, relevant portions of which may be extracted:—

"Repeated orders have been issued regarding the making of posts permanent. Despite this, the Accountant General has recently pointed that very many posts in Nagaland were still temporary giving rise to infructuous work every year for continuance of the posts and scrutiny of the records etc., in his office. The Chief Secretary emphasised that Government orders had already been issued that 80 per cent of all posts which were in existence for 3 years on 1st January 1966, should be made permanent. A copy of this Government order is enclosed for immediate action.

Regarding the permanency of individuals against these posts, it was decided that even in the absence of service rules all persons who had been in service for three years and whose seniority has been fixed on the basis of the principles of seniority issued by the Home Department vide No. 11/APA/1/66 dated 9-6-1966 (copy enclosed) should be granted permanency".

10. According to Rule 3 of the Central Civil Services (Temporary Service) Rules, 1919, which, admittedly, are in force in Nagaland, a person who holds Government service for more than three years is accepted as a quasi-permanent servant and a declaration is issued in pursuance of the rule. This rule is as follows:—

"3. A Government servant shall be deemed to be in quasi-permanent service —

- (i) if he has been in continuous Government service for more than three years; and
- (ii) if the appointing authority, being satisfied as to his suitability in respect of age, qualifications, work and character, for employment in a quasi-permanent capacity, has issued a declaration to that effect, in accordance with such instructions as the Governor General may issue from time to time".

Under Rule 2 (b) of these rules 'quasi-permanent service' has been defined as temporary service commencing from the date on which a declaration issued under Rule 3 takes effect and consisting of periods of duty and leave (other than extraordinary leave) after that date. As Annexure A deals directly with the declaration of permanency of individuals holding permanent posts, it is, in our opinion, intended to serve as a declaration as required by Rule 3 (ii) of the said Rules. Hence, we are of opinion that the petitioner must be regarded as a quasi-permanent servant of the Government and as such cannot be removed just as any other permanent Government servant cannot be removed, except for reasons bringing the case within the scope of Article 311 of the Constitution.

11. The learned Advocate General, Nagaland placed reliance on a number of decisions. It will be useful to refer to the case of Parshotam Lal Dhingra v. Union of India, reported in AIR 1958 SC 36. He placed particular reliance on the following passage at p. 49:

"In short, if the termination of service is founded on the right flowing from contract or the service rules then prima facie, the termination is not a punishment and carries with it no evil consequences and so Art. 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with".

Then lower down at page 49 their Lordships observed as follows:—

"But the mere fact that the servant has no title to the post or the rank, and the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post, does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the

servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty. The use of the expression 'terminate' or 'discharge' is not conclusive. In spite of the use of such innocuous expressions, the Court has to apply the two tests mentioned above, namely, (1) whether the servant had a right to the post or the rank or (2) whether he has been visited with evil consequences of the kind hereinbefore referred to? If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from service or the reversion to his substantive rank must be regarded as a reduction in rank and if the requirements of the rules and Art. 311, which gives protection to Government servant have not been complied with, the termination of the service or the reduction in rank must be held to be wrongful and in violation of the constitutional right of the servant".

12. The petitioner is the seniormost in the list of the persons holding certain posts and which posts have been declared to have been permanent and nothing is shown against her, except an attempt to remove her from service by virtue of the service rules or conditions of service. Obviously, therefore, the removal has no legs to stand on and could not have been resorted to except as a punishment or penalty. Having regard to all the circumstances in this case coupled with the circumstance that the Government does not tell us how persons junior to her are retained in service while the services of the petitioner, who is the seniormost of the assistant teachers, are terminated, we feel that Article 311 of the Constitution is clearly attracted in this case and it is not disputed that the provisions of this article had not been complied with in this case. We, therefore, hold that the order terminating the services of the petitioner is devoid of jurisdiction and unconstitutional and quash the same, and as a consequence we declare that the petitioner is still in service of the State of Nagaland in the post she was holding immediately prior to the termination of her services.

13. The rule is thus made absolute and the petition is allowed with costs. Advocate's fee Rs. 250 (rupees two hundred and fifty).

GGM/D.V.C.

Petition allowed.

AIR 1969 ASSAM AND NAGALAND 7
(V 56 C 3)

S. K. DUTTA, C. J. AND
K. C. SEN, J.

M/s. Bangshidhar Shewbhagwan and Co.,
Petitioners v. Deputy Commissioner,
Lakhimpur and others, Opposite Parties.

Civil Rule No. 420 of 1966, D/-30-7-1968, from order of Deputy Commissioner, Lakhimpur, D/-25-10-1966.

(A) Defence of India Act (1962), Ss. 29 and 40 — Delegation of powers by Central Government — To whom can be made — Imposition of conditions on delegate not obligatory — All powers of Central Government may be delegated — Notification delegating powers under S. 29 to specified authorities subordinate to State Government held valid.

Under Sec. 40 Defence of India Act the Central Government may delegate its powers (1) to officers subordinate to it, (2) to officers subordinate to any State Government, (3) to any authority, (4) to a State Government. If powers and duties are delegated to the State Government the said Government in its turn may delegate the same to any officer or authority not being an officer or an authority subordinate to the Central Government. (Para 5)

Section 40 (1) clearly shows that when delegation is made, the delegate has all the powers of the Central Government unless the order of delegation imposes some conditions. Imposition of conditions is not obligatory and delegation may be unrestricted. (Para 7)

The Central Government Notification No. S. O. 1888, D/-10-6-1966 delegating powers under Sec. 29 of the Act to Collectors, District Magistrates etc., in the States and all political officers in N. E. F. A. is therefore valid. (Paras 4, 5)

(B) Constitution of India, Art. 226 — Mandamus — Writ of — Mala fide action of executive authority — Writ can issue.

A writ of mandamus will be issued to strike down any mala fide action of the executive authorities. If a person exercised a power conferred on him by a statute in bad faith or for collateral purpose, it is an abuse of the power and fraud upon the statute and is not real exercise of the power at all. (1944) 48 Cal WN 766, Rel. on.

(Para 8)

When the circumstances preceding the order of requisition of demised land for defence purposes showed that the real intention of the Government was to lease out the land to the highest bidder in the hope of getting a good value for the land which was developed into a working tea garden by the lessee it must be held that the land was being requisitioned only for a collateral purpose and the purpose mentioned in the order was not bona fide. (Para 10)

IL/IL/D853/68

(C) Constitution of India, Article 226 — Who can apply — Registered partnership firm taking from Government certain land on lease for purpose of tea estate owned by it — Agreement entered through J, one of its partners — Order requisitioning land served on tea estate — Firm has locus standi to challenge order by writ petition.

(Para 11)

Cases Referred: Chronological Paras
(1944) 48 Cal WN 766, In re Banwarilal Roy

A. K. Sen, J. C. Medhi, D. Sharma, D. N. Hazarika, S. R. Khound and Prasanta K. Goswami, for Petitioners; G. K. Talukdar, Sr. Govt. Advocate, for Opposite Parties.

DUTTA, C. J.: This is a petition under Article 226 of the Constitution of India. The petitioner's case is as follows. The petitioner is a firm registered under the Indian Partnership Act and this firm owns and possesses a tea estate known as Bagrodia Tea Estate in the district of Lakhimpur, Assam. During the second World War the Government of India acquired in 1940 for defence purposes a part of the Sookeriting Tea Estate with its adjoining lands measuring 769.20 acres for the construction of an air-field. The air-field was constructed on a portion of the said land; but an area of 300.20 acres over which there were tea bushes, was left out. The tea bushes were unattended and growing wild. This area became overgrown with thick jungles. After the war, the area utilised for the air-strip measuring 469 acres was transferred to the State Government for its use and this area is still lying unutilised. The Government of India with a view to earn foreign exchange, decided to settle the aforesaid area of 300.20 acres with tea bushes thereon with some established tea planter. The petitioner coming to know about this entered into negotiation with the Special Military Estates Officer, Assam Circle, with headquarters at Shillong and also with the Ministry of Defence, Government of India. Ultimately an agreement for lease was made by and between the Union of India through Sri S. N. Mathur, the then Special Military Estates Officer, Assam, Shillong and the petitioner through its partner Sri Jayantilal Agarwalla.

On 2-3-62 the said deed of agreement was signed by Sri Mathur for and on behalf of the President of India and by the said Sri Jayantilal Agarwalla for the petitioner. By this deed of agreement the Union of India agreed to lease out the said 300.20 acres of land at Sookeriting at an annual rent of Rs. 6304.20 P. to the petitioner. It was stipulated that the lease would run for one year from the date of handing over of possession of the land and that it would be renewable for a period of one year at a time subject to the condition that the land was not required by the lessor. Pursuant to this agreement, the petitioner paid on 2-3-62 the first instalment of annual rent amounting to Rs. 6304.20 P. and on the 10th March, 1962 took possession of the land. After thus

taking possession, the petitioner invested a sum of about Rs. 175000 and renovated the tea estate and succeeded in converting it to a well managed tea garden which now gives an average annual yield of 324317 kilograms of green leaves producing 73,149 kilograms of made tea worth Rs. 2,78,649. The petitioner thereafter deposited as directed, the requisite stamps for execution of the lease. But Sri Mathur put off the execution of the same from time to time on one pretext or another.

In the meantime the petitioner approached the Government of India through Sri J. N. Hazarika, Member of Parliament, who took up the matter with the Ministry of Defence at New Delhi. Then the Deputy Minister for Defence by a letter dated 20-12-62 informed Shri Hazarika that it would not be possible to extend the current lease as the land was required for Defence purposes. Thereafter, as the matter was pursued further by Sri Hazarika, the Minister of Defence informed him by a letter dated 1-4-63 that since several tea planters had showed interest in the said tea estate, it was decided to auction the lease-hold right of that tea estate on an annual basis subject to the condition that the land might be resumed on short notice for defence purposes. The petitioner demanded the renewal of the lease on 25-1-63 but in spite of such demand, no action was taken whatsoever by the Government of India. On the other hand, the Military Estates Officer, Jorhat Circle (opposite party No. 4) issued a public notice on 20-3-63 for disposal of the said tea garden in public auction temporarily for one year. Being aggrieved by this notice, the petitioner moved this Court under Art. 226 of the Constitution when a rule was issued and an interim order was passed restraining the opposite parties from giving effect to the said notice for public auction.

On 28-5-63 the opposite parties moved an application before this Court for restraining the petitioner from plucking tea leaves, but this application was rejected. On 18-7-63, the petitioner filed a suit being Title Suit No. 30 of 1963 in the Court of the Subordinate Judge, Upper Assam Districts, Dibrugarh against the Union of India and others for declaration of title and confirmation of possession and for specific performance of the agreement for lease and an interim injunction was granted by the Court restraining the defendants from interfering in any manner with the plaintiff's possession of the tea garden in suit. The writ application filed before this Court came up for hearing on 23-7-63, but it was not pressed as identical reliefs were claimed by the petitioner in the Court of the Subordinate Judge, Upper Assam Districts at Dibrugarh in the aforesaid title suit. The petition was therefore dismissed by this Court by its order dated 23-7-63.

Subsequently two more suits being Title Suit No. 6 of 1964 and Title Suit No. 13 of

1965 were filed by the petitioner in the Court of the Subordinate Judge, Upper Assam Districts, Dibrugarh claiming identical reliefs in respect of different years. In these two suits also a temporary injunction was granted. Thereafter another suit being Title Suit No. 4 of 1966 was filed by the petitioner claiming identical reliefs for another year. All these four suits are now pending. On 4-9-65 the temporary injunctions granted by the Subordinate Judge were confirmed. On 26-10-66 the petitioner received an order of requisition of the said lands passed by opposite party No. 1, the Deputy Commissioner, Lakhimpur, Dibrugarh. The petitioner, therefore, moved this Court under Article 226 of the Constitution of India and a rule was issued and the operation of the requisition order was stayed.

2. The arguments advanced by Mr. A. K. Sen, appearing on behalf of the petitioner, are as follows:—

(1) The order of requisition was made by the Deputy Commissioner, Lakhimpur, Dibrugarh in which it was said that in his opinion it was necessary to requisition the property. The Deputy Commissioner was not the competent authority to form the opinion.

(2) The requisition of the land of the tea garden was mala fide.

3. In order to appreciate the first point it is necessary to refer to certain provisions in the Defence of India Act 1962 (hereinafter called the Act). Section 29 (1) of the Act is as follows.

“29. Requisitioning of immovable property:—

(1) Notwithstanding anything contained in any other law for the time being in force, if in the opinion of the Central Government or the State Government it is necessary or expedient so to do for securing the defence of India, civil defence, public safety, maintenance of public order or efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community, that Government may by order in writing requisition any immovable property and may make such further orders as appear to that Government to be necessary or expedient in connection with the requisitioning:

Provided that no property or part thereof which is exclusively used by the public for religious worship shall be requisitioned”.

Section 40 of the Act is as follows:

“40. Power to delegate: (1) The Central Government may, by order, direct that any power or duty which by this Act or by any rule made under this Act is conferred or imposed upon the Central Government shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged also—

(a) by any officer or authority subordinate to the Central Government, or

(b) whether or not the power or duty relates to a matter with respect to which a

State Legislature has power to make laws, by any State Government or any officer or authority subordinate to such Government, or

(c) by any other authority.

(2) The State Government may, by order, direct that any power or duty which by this Act or by any rule made under this Act is conferred or imposed on the State Government or which, being by this Act or any such rule conferred or imposed on the Central Government, has been directed under sub-section (1) to be exercised or discharged by the State Government, shall, in such circumstances and under such conditions, if any, as may be specified in the authority not being (except in the case of a Union territory) an officer or authority subordinate to the Central Government”.

4. It will appear from the above sections that the opinion has to be formed either by the State Government or the Central Government. The Ministry of Home Affairs, by notification No. S. O. 1888, dated the 10th June, 1965, published in the Gazette of India, Ext. dated June 11, 1965, delegated the powers under Section 29 to all Collectors, District Magistrates, Additional District Magistrates and Deputy Commissioners in the States and all Political Officers in N. E. F. A.

5. It is contended by Mr. Sen, the learned Counsel for the petitioner, that under Section 40 of the Act the delegation of the powers and duties of the Central Government can be made by the said Government only to officers subordinate to it. Hence delegation made by the above notification to Deputy Commissioners who are not subordinate to the Central Government, is bad. But it will appear from Clause (b) of sub-section (1) of Section 40 that the Central Government may delegate its powers and duties under the Act to an officer, subordinate to the State Government. Reading the aforesaid section as a whole, I find the following result viz., the Central Government may delegate its powers (1) to officers subordinate to it, (2) to officers subordinate to any State Government, (3) to any authority, (4) to a State Government. If powers and duties are delegated to the State Government, the said Government in its turn may delegate the same to any officer or authority not being an officer or an authority subordinate to the Central Government. In this view of the matter, the above notification must be held to be valid.

6. Mr. Sen further argues that delegation cannot be made without specifying conditions. There is no force in this argument. As stated above Section 40 (1) reads as follows:—

“40. Power to delegate.— (1) The Central Government may, by order, direct that any power or duty which by this Act or by any rule made under this Act is conferred or imposed upon the Central Government shall, in such circumstances and under such condi-

tions, if any, as may be specified in the direction, be exercised or discharged also

7. From the above provision it is quite clear that when delegation is made, the delegate has all the powers of the Central Government unless the order of delegation imposes some conditions. Imposition of conditions is not obligatory and delegation may be unrestricted.

8. As regards the question of mala fides, the law is well settled that a writ of mandamus will be issued to strike down any mala fide action of the executive authorities. In this connection Mr. Sen cites the case of *re Banwarilal Roy*, (1944) 48 Cal WN 766. In this case after discussing various English and Indian cases the Calcutta High Court held that if a person exercised a power conferred on him by a statute in bad faith or for collateral purpose, it is an abuse of the power and fraud upon the statute and is not real exercise of the power at all. This rule of law is so well settled that it appears to me that reference to judicial decisions on it is not necessary.

9. I have already stated the circumstances that led to the requisition of the property by the Deputy Commissioner. The real purpose of the Government in requisitioning the land in question can be seen from certain correspondence that passed between the Ministry of Home Affairs and Sri Jogendra Nath Hazarika, M. P. In a letter dated the 20th December, 1962 Sri D. R. Chavan, Deputy Minister for Defence wrote to Sri Hazarika, M. P. saying that the lease of the land could not be extended as it was required for defence purpose vide Annexure E to the petition. Then in a letter dated the 1st April, 1963 from Sri Y. B. Chavan, Minister of Defence to Sri Hazarika, it was said as follows:—

“Since several tea planters have evinced interest in the Tea Estate, it will be in the public interest to auction the lease-hold rights on a yearly basis only, subject to the provisions that the land can be resumed at a short notice for Defence purposes”.

10. In the affidavit filed by the Deputy Commissioner, Lakhimpur, Dibrugarh, it is said that till 1964 the land in question was not needed for Defence purposes, but the need of the land for such a purpose arose thereafter and hence the requisition notice dated 25-10-66 was issued. The petitioner has stated in his affidavit that although the Union of India as a defendant, is contesting the suits filed by the petitioner in the Court of the Subordinate Judge at Dibrugarh yet the said defendant did not take the plea in its written statements that the land was required for Defence purposes although the written statements were filed in 1966. When the Court granted the temporary injunctions restraining the defendant from interfering with the possession of the land by the petitioner, the plea that the land was required for Defence purposes was not taken. All

these go to show that the intention of the Government is to lease out the land to the highest bidder in the hope of getting a good value as the land has now been developed into a working tea garden. Such a purpose cannot be said to be bona fide and it must be held that the land is being requisitioned only for a collateral purpose.

11. The learned Government Advocate submits that M/s. Bangshidhar Shewbhagwan and Company who is the petitioner in this case has no locus standi to file the petition. The order of requisition is against M/s. Bagrodia Tea Estate with whom there was the agreement entered into by the Military Estates Officer. It may however, be noted that the petitioner in his petition says that M/s. Bangshidhar Shewbhagwan and Company owns and possesses the Bagrodia tea estate. This has not been controverted in any of the affidavits filed by the opposite parties. This firm has filed the writ petition through one of its partners Sri Jayantilal Agarwalla. The agreement of lease was also through the said Sri Jayantilal Agarwalla. In such circumstances, I do not see any reason why M/s. Bangshidhar Shewbhagwan and Company should have no locus standi to file the petition.

12. In the result, the petition is allowed. The rule is made absolute. A writ in the nature of mandamus is issued directing the Deputy Commissioner, Lakhimpur, Dibrugarh not to give effect to his order dated 25-10-66 i. e., order No. LA 100/27511-15/R for requisition of lands including tea bushes and trees standing thereon. There will be no order as to costs of this petition.

13. K. C. SEN, J.: I agree.

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Rule made absolute.

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S. K. DUTTA, C. J. AND
M. C. PATHAK, J.

Tapes Chandra Bagchi, Petitioner v. United Bank of India Ltd. and others, Opposite Parties.

Civil Revn. No. 30 of 1968, D/-29-7-1968, from order of Asst. Dist. J., Lakhimpur, Dibrugarh, D/-4-4-1968.

Civil P. C. (1908), O. 21, R. 84 — Rule is mandatory — 25 per cent deposit by auction purchaser should be made to officer conducting sale as soon as he is declared purchaser — Deposit made to executing Court and not to officer conducting sale — There is no sale before the executing Court which he has to confirm — Property has to be resold — High Court Rules and Orders — Assam and Nagaland High Court Civil Rules and Orders (1967), R. 185.

The provisions of Order 21, R. 84, Civil P. C. are mandatory and non-compliance

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thereof will make the sale a nullity.

(Para 9)

As soon as the sale is knocked down in favour of the highest bidder by the officer conducting the sale and the purchaser declared, it amounts to declaration as required under Rule 84 and the deposit in question has to be made immediately thereafter to the officer conducting the sale and not after the executing Court formally accepts the bid and declares the purchaser. The mere recognition of the position that a certain person is the highest bidder by itself constitutes a declaration of the fact that he is the highest bidder and no formal or separate order by the Court is necessary to constitute the declaration for the purpose of making the deposit of twenty five per cent on the amount of his purchase money to the officer conducting the sale as prescribed in Rule 84.

Where the sale was knocked down in favour of the auction purchaser on 30-9-1967, but the deposit of twenty five per cent of the purchase money as required under R. 84 was not made to the officer conducting the sale, there was no sale in the eye of law for final acceptance by the Court. The executing Court also could not accept the highest bid on 4-4-1968 and make a declaration of the purchaser inasmuch as when he considered the bid for acceptance it was not accompanied by the deposit of twenty five per cent on the amount of the purchase money paid to the officer conducting the sale. The subsequent order dated 30-9-1967 allowing time to pay the deposit till 6-11-1967 was also illegal. The Court had no jurisdiction to extend the time for paying the deposit in question to the officer conducting the sale. On failure to pay the deposit as required under Rule 84 immediately after the sale was knocked down on 30-9-1967 and purchaser declared, the property should have been put to resale as required under R. 84. The order dated 4-4-1968 passed by the Executing Court was bad in law. AIR 1954 SC 349, AIR 1950 All 450, Rel. on.

(Paras 10, 15)

Cases Referred:	Chronological	Paras
(1954) AIR 1954 SC 349 (V 41) =		
1955 SCR 108, Manilal Mohanlal		8
v. Sayed Ahmed		
(1950) AIR 1950 All 450 (V 37) =		
1950 All LJ 653, Ebadullah Khan		11
v. Allahabad Municipality		

B. Islam and S. Rahman, for Petitioner;
P. Choudhuri and S. K. Sen, for Opposite
Party No. 1; S. M. Lahiri, R. C. Choudhury,
D. N. Hazarika, for Opposite Parties Nos. 2
to 4.

PATHAK, J.: This is a revision petition under Sec. 115, Civil Procedure Code, by which the petitioner has challenged the order dated 4-4-1968 passed by the learned Assistant District Judge, Dibrugarh, in Title Execution Case No. 16 of 1964.

2. The facts of the case in brief are as follows:—

Opposite Party No. 1, the United Bank of India, Ltd., filed a mortgage suit being Title Suit No. 13 of 1956 against Asit Chandra Bagchi and others for recovery of Rs. 2,24,011-12-6 on account of loan with interest. The suit was decreed on compromise on 27-5-1958 for Rs. 2,24,011-78 nP. in terms of the compromise petition filed in the suit. The terms of the compromise inter alia were that the decretal amount with future interest and costs would be paid in course of five years subject to a minimum annual instalment of Rs. 42,000 together with interest, that the defendants would keep Phukanbari T. E. running at their own cost and fully insured against loss by fire or otherwise and that in default of payment or payment of any one of the annual instalments or failure of the observance of the terms mentioned in the compromise decree, the whole of the decretal amount would be due by the defendants to the plaintiff-Bank who would be at liberty to execute the decree against the defendants and to bring the mortgage properties to sale. A final mortgage decree was also passed embodying the terms of the compromise petition.

3. The judgment debtors having failed to satisfy the decree, the decree-holder put the decree into execution in Title Execution Case No. 16 of 1964. In the execution case, the Phukanbari T. E. containing 3421 B 3 K 15 L of land with trees, buildings, factory houses, leaf-houses, machineries etc., were brought to sale. The judgment debtors filed an objection before the executing Court on a number of grounds, viz., that the sale proclamation was not in accordance with law, that in the sale proclamation the decretal amount was wrongly shown and that no notice was served upon some of the judgment debtors and so on. The objection was, however, rejected by the executing Court and the judgment debtors preferred an appeal being M. A. (F) No. 33 of 1964, which was dismissed by the High Court. Thereafter, the judgment debtors filed another petition on 21-9-1967 raising several objections to the sale which was also rejected by the executing Court by its order dated 23-9-1967.

4. By his order dated 8-9-1967 the learned Assistant District Judge, Dibrugarh, sent the sale papers to the Munsiff, Dibrugarh for conducting the sale on 25-9-1967, and to report on 30-9-1967. Accordingly the auction was held on 25-9-1967 and continued till 30-9-1967, on which date the sale was knocked down at the highest bid of Rs. 2,38,000 offered by Abhayajan Tea Company (P) Ltd., Opposite Party No. 4. The deposit of twenty five per cent of the bid money was however not made to the learned Munsiff, the officer conducting the sale. The papers were sent by the officer conducting the sale the same day to the learned Assistant District Judge. Before the executing Court, the petitioner judgment-debtor filed a petition on the same date raising a number of objections to the sale

and praying that the highest bid which was too low should not be accepted and fresh proclamation of sale should be issued and the auction purchaser also submitted a petition before the executing Court praying for time till 3-10-1967 to deposit twenty five per cent of the bid money as he was not able to deposit the same on that day because that was a Saturday and the Bank was closed early.

On the same date, that is, on 30-9-1967, the learned executing Court passed an order on his petition directing the auction purchaser to deposit twenty five per cent of the bid money on 6-11-1967, that is, on the reopening of the civil Court after the Puja Vacation. On the petition filed by the judgment debtor, the Court ordered for putting up the papers for orders on 6-11-1967. Against the said order dated 30-9-1967, the petitioner moved the High Court in Civil Revision No. 99 of 1967. The High Court by its order dated 23-1-68 passed in Civil Revision No. 99 of 1967 remanded the case and directed the learned Assistant District Judge to first dispose of the two petitions filed by the judgment debtors and the auction purchaser and then to come to a decision whether the money was to be accepted or not and after coming to such a decision he should act accordingly. The matter went back to the learned Assistant District Judge, who by his order dated 4-4-1968 found that the sale was duly conducted and there was nothing on the record to show that there was any fraud or collusion and he held that the money could be accepted and by the same order the learned Assistant District Judge formally accepted the highest bid and declared the highest bidder Abhoyjan Tea Company (P) Ltd., as the purchaser and ordered it to deposit twenty five per cent of the sale money, which was deposited on the same date. The auction purchaser also prayed for permission of the Court to deposit the entire purchase money which the Court permitted. This order of the learned Assistant District Judge is questioned in this revision petition.

5. Mr. B. Islam, the learned counsel for the judgment-debtor-petitioner, has submitted that as soon as the sale is knocked down in the auction sale in favour of a bidder he is declared a purchaser and he must immediately thereafter pay a deposit of twenty five per cent on the amount of his purchase-money to the officer conducting the sale as required under Rule 84, Order 21, Civil P. C.; and in the instant case the auction purchaser having failed to pay the deposit on the same date, the sale is a nullity inasmuch as the provisions of R. 84, Order 21, Civil P. C. are mandatory. He has further submitted that the Court has no jurisdiction to extend the time for paying the deposit of twenty five per cent on the amount of the purchase-money. As no deposit was made by the auction purchaser, the property should have been re-sold forthwith as required under Rule 84.

6. Mr. S. M. Lahiri, the learned counsel for the auction-purchaser, has submitted that the deposit of the twenty-five per cent of the purchase money has to be paid only when the Court formally accepts the bid and declares the purchaser. In the instant case, the bid was formally accepted and the purchaser declared by the Court only on 4-4-1968 and on the same date the deposit was made and as such there was no violation of the provisions of Order 21, Rule 84, C.P.C.

7. Alternatively, it has been submitted that even if it is held that the deposit was to be paid on 30-9-1967, in view of the peculiar facts and circumstances of the case, the Court was justified in extending the time till the reopening date of the Civil Court after the Puja Vacation.

8. The Supreme Court in the case of Manilal Mohanlal v. Sayed Ahmed, AIR 1954 SC 349, has laid down as follows:—

"Having examined the language of the relevant rules and the judicial decisions bearing upon the subject, we are of opinion that the provisions of the rules requiring the deposit of 25 per cent of the purchase money immediately, on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory; and upon non-compliance with these provisions, there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25 per cent of the purchase money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these rules, there can be no question of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the Court is bound to resell the property in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law. We hold, therefore, that in the circumstances of the present case there was no sale and the purchasers acquired no rights at all."

9. It is, therefore, a settled law that the provisions of Order 21, Rule 84, C.P.C., are mandatory and non-compliance thereof will make the sale a nullity.

10. The point that falls for determination in the case is whether the deposit of twenty-five per cent on the amount of purchase money is to be paid immediately after the sale is knocked down by the officer conducting the sale in favour of the bidder or it is to be paid after the bid list is forwarded to the Court and the Court formally accepts the bid and declares the purchaser. In other words, whether, as soon as the sale is knocked down in favour of the highest bidder by the officer conducting the sale and the purchaser declared, it amounts to declaration as required under

1969

Rule 84 and the deposit in question has to be made immediately thereafter to the officer conducting the sale, or this deposit has to be made only after the executing Court formally accepts the bid and declares the purchaser. The language of Rules 84 and 85, Order 21, C.P.C., has to be carefully examined.

11. Order 21, Rules 84 and 85, C.P.C., run as follows:—

"84. Deposit by purchaser and resale on default.—(1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be resold.

(2) Where the decree-holder is the purchaser and is entitled to set off the purchase-money under Rule 72, the Court may dispense with the requirement of this rule.

85. The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property:

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set off to which he may be entitled under Rule 72."

Under Rule 84, a deposit of twenty-five per cent on the amount of purchase money has to be paid to the officer or other person conducting the sale immediately after the person is declared to be the purchaser and in default of such deposit, the property shall forthwith be resold. Rule 84 speaks of a deposit, the amount of which is fixed at twenty-five per cent on the amount of the purchase-money and the deposit is to be paid to the officer or other person conducting the sale. So it appears that this is only a deposit to be paid by the person in whose favour the sale has been knocked down and who has been declared the purchaser by the officer conducting the sale.

On the other hand, Rule 85 lays down that the full amount of the purchase money payable shall be paid by the purchaser into Court. Rule 85 speaks of full amount of purchase money payable, whereas R. 84 speaks of deposit of 25 per cent on the amount of purchase money. Rule 84 also speaks of paying the deposit to the officer conducting the sale, whereas Rule 85 speaks of payment of the full amount of the purchase money into Court.

On a comparison of the language of the two rules, I find that this deposit has to be paid to the officer conducting the sale as a security before the bid is formally accepted and the purchaser declared by the Court and on such acceptance and declaration only the sale becomes complete as provided under R. 185 of the Civil Rules and Orders of the High Court of Assam and Nagaland.

The reason for the difference in the language of the two rules, in my opinion, is

very clear. The deposit of twenty-five per cent on the amount of purchase money has to be paid by the person who is declared to be the highest bidder and purchaser by the officer conducting the sale because if the bid so accepted is not accompanied by the deposit, such a bid cannot be placed before the Court for formal acceptance and declaration of the purchaser. A bid accepted by the officer conducting the sale can be placed for formal acceptance and for declaration of the purchaser by the Court, only when it is accompanied by the deposit necessary under the rule, otherwise it becomes an empty offer which cannot even be considered for acceptance by the Court.

Another reason why this deposit of 25 per cent on the amount of the purchase money has to be paid to the officer conducting the sale immediately after the sale is knocked down and purchaser declared by the officer conducting the sale is that it safeguards against reckless or collusive bid.

This view is also supported by the decision in the case of Ebadullah Khan v. Allahabad Municipality, AIR 1950 All 450, wherein it has been held that as soon as it is found that no higher bidder is forthcoming, the amin can declare the highest bidder and accept and conclude the sale and his mere recognition of the position that a certain person is the highest bidder by itself constitutes a "declaration" of the fact that he is the highest bidder and no formal or separate order is necessary to constitute the "declaration".

12. Mr. Lahiri, the learned counsel for the auction-purchaser, has submitted that the officer conducting the sale in the instant case being not the executing Court, must be held to be only the recorder of bids and his function is ministerial and that no sale was complete till the Court formally accepts it and declares the purchaser under Order 21, Rule 84, C.P.C. In this connection he has referred to Rule 185 of the Civil Rules and Orders of the High Court of Assam and Nagaland. These rules came into force with effect from 16th August 1967, on which date these were published in the Assam Gazette.

13. Rule 185 of the said Rules is as follows:—

"Except as regards property of the kind mentioned in Rule 187, sales in execution of the decrees of any Court shall be conducted in that Court by the Nazir or other officer of the Court or by such other person as the Court may appoint in this behalf in the immediate presence of the presiding Judge. Where this is not possible, sales may be held in another place within the Court premises to be selected by the presiding Judge; provided that the Court executing the decree may, if it sees fit, for reasons to be specified in writing, direct in the interest of the parties that the sale be held at any other time and place within its jurisdiction,

(1) The order of detention is invalid as the same was served on the petitioner while he was in detention.

(2) The Advisory Board which finally considered the matter was not the Board to which the case of the petitioner had been referred by the State Government.

(3) The order of confirmation by the State Government was beyond three months of the date of detention.

(4) The grounds which have been furnished to the petitioner are vague, illusory, irrelevant and non-existent, and, as such, the petitioner could not make an effective representation against the detention order and hence the order of detention is invalid.

4. It is admitted that the impugned order was served on the petitioner while in jail custody in connection with some other offences. The District Magistrate in his affidavit has affirmed that as there was possibility of the petitioner being released on bail and he was satisfied from his activities that immediately on his release on bail he would indulge in like activities prejudicial to the security of the State and maintenance of public order, he passed the impugned order on 2nd March 1968. The petitioner also has admitted that, but for this detention order, he would have been released on bail. In this context the point that arises for consideration is whether an order under the Preventive Detention Act will be invalid in law if the same is served while the petitioner is in custody. The learned counsel draws our attention to a decision of the Supreme Court in the case of *Rameshwar Shaw v. District Magistrate, Burdwan*, AIR 1964 SC 334, where the following passage occurs:—

"Before an authority can legitimately come to the conclusion that the detention of the person is necessary to prevent him from acting in a prejudicial manner, the authority has to be satisfied that if the person is not detained, he would act in a prejudicial manner and that inevitably postulates freedom of action to the said person at the relevant time. If a person is already in jail custody, as a result of a remand order passed by a competent authority, it cannot rationally be postulated that if he is not detained, he would act in a prejudicial manner. At the point of time when an order of detention is going to be served on a person, it must be patent that the said person would act prejudicially if he is not detained and that is a consideration which would be absent when the authority is dealing with a person already in detention. The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus the basis of the order under S. 3 (1) (a), and this basis is clearly absent in the case of a person already in jail custody."

In this connection the Supreme Court has referred to two decisions of this Court reported in AIR 1951 Assam 43, *Labaram*

Deka v. The State and AIR 1952 Assam 175, *Haridas Deka v. State*. Their Lordships also noticed another decision of this Court reported in AIR 1953 Assam 97, *Sahadat Ali v. State of Assam*. Their Lordships noticed that the detention order in *Sahadat Ali's* case, AIR 1953 Assam 97, was passed in anticipation of his release order in a police case. The Court observed as follows:—

"These facts clearly illustrate how an order of detention can be passed against a person even though he may be in detention or jail custody, and also show that the said order should be served on the detenu after he is released. The test of proximity of time is fully satisfied in such a case and no invalidity or infirmity is attached to making of the order or its service."

From the aforesaid observations of the Supreme Court, the learned counsel submits that an order of detention, even though it may be passed while he is in detention, cannot be served while he is still behind the bars and such an order served in that manner is invalid in law. The facts of *Rameshwar Shaw's* case, AIR 1964 SC 334, are as follows: He was detained under the Preventive Detention Act by an order of the District Magistrate, Burdwan, on 9-2-1963 and the same was served on 15-2-63 while he was lodged in Burdwan Jail where he had been kept in pursuance of the remand order of a competent Court which had taken cognizance of a criminal complaint against him. In this case there was nothing to show that there was any prospect of his release. In the circumstances of this case, the Supreme Court ordered release of *Rameshwar Shaw*. The decision in *Rameshwar Shaw's* case, AIR 1964 SC 334, was made on 11-9-1963 and a month later on 11-10-1963 the Supreme Court had to consider this decision in *Makhan Singh's* case, AIR 1964 SC 1120. *Gajendragadkar, J.*, as he then was, speaking for the Court, while referring to *Rameshwar Shaw's* case, AIR 1964 SC 334, observed as follows:—

"It would be recalled that in that case also, *Rameshwar Shaw* was ordered to be released on the ground that he was served with the order of detention whilst he was in jail and not on the ground that the making of the order was invalid. In fact, this Court made no finding on that question and based its decision on the narrow ground that the service of the order was invalid."

While setting aside the order of detention in *Makhan Singh's* case, AIR 1964 SC 1120 at para 18, their Lordships observed as follows:—

"The result is, the appeal is allowed and the order of detention passed against the appellant is set aside on the ground that the service of the order is invalid and is outside the scope of Rule 30 (1) (b) of the Rules." It may be mentioned that their Lordships have held that there is no difference so far

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Bombay High Court

AIR 1969 BOMBAY 1 (V 56 C 1)
CHANDRACHUD AND DESHPANDE, JJ.

Chudaman Narayan Patil, Petitioner v.
State of Maharashtra, Respondent.

Criminal Revn. Appln. No. 60 of 1967,
(With Revn. Appln. No. 61 of 1967) D/-
22-9-1967.

(A) Criminal P. C. (1898), Ss. 403,
561A, 222 and 234 — Conviction for criminal
breach of trust — Subsequent
prosecution for different sums during the
period covered earlier — Subsequent
trial not barred. AIR 1917 Mad 524, Dis-
sented.

Where a prosecution for criminal breach
of trust in respect of certain sum, during
a particular period has ended in conviction,
a subsequent trial for the same offence
is not barred under S. 403, Criminal
P. C. if the period covered by the subsequent
prosecution overlaps the period
covered by the earlier prosecution. But
the High Court has a power under Section
561A to disallow the subsequent prosecution
on the ground that it would not
be in the interest of justice to allow the
case to proceed. (1910) 12 Bom LR 226
and AIR 1931 All 209 and AIR 1923 Cal
654 and AIR 1956 Madh Bha 194 and AIR
1965 SC 1248, Foll. AIR 1917 Mad 524,
'Diss. (Paras 17, 20, 22)

(B) Criminal P. C. (1898), S. 561A —
Scope — Power can be exercised to
quash proceedings.

Section 561A confers no new powers
on the High Court and it merely safeguards
all existing inherent powers possessed
by the High Court which are necessary,
among other purposes, to secure the
ends of justice. The object of the
section is to provide that those powers

which the Court inherently possesses
shall be preserved lest it be considered
that the only powers possessed by the
Court are those expressly conferred by
the Code and that no inherent powers
had survived the passing of the Code.
There is no express provision in the Code
under which proceedings can be quashed
and the inherent power can be exercised
to quash proceedings in a proper case
either to prevent the abuse of the process
of any Court or to secure the ends
of justice. AIR 1964 SC 703 and AIR 1960
SC 866 and AIR 1960 Andh Pra 164, Rel.
on. (Para 22)

Cases Referred: Chronological Paras

- (1965) AIR 1965 SC 1248 (V 52)=
1965 (2) Cri LJ 253, Ranchhod Lal
v. State of Madhya Pradesh 15, 20
- (1964) AIR 1964 SC 703 (V 51)=
(1964) 1 Cri LJ 549, State of Uttar
Pradesh v. Mohammad Naim 22
- (1960) AIR 1960 SC 866 (V 47)=1960
Cri LJ 1239, R. P. Kapur v. State
of Punjab 22
- (1960) AIR 1960 Andh Pra 164 (V 47)=
1960 Cri LJ 315, In re G. Bhashya-
karacharyulu 22
- (1956) AIR 1956 Madh Bha 194 (V 43)=
1956 Cri LJ 1073, Ramkrishna v.
State 17, 21
- (1945) AIR 1945 Bom 413 (V 32)=47
Bom LR 138=47 Cri LJ 138, Emperor
v. Anant Narayan 9, 11, 12, 16, 18,
21, 22
- (1931) AIR 1931 All 209 (V 18)=32
Cri LJ 376, Brijiwan Das v.
Emperor 17, 21
- (1929) AIR 1929 Cal 457 (V 16)=
ILR 57 Cal 17=31 Cri LJ 747,
Sidh Nath v. Emperor 18, 19, 21, 22
- (1923) AIR 1923 Cal 654 (V 10)=ILR
50 Cal 632=25 Cri LJ 156, Nagendra
Nath Bose v. Emperor 17, 21

(1917) AIR 1917 Mad 524 (V 4)=17
 Cri LJ 30, In re, Appadurai 14, 17, 20
 (1910) 12 Bom LR 226=11 Cri LJ
 337, Emperor v. Kashinath
 Bagaji 9, 10, 11, 12, 16, 17, 18, 19, 21
 (1906) ILR 29 Mad 126=3 Cri LJ
 274, Emperor v. Chinna Kaliappa
 18, 19, 21, 22

H. D. Gole, for Petitioner; V. T. Gambhirwalla, Asst. Govt. Pleader, for the State.

CHANDRACHUD, J.: These are two companion revision applications from the judgment of the learned Additional Sessions Judge, Jalgaon dismissing the revision applications filed by the petitioner against two orders passed by the learned Judicial Magistrate, First Class, Jalgaon. The facts leading to the revision applications before us are as follows:

2. Chudaman Narayan Patil, who is the petitioner in these revision applications, was employed in the Revenue Department of the Government of Maharashtra and at the material time he was working as a Special Recovery Officer in the Jalgaon People's Co-operative Bank Limited. He worked in this capacity from the 20th of January 1962 to the 3rd of October 1962. It was found that he had committed criminal breach of trust in respect of a sum of Rs. 583 which was entrusted to him during this period. He was accordingly prosecuted under Section 409 of the Indian Penal Code in Sessions Case No. 46 of 1963 and was found guilty of that offence. He was sentenced to suffer rigorous imprisonment for a period of one year and to pay a fine of Rs. 500 in default to suffer rigorous imprisonment for a period of three months. The appeal filed by the petitioner against the order of conviction and sentence was dismissed by this court. His application for leave to appeal to the Supreme Court and the application filed by him before the Supreme Court for special leave to file an appeal were also dismissed.

3. After the conclusion of the Sessions Case, two more chargesheets were filed against the petitioner under S. 409 of the Indian Penal Code in the Court of the learned Judicial Magistrate, First Class, Jalgaon. In the first of these chargesheets, the allegation against the petitioner is that he had committed criminal breach of trust in respect of a sum of Rs. 53 which was received by him on the 23rd of July 1962 and that he had also committed a similar offence in respect of a sum of Rs. 106 which was received by him on the 21st of August 1962. In this case (Case No. 42 of 1966) an application Ex. 4 was filed by the petitioner contending that the order of conviction in Sessions Case No. 46 of 1963 constituted a bar to the trial in view of the provisions contained in Section 403

of the Criminal Procedure Code and that therefore, the proceedings could not be continued. This application was rejected by the learned Magistrate and the revision application filed against that order has been dismissed by the learned Additional Sessions Judge, Jalgaon. Being aggrieved by the later order, the petitioner has filed Revision Application No. 60 of 1967.

4. In the companion case (Case No. 43 of 1966) the allegation against the petitioner is that he had committed criminal breach of trust in respect of a sum of Rs. 106 received by him on the 23rd of July 1962 and in respect of another sum of Rs. 106 received by him on 21-8-1962. In this case also a similar application was filed by the petitioner contending that the prosecution was not maintainable by reason of his previous conviction in Sessions Case No. 46 of 1963. This application was dismissed by the learned Magistrate and the learned Sessions Judge, Jalgaon has confirmed that order in Revision. Being aggrieved thereby, the petitioner has filed Revision Application No. 61 of 1967.

5. The two revision applications came up for hearing before the learned Chief Justice on the 28th of July 1967. The attention of the learned Chief Justice was drawn to certain decisions and he felt that ".....in view of a possible conflict of views it is better that this case should be decided by a Division Bench." The conflict of views is stated to be on the question whether in a matter of this nature the subsequent trial is barred under Section 403 of the Code of Criminal Procedure. This is how these revision applications have come up for hearing before us.

6. It is urged by Mr. Gole, who appears in support of these applications, that the petitioner was convicted in Sessions Case No. 46 of 1963 for an offence under Section 409 of the Indian Penal Code which was committed by him during the period 20th of January 1962 to 3rd of October 1962 and therefore, the two present prosecutions, which have been filed against him for offences alleged to have been committed by him during the same period, are not maintainable. The argument is founded on the provisions contained in Section 403 of the Criminal Procedure Code and what is urged before us is that the petitioner having been once convicted of the offence of criminal breach of trust committed by him during a certain period he cannot be prosecuted again for the offence of criminal breach of trust committed during the same period, for which he could have been charged and tried in the same Sessions trial. Now Section 403 is founded on a rule of public policy that a person shall not be tried for the same cause more than

once. It provides by sub-section (1) that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237. Sub-section (1) can, in our opinion, have no application to the facts of the case before us, because the petitioner is not being tried for the same offence for which he was tried and convicted in Sessions Case No. 46 of 1963. In that case the charge against him was that he had committed criminal breach of trust in respect of a gross sum of Rs. 583 which was entrusted to him between the 20th of January 1962 and the 3rd of October 1962. The charge against the petitioner in the two cases which are now filed against him is in respect of amounts which, undoubtedly, were entrusted to him during the same period but these amounts were admittedly not included in the gross sum of Rs. 583 in respect of which the Sessions trial was held. The offences which form the subject-matter of the two prosecutions which are now filed against the petitioner are therefore independent of the offence for which the petitioner was tried and convicted in Sessions Case No. 46 of 1963. It cannot therefore be said that the petitioner is being tried again for the same offence.

7. It is however urged by Mr. Gole that sub-section (1) of Section 403 not only prohibits a second trial for the same offence but it also prohibits a second trial on the same facts for any other offence for which a different charge from the one made against the accused might have been made under section 236 or for which he might have been convicted under Section 237. Now Section 236 deals with a case where a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute. In such a case, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences. Section 237 deals with a situation where, in the case mentioned in Section 237, the accused is charged with one offence, and it appears in evidence that he has committed a different offence for which he might have been charged under the provisions of Section 236. In such a case, he may be convicted of the offence which he is shown to have committed,

although he is not charged with it. It is transparent that neither Section 236 nor Section 237 can have any application to the facts before us, because this is not a case in which the acts attributed to the petitioner are of such a nature that it is doubtful as to which of several offences the facts which can be proved will constitute. If Section 236 can have no application to the case, Section 237 can obviously have none, because the latter section only deals with cases which are covered by the former.

8. In our opinion, therefore, sub-section (1) of Section 403 can have no application to this case and therefore, the learned Additional Sessions Judge was justified in taking the view that the charges now levelled against the petitioner are valid and the proceedings are maintainable.

9. It is then urged on behalf of the petitioner that assuming that sub-section (1) of Section 403 has no application to the case, the principle underlying that sub-section should be extended to the case and the charges should be quashed. It is in the context of this argument that the attention of the learned Chief Justice was invited to certain decisions. Having considered this argument carefully, and the several decisions to which our attention has been drawn, we are of the opinion that there is no conflict of decisions on the question and there is certainly no conflict between the views expressed by the two Division Benches of this Court in *Emperor v. Kashinath Bagaji*, (1910) 12 Bom LR 226 and *Emperor v. Anant Narayan*, 47 Bom LR 138=(AIR 1945 Bom 413).

10. The question for our decision is whether in circumstances as those before us, the second trial is barred by reason of the principle contained in Section 403 if not because of the direct application of that section. In (1910) 12 Bom LR 226 the accused was tried for the offence of criminal breach of trust as a public servant in respect of a sum of Rs. 12 and odd and was acquitted of the offence. He was again tried for the offence of criminal breach of trust in respect of a sum of Rs. 19 and odd misappropriated during the same period and was convicted. On an appeal, the Sessions Judge acquitted the accused on the ground that his previous acquittal was a bar to the second trial. The Sessions Judge took the view that the first trial must be treated as being for the same offence as that in respect of the second amount, because both the amounts were misappropriated during the same period. According to him, the prosecution having made its election under Section 222(2) of the Criminal Procedure Code to prosecute the accused in respect of one out of the two amounts

misappropriated by him during the same period, it was estopped by the provisions of Section 403 from instituting the second prosecution in respect of fresh item falling within the same period. This view was reversed in appeal by the High Court (Chandavarkar and Knight JJ.) on the ground that the normal rule was the one contained in Section 233 of the Code that for every distinct offence there shall be a separate charge and every such charge shall be tried separately. One of the exceptions to this rule was contained in Section 234 which provides that more than one charge but not exceeding three charges can be included in one trial, provided the offences charged are of the same kind and the offences in respect of those charges have been committed within a space of twelve months from the first to the last of such offences. According to the learned Judges, though subsection (2) of Section 222 engrafts an exception on the rule in Section 233 it was not an exception of the same kind as was contained in S. 234 and it did not restrict in any way the scope and object of S. 234. Section 222(2) was construed as containing an exception rather to the general rule that certain particulars must be given in the charge. It was on these grounds that the decision of the learned Sessions Judge was overruled and it was held that the second trial of the accused was not barred merely because the period covered by the two trials was identical. No other question was canvassed before the learned Judges and it is obvious from the judgment that apart from the legality of the second trial, no other question was considered by them.

11. It is argued on behalf of the petitioner that this decision is in conflict with that in 47 Bom LR 138=(AIR 1945 Bom 413). In the latter case the accused was found to have misappropriated certain sums belonging to Government which he repaid subsequently. He was charged for offences under Sections 409 and 466 of the Indian Penal Code in respect of two items only as having been misappropriated during a certain period of time. The trial was held before a Sessions Judge, who, agreeing with the unanimous verdict of the jury as regards the charge under Section 409 and the opinion of assessors as regards the charge under Section 466, acquitted the accused. The accused was then tried by another Sessions Judge for an offence under Section 409 of the Penal Code in respect of an amount which formed part of the gross amount which was mentioned in the earlier trial but which was not included in the two charges which alone were picked up in that trial. The accused contended that the second trial was barred under Section 403 of the Criminal Procedure Code and he was therefore en-

titled to an acquittal. The Sessions Judge acquitted the accused holding that though it was technically correct to try the accused for what was a separate offence, it was undesirable that the accused should be so tried for an offence which could have been included in the first trial. On a reference by the Sessions Judge for quashing the order of committal, it was held by a Division Bench of this Court (N. J. Wadia and Sen JJ.) that even though the plea of *autrefois acquit* under Section 403 was not technically available to the accused, the principle of it was available to him in the interests of justice and that he should not be tried again for the offence under Section 409. The attention of the learned Judges who decided this case was specifically drawn to the earlier decision in (1910) 12 Bom LR 226 and they have characterised in view taken therein as "somewhat technical". This may *prima facie* give the impression that the two decisions take contrary views but there is in our opinion no conflict between these decisions. The decision in Kashinath's case, (1910) 12 Bom LR 226 was construed by the learned Judges, who decided the subsequent case, as one in which the only question which was considered was whether the second trial was illegal and it was held that the second trial was not illegal. It was not held in Anant's case, 47 Bom LR 138=(AIR 1945 Bom 413) that the second trial was illegal and thus both the decisions take the same view regarding the legality of the second trial. The further question, apart from the legality of the second trial, which was considered in Anant's case, 47 Bom LR 138=(AIR 1945 Bom 413) was whether it was in the interests of justice to allow the subsequent trial to proceed and it was held that on the facts and circumstances of the case, it was not desirable to subject the accused to another trial. It was observed (page 142 of Bom LR)=(at pp. 416-417 of AIR) that the Jury had unanimously held in the first trial that the accused was not guilty, that the accused had in fact paid the entire amount involved in the two trials, that he had already suffered one lengthy trial and that it was undesirable that in the second trial there should be any risk of the jury's taking a view different from that which was taken in the first trial. These circumstances made it necessary that the second trial of the accused should be prevented.

12. It is thus clear that whereas the decision in Kashinath's case, (1910) 12 Bom LR 226 deals only with the legality of the second trial, the decision in Anant's case 47 Bom LR 138=(AIR 1945 Bom 413) deals principally with the propriety of the second trial. Both the cases take the view that the second trial is not illegal. Kashinath's case, (1910) 12 Bom LR

226 stops by holding that the second trial is legal but Anant's case, 47 Bom LR 138= (AIR 1945 Bom 413) proceeds to hold that though the second trial was not barred, it was desirable not to allow it to proceed. The question as to desirability of the second trial could arise only if it was legal.

13. Our attention has been drawn by Counsel for both the sides to a large number of decisions bearing on this question. It would be necessary to examine some of these decisions.

14. The case *In re Appadurai*, AIR 1917 Mad 524 is, if we may say so, unique, because it is the only decision which takes the view that the second trial in circumstances such as those before us, is illegal. The question in that case was whether the accused could be tried for misappropriation of a sum of money committed during a period which was covered by the earlier trial though the amount which formed the subject-matter of the earlier case was different. It was held that the accused was already tried and convicted for having misappropriated a gross sum of money during the same period and the charge in the previous case should be taken to include all the items misappropriated by the accused in the course of the same transaction during that period. This, according to the learned Judge, was the true interpretation of Section 403, because they thought that the provisions contained in Section 222 of the Criminal Procedure Code would otherwise become meaningless. With great respect, it is not possible to agree with this view. Even though the period covered by two separate cases might be identical, the trials are not for the period but the trials are for misappropriation of certain amounts committed during a certain period. We see no justification for the view that a prior case must be deemed to include all items misappropriated by an accused during a particular period, whether or not those items are specifically included in the charge.

15. We might in this behalf draw attention to the decision of the Supreme Court in *Ranchhod Lal v. State of Madhya Pradesh*, AIR 1965 SC 1248 which says that sub-section (2) of Section 222 is not the normal rule with respect to framing of charges in cases of criminal breach of trust and it is only in the nature of an exception to meet a certain contingency. The normal rule, according to the Supreme Court, is that there should be a charge for each distinct offence as provided in Section 233 of the Code.

"It is only when it may not be possible to specify exactly particular items with respect to which criminal breach of trust took place or the exact date on which the individual items were misappropriat-

ed or in some similar contingency, that the Court is authorised to lump up the various items with respect to which breach of trust was committed and to mention the total amount misappropriated within a year in the charge If several distinct items with respect to which criminal breach of trust has been committed are not so lumped together, no illegality is committed in the trial of those offences. In fact, a separate trial with respect of each distinct offence of criminal breach of trust with respect to an individual item is the correct mode of proceedings with the trial of an offence of criminal breach of trust. (page 1250).

16. The Supreme Court further held that Section 234 of the Criminal Procedure Code under which three offences of *criminal breach of trust* can under certain circumstances be included in one trial is an enabling provision and is in the nature of an exception to Section 233 of the Code. Therefore "if each of the several offences is tried separately, there is nothing illegal about it." It is thus clear that as a matter of legality, a person who commits breach of trust in respect of several amounts can be prosecuted as many times as the number of individual items misappropriated by him. Whether the interests of justice require that this should not be permitted to be done is another question. That is the question which was dealt with in 47 Bom. L.R. 138 = (AIR 1945 Bom 413) and that it is the question which was neither canvassed nor dealt with in (1910) 12 Bom. L. R. 226. That is why we have taken the view that there is no conflict of view between these two decisions.

17. As we have stated earlier, the decision in AIR 1917 Mad 524 is perhaps the only one which has taken the extreme view that by reason of the provisions contained in Sections 222 and 234 the second prosecution of an accused for criminal breach of trust is barred if the amount included in the second trial is alleged to have been misappropriated during a period which is covered by the first prosecution. No other case would seem to have taken this view and indeed, a large number of cases have taken the view that the second prosecution is in fact not barred. We have already dealt with the decision in (1910) 12 Bom LR 226 which has taken this view and we might now turn to the decisions in *Nagendra Nath Bose v. Emperor*, ILR 50 Cal 632=(AIR 1923 Cal 654) and *Ramkrishna v. State*, AIR 1956 Madh Bha 194 which expressly refer to (1910) 12 Bom LR 226 and follow that decision. The view taken in the Calcutta and the Madhya Bharat cases is that even if the period covered by the subsequent prosecution overlaps the period covered by the earlier prosecution the second trial is not barred by reason of the provisions

contained in Section 403 of the Criminal Procedure Code. The High Court of Allahabad has taken the same view in AIR 1931 All 209. With these decisions we respectfully agree.

18. The other group of decisions which is in point is: 47 Bom LR 138 = (AIR 1945 Bom 413); *Sidh Nath v. Emperor*, ILR 57 Cal 17=(AIR 1929 Cal 457) and *Emperor v. Chinna Kaliappa*, (1906) ILR 29 Mad 126. The decision in 47 Bom LR 138 has already been discussed by us and as stated earlier that case takes the view that even if Section 403 may not be applicable to a given case, it may still be necessary in the interests of justice to prevent a second trial. In ILR 57 Cal 17=(AIR 1929 Cal 457) the second trial was held legal but on the facts of that case it was held that it was not proper to allow the second trial to be held. It is observed in that case that the prosecution knew perfectly well what was the gross amount under Section 222(2) of the Criminal Procedure Code. This circumstance was held to be a sufficient justification for the view that the second trial ought not to have been held. The second trial however was already held and therefore, the learned Judges reduced the sentence to a token period of one day's imprisonment. Incidentally, the order passed by the learned judges emphasises that the second trial was not illegal. Though, however, the second trial is not illegal, the interests of justice may require that the accused be not subjected to more than one trial. This is one of the cases which is said to have taken a different view from the one taken in (1910) 12 Bom LR 226, but it is in our opinion clear that the view taken in the Calcutta case is in no way in conflict with the view taken in the earlier Bombay decision. The Calcutta decision concerns itself more with the propriety of the second trial than with its legality.

19. The decision in (1906) ILR 29 Mad 126 is also stated to be in conflict with the view taken in (1910) 12 Bom LR 226. Now in the first place, the case in (1906) ILR 29 Mad 126 dealt with an entirely different situation and the main question which arose for decision therein was whether it is competent to a Magistrate to entertain a fresh complaint against an accused on facts substantially similar to those on which an earlier complaint was filed, the accused having been discharged in that complaint. A Bench of five Judges of the High Court heard that case, three learned Judges taking the view that if the earlier order of discharge was not set aside by the Superior Court, it is open to the Magistrate to entertain a fresh complaint on the same facts and to try the accused for the same offence. This view is founded on the basis that

Section 403 cannot strictly apply to such a case for there was no previous "acquittal", in the true sense of the term. One of the two learned Judges who took a contrary view, namely Subrahmaniam Ayyar J. observes in his dissenting judgment that though S. 403 may not apply to a case of a previous discharge as contrasted with the case of a previous acquittal, authority was not wanting for the view that the principle of S. 403 was available to an accused when the interests of justice required its extension in his favour. The principle *nemo debet bis vexari*, namely, that a person shall not be vexed again for the same cause was extended by the learned Judge to the case in which the accused was previously discharged (and not acquitted) and it was held that the Magistrate was in error in entertaining a fresh complaint on the same facts. Now this decision, in our opinion, is no more in conflict with the view expressed in (1910) 12 Bom LR 226 than the decision in ILR 57 Cal 17=(AIR 1929 Cal 457) is. In both of these cases, namely (1906) ILR 29 Mad 126 and ILR 57 Cal 17=(AIR 1929 Cal 457) the principle contained in S. 403 was extended to cases not falling within the strict letter of that section.

20. This analysis shows that apart from AIR 1917 Mad 524, no case has taken the view that the second trial of an accused for criminal breach of trust committed by him during a certain period is illegal if he has been tried previously for having committed criminal breach of trust during the same period but in respect of a different amount. We respectfully differ from that view, particularly because of the decision of the Supreme Court in AIR 1965 SC 1248.

21. The decisions in (1910) 12 Bom LR 226, ILR 50 Cal 632=(AIR 1923 Cal 654); AIR 1956 Madh Bha 194 and AIR 1931 All 209 take the view that the second prosecution is not barred in such circumstances but the further question as to the propriety or the desirability of the second prosecution was not considered in those cases. The decisions in 47 Bom LR 138=(AIR 1945 Bom 413) and ILR 57 Cal 17=(AIR 1929 Cal 457) take the view that the second prosecution is legal but they further hold that despite the legality of the second prosecution, the interests of justice may require that the accused should not be asked to face yet another trial. The dissenting opinion in (1906) ILR 29 Mad 126, like the decision in ILR 57 Cal 17=(AIR 1929 Cal 457) shows that though a case may not fall within the letter of Section 403 so as to bar a subsequent prosecution, the facts and circumstances of a case may be such as to justify the extension of the principle underlying Section 403.

22. The decision therefore that the present prosecutions are not barred under

Section 403 shall have to be upheld. But that is not always the sole question for decision. A prosecution may not be barred under Section 403 and yet as held in 47 Bom LR 138=(AIR 1945 Bom 413); ILR 57 Cal 17=(AIR 1929 Cal 457) & (1906) ILR 29 Mad 126 it would not be in the interests of justice to allow the case to proceed. That the High Court has such a power is clear from Section 561A of the Criminal Procedure Code, which says that nothing in the Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under the Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is true that as held by the Supreme Court in the State of Uttar Pradesh v. Mohammad Naim, AIR 1964 SC 703, Section 561A confers no new powers on the High Court and it merely safeguards all existing inherent powers possessed by the High Court which are necessary, among other purposes, to secure the ends of justice. The object of the section, as stated by the Supreme Court, is to provide that those powers which the Court inherently possesses shall be preserved lest it be considered that the only powers possessed by the Court are those expressly conferred by the Code and that no inherent powers had survived the passing of the Code. Now there is no express provision in the Code under which proceedings can be quashed in circumstances such as those before us and the inherent power of this Court to act in the interests of justice has been preserved by Section 561A. As held by the Supreme Court in R. P. Kapur v. State of Punjab, AIR 1960 SC 866 the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any Court or to secure the ends of justice. We might indicate that the power to quash proceedings was exercised by the High Court of Andhra Pradesh in Re G. Bhashyakaracharyulu, AIR 1960 Andh Pradesh 164 under Section 561A.

23. The only question which now remains to be considered is whether the ends of justice require that the two cases which are pending against the petitioner should not be allowed to proceed. What constitutes sufficient reason for not permitting subsequent proceedings to continue must evidently depend upon the facts and circumstances of each case and we are of the opinion that this is one of those cases in which it is in the interests of justice that the proceedings must be quashed. In case No. 42 of 1966 the petitioner is alleged to have committed criminal breach of trust in respect of two sums, Rs. 53 and Rs. 106. In case No. 43 of 1966 he is alleged to have committed

criminal breach of trust in respect of two identical sums of Rs. 106. The amount covered by the four charges has already been recovered from the petitioner. He has undergone one Sessions trial, he has already suffered a sentence of one year and he has paid the fine of Rs. 500 which was imposed on him. The amounts which now form the subject-matter of the two proceedings are paltry and the petitioner who is a Govt. servant has already been subjected not only to the agony and humiliation of a criminal trial but he shall have to face the necessary consequence, namely, that he will lose his job and will find it hard to get any other.

24. In view of these circumstances, we are of the opinion that, though there is no legal bar to the prosecution pending against the petitioner, it is not necessary to subject him to fresh trials. We therefore set aside the decision of the learned Additional Sessions Judge, treat these revision applications as under Section 561A of the Criminal Procedure Code and quash the proceedings in cases Nos. 42 of 1966 and 43 of 1966 pending on the file of the learned Judicial Magistrate, First Class, Jalgaon.

GGM/D.V.C.

Order accordingly.

AIR 1969 BOMBAY 7 (V 56 C 2)

(At Nagpur)

CHANDURKAR, J.

Union of India, owning the South Eastern Rly. Admn. through its General Manager and another, Appellants v. Radhakisan S/o Ramnath Proprietor of Ramakrishna Ramnath and another, Respondents.

Second Appeal No. 18 of 1962, D/- 27-3-1968, against decision of Asst. J., Bhandara in Appeal No. 57-B of 1960.

(A) Railways Act (1890), S. 74-A—Applicability — Conditions essential.

Before the railway authorities want to take advantage of S. 74-A certain essential conditions are required to be satisfied as enumerated in that section. These conditions are:

(1) That the goods which are tendered to the railway administration must be in a defective condition or must be either defectively packed or packed in a manner not in accordance with the general or special order as provided by sub-section (2) thereof,

(2) The fact of such condition or defective or improper packing has been recorded by the sender or his agent in the forwarding note and

(3) Deterioration, leakage, wastage or damage in transit must be a consequence of the defective condition or the defective packing must result in leakage, wastage

JL/JL/E349/68

or damage in transit. It is only if these conditions are satisfied that it is open to the railway administration to take recourse to this section and then say that the railway administration shall not be liable for any deterioration, leakage, wastage or damage or for the condition in which such goods are available for delivery at destination, except upon a proof of negligence or misconduct on the part of the railway administration or of any of its servants. But if in a given case the damage is not in any way related to or is not a consequence of the defective packing, obviously the condition necessary for the operation of S. 74-A is not fulfilled. (Paras 7 and 10)

(B) Railways Act (1890), Ss. 74A and 74C — Negligence — Burden of proof — Railway obliged to place all material on record to decide whether Railway was negligent.

Sections 74-A and 74-C of the Railways Act cast a burden on the plaintiff to prove that the railway administration was negligent but the railway administration cannot claim to be absolved from the obligation to place the relevant facts before the Court to enable it to decide the question whether the Railway had taken as much care of the goods as was required of them. AIR 1960 Bom 344, Foll.

(Para 9)

(C) Railways Act (1890), S. 72 — Damage to goods in transit — Damages — Absence to show the exact monetary loss suffered would not disentitle plaintiff to claim damages.

When the plaintiff has received the damaged consignment and the extent of the damage itself is ascertained, merely because the plaintiff has led no evidence to show as to the exact monetary loss caused to him, it cannot be said that the plaintiff is not entitled to damages. The very fact that the railway authorities have found that the consignment had deteriorated in value and the extent of that deterioration was also estimated by them, it is not open to the railway administration to say that the plaintiff was not entitled to damages. (Para 12)

Cases Referred: Chronological Paras

(1961) S. A. No. 108 of 1961 (Bom) 6

(1960) AIR 1960 Bom 344 (V 47)=1960

Nag LJ 177, Ramkrishna Ramnath Firm v. Union of India 6, 9

(1957) AIR 1957 Nag 59 (V 44)=1956

Nag LJ 679, Asaram Gangaram v. Union of India 9

(1956) AIR 1956 Nag 255 (V 43)=ILR

(1956) Nag 506, Union of India v.

Parikh Shankarlal Jethalal 9

(1917) AIR 1917 PC 173 (V 4)=20

Bom LR 735, Dwarkanath v. Rivers Steam Navigation Co., Ltd. 9

V. R. Padhye, for Appellants; H. W. Dhabe, for Respondent No. 1.

JUDGMENT: This is a second appeal by the Union of India owning the South-Eastern Railway Administration and the Central Railway Administration against a decree for damages which was passed by the trial Court in favour of the plaintiff and was confirmed by the lower appellate Court.

2. The plaintiff in his capacity as sole proprietor of the shop 'Ramkrishna Ramnath' and as owner of 305 bags of bidi tobacco sued the appellants-defendants for damages on account of negligence or misconduct of the Railway Administration alleging that 39 bags of the consignment which was booked on 6th June 1956 Ex-Nipani out agency to Tirora, was damaged by water. These bags were delivered on 18th June 1956 in a damaged condition and the Railway authority had assessed the damage at 13 per cent on each bag. The plaintiff, therefore, claimed Rs. 1543.10 as damages including notice charges.

3. The main contention of the defendants was that the goods were booked at the owner's risk rate and therefore they were not liable for any damage to the goods during transit which had occurred because of the defective package. The right of the plaintiff to file the suit was also denied and it was denied that the consignment was damaged by rains or that the damage was due to the negligence or misconduct of the defendant-Railway Administration. The usual pleas of validity of notice under Ss. 77 and 80 were also raised. When in the written statement the frame of the suit was found fault with by the defendants the cause title of the plaint was amended and the plaint as amended was "Radhakisan son of Ramnath Proprietor of M/s. Ramkrishna Ramnath shop". The suit was filed on 9-8-1957 and the amendment was made on 5-11-1958. At no stage of the suit this amendment of the plaint was challenged.

4. On the evidence tendered on behalf of the plaintiff and the defendants, the trial Court found that the plaintiff was the sole proprietor of the shop Ramkrishna Ramnath and was entitled to file the suit. The trial Court found that the packing of the goods was not inherently defective and that the defendants were liable to pay damages in respect of 39 bags of bidi tobacco which was delivered in a badly damaged condition. It was also found that the damages were caused as a result of the misconduct of the Railway Administrations as alleged. The defendants' challenge to the validity of the notices was negatived by the trial Court. Thus a decree for Rs. 1506-2-0 and corresponding costs was passed against the defendants. In appeal against this decree filed by the Railway Administra-

tion, the lower appellate Court confirmed the finding of the trial Court that the damage was due to the misconduct and negligence on the part of the Railway Administration and that 39 bags of bidi tobacco were received by the plaintiff in a badly damaged condition. The plaintiff, was therefore, held entitled to get damages as decreed by the trial Court. The appeal, was therefore, dismissed. The defendants have now come up in second appeal.

5. The first contention raised by the learned counsel for the appellants was that the plaintiff was not the owner of the suit consignment and therefore he was not entitled to file the present suit. Both the Courts have, however, found on facts that the plaintiff was the consignee and owner of the goods. On that finding which is binding in the second appeal, the argument of the learned counsel that the plaintiff has no right of suit as he is not the owner, cannot be entertained at this stage.

6. The second contention of the learned counsel for the appellants is that the finding recorded by the lower appellate Court that the Railway Administration is guilty of negligence is based on an erroneous assumption which has been made in paragraph 9 of the judgment that there are rules which provide that, for carriage of goods during monsoon, it is the duty of the railway servants to provide water-tight wagons for the goods which are liable to be damaged by water. According to the learned counsel, the learned Judge of the lower appellate Court has also not properly considered the effects of Sections 74-A and 74-C of the Indian Railways Act, and the finding of negligence is based upon an erroneous assumption that burden of proof to show that the Railway Administration was not negligent, was on the Railway Administration. The learned counsel also contends that the lower appellate Court was not justified in following the decision of this Court in *Ramkrishna Ramnath Firm v. Union of India*, 1960 NLJ 177=(AIR 1960 Bom. 344) as according to him even this decision is based on an admission by counsel of both sides appearing in that case. The learned counsel says that the admission on which the judgment is based is that there are rules which require the Railway Administration to use a water-tight wagon in monsoon for carriage of goods. The counsel was emphatically asserting that as a matter of fact there are no such rules, and relied on a subsequent decision by a Single Judge of this Court in second appeal No. 108 of 1961 (Bom.) in which according to the learned counsel the contention raised on behalf of the Railway Administration that water-tight wagon is not a category of wagons which is provided by relevant

rules has been accepted on the basis of certain publications issued by the Railway Administration which were referred to at the hearing of that appeal. Fortunately, for the purpose of this case in view of the averments in the written statement it is not necessary to go into the question as to whether any obligation is cast, by statutory rules or otherwise on the Railway Administration to supply water-tight wagons for the carriage of goods during monsoon. It is also not necessary to consider the arguments of the learned counsel for the appellants that in the absence of any such enforceable obligation the Railway authority is absolved of any responsibility to show that it was not guilty of negligence where goods are damaged and the allegation of the plaintiff is that the goods were liable to be transported in a water-tight wagon.

7. A bare reading of the written statement of the Railway Administration in this case will show that even according to them, the goods were transported in a water-tight wagon. In view of the fact that the extensive arguments were advanced by the learned counsel for the appellants on the extent of the obligation of the Railway Administration it will be proper to refer to the pleadings of the defendants. In paragraph 3 of the written statement it is stated:

"It is submitted that the goods was transhipped in a wagon which was water-tight and thereon it was carried in the same wagon till destruction (probably destination) without exposing the bags to rain and these defendants are not liable for the loss if any."

In paragraph 4 of the written statement it is stated:

"The wagons arrived without tampering to Tirora, and the water must have entered the crevices of flap doors of the wagons, due to strong wind and speed of the rain, and intensity of rains which could not be checked in spite of due care and caution of a prudent man, carrying his goods in a water-tight wagon."

The defence, therefore, is not that the Railway Administration was not bound to carry the goods in a water-tight wagon. The absence of negligence on the part of the Railway Administration was sought to be made out on the basis of the fact that the Railway Administration had carried the goods in a water-tight wagon and very likely the water must have entered the crevices of the flap door of the wagon due to strong wind and intensity of rains. On this statement, it is therefore, clear that the damage to the consignment of the plaintiff was caused by the rain water. But the liability for such damage is sought to be avoided by saying that the force of the wind and inten-

sity of the rains were such that in spite of the wagon being water-tight, water entered into it. It is true that the lower appellate Court has observed that Railway Rules provide that for carriage of goods during monsoon, it is the duty of the Railway servants to provide water-tight wagons for goods which are liable to be damaged by water. In so far as these observations of the learned Judge are concerned, the grievance of the appellant appears to be justified because none of the parties has been able to produce any such rules. But merely because those observations appear to be erroneous, the conclusion reached by the learned Judge is not vitiated. On evidence, the learned Judge has come to the conclusion that negligence of the Railway Administration has been proved. It is at this stage that the learned counsel wants to take recourse to the provisions of Sections 74-A and 74-C of the Railways Act. Section 74-A of the Railways Act is as follows:

"Section 74-A. (1) When any goods tendered to a railway administration for carriage by railway (a) are in a defective condition as a consequence of which they are liable to deterioration, leakage, wastage or damage in transit, or

(b) are either defectively packed or packed in a manner not in accordance with the general or special order, if any, issued under sub-section (2) and, as a result of such defective or improper packing are liable to leakage, wastage or damage in transit, and the fact of such condition or defective or improper packing has been recorded by the sender or his agent in the forwarding note, the railway administration shall not be responsible for any deterioration, leakage, wastage or damage or for the condition in which such goods are available for delivery at destination, except upon proof of negligence or misconduct on the part of the railway administration or of any of its servants.

(2) The (Central Government) may, by general or special order, prescribe the manner in which goods tendered to a railway administration for carriage by railway shall be packed."

Before the railway authorities want to take advantage of this section, certain essential conditions are required to be satisfied as enumerated in that section. These conditions are:

(1) That the goods which are tendered to the railway administration must be in a defective condition or must be either defectively packed or packed in a manner not in accordance with the general or special order as provided by sub-section (2) thereof.

(2) The fact of such condition or defective or improper packing has been re-

corded by the sender or his agent in the forwarding note, and

(3) Deterioration, leakage, wastage or damage in transit must be a consequence of the defective condition or the defective packing must result in leakage, wastage or damage in transit.

It is only if these conditions are satisfied that it is open to the railway administration to take recourse to this section and then say that the railway administration shall not be liable for any deterioration, leakage, wastage or damage or for the condition in which such goods are available for delivery at destination, except upon a proof of negligence or misconduct on the part of the railway administration or of any of its servants.

8. Section 74-C is more or less a similar provision but providing for a different set of circumstances viz., when animals or goods are carried at owner's risk rate which is admittedly a lesser rate advantageous to the consignor or consignee and the railway administration is not made responsible for any loss, destruction or deterioration or damage to such goods from any cause whatsoever except upon proof that such loss, destruction, deterioration or damage was due to negligence or misconduct on the part of the railway administration or of any of its servants. It is the contention of the learned counsel for the railway administration that in view of this special provision in both these sections, the railway administration is absolved of all responsibility or obligation at all stages of the proceedings in the suit to show that it was not negligent in carrying out the contract of carriage.

9. It is difficult to see how such a conclusion can follow on a construction of both these sections. No doubt the liability of the railway administration for deterioration, leakage, wastage or damage or the damaged condition of the goods, is made conditional upon a proof of negligence or misconduct on the part of the railway administration or any of its servants. But it cannot be forgotten that facts about the manner in which the consignment is dealt with and handled are facts which are exclusively within the special knowledge of the railway administration itself. If it is the obligation of the plaintiff to show that the railway administration was negligent, that can only be done when the relevant facts which are in the exclusive knowledge of the railway administration are brought on record and it is difficult to appreciate how the railway administration can disown any obligation to bring on record such facts by taking protection of sections 74-A and 74-C and asking the plaintiff, who obviously has no knowledge of the relevant facts, to show that the railway administration was negligent. The

scope of provisions of Section 74-C came for consideration before the Division Bench of this Court in AIR 1960 Bom 344 where a similar argument was advanced. Repealing such an argument, the Division Bench observed in paragraph 8 of the judgment as follows:

"In case to which S. 74-C of the Railways Act is applicable the burden of proving misconduct or negligence is of course on the plaintiff, but as observed by the Privy Council in *Dwarkanath v. Rivers Steam Navigation Co. Ltd.*, 20 Bom LR 735=(AIR 1917 PC 173), under S. 106 of the Indian Evidence Act the bailee should call all the material witnesses to prove the facts which were within the special knowledge of the bailee. As observed in *Union of India v. Parikh Shankarlal Jethalal*, AIR 1956 Nag 255 the law does not cast any burden upon the administration to establish positively how the loss or damage occurred, and to prove an absence of negligence on their part, but a duty is cast on the administration to lay all the materials concerning the occurrence before the Court; but even so it remains for the consignees to satisfy the Court that the true inference from the materials is that the carrier's servants have not shown due care, skill and nerve. As observed in *Asaram Gangaram v. Union of India*, New Delhi, AIR 1957 Nag 59:

"It is no doubt true that it is always for the plaintiff to prove that the loss was caused by the neglect or negligence of the Railway Administration. But when the Court has the evidence that the goods had deteriorated while in the custody of the Railway Administration, there is a prima facie case of negligence for the Railway Administration to answer. Under S. 106 of the Evidence Act, the special facts and circumstances under which the consignment was handled are only known to the Railway Administration, and therefore, it is for them to place that material before the Court for forming its opinion on the question whether it had taken as much care of the goods as is required of them. The Railway Administration should place material before the Court from which it could be inferred how the consignment was dealt with, in order to ascertain whether the Railway Administration took as much care as is required of them, being bailees of the goods under Ss. 151, 152 and 161 of the Contract Act'."

The principle contained in Ss. 74-A and 74-C with regard to the burden of proof is the same except that two different sets of circumstances are contemplated by these two sections and the observations quoted above apply equally to a case governed by S. 74-A of the Railways Act.

Thus though Ss. 74-A and 74-C of the Railways Act cast a burden on the plaintiff to prove that the railway administration was negligent, the railway administration cannot claim to be absolved from the obligation to place the relevant facts before the Court to enable it to decide the question whether the Railway had taken as much care of the goods as was required of them. The learned counsel contended that the decision of the Division Bench cannot be considered as an authority for this proposition because according to him it is a decision which is based on admission. If the decision of the Division Bench is read carefully it becomes clear that the only finding which was given on the admission of the counsel was that there was an obligation on the railway administration to supply water-tight wagons. But so far as the construction of Section 74-C of the Railways Act was concerned, the construction propounded in that decision is not based on any admission or concession, but is based on the consideration of the provisions of the Act itself. I am, therefore, unable to accept the contention of the learned counsel that the decision of the Division Bench is not an authority in so far as the construction of Section 74-C was concerned. That question was considered independently of the question of obligation to supply a water-tight wagon.

10. The learned counsel then contended that the plaintiff had not discharged the burden of proof laid upon him by Sections 74-A and 74-C. According to him the forwarding note had an endorsement with regard to the nature of the packing and that endorsement showed that it was a gunny bag packing and that the goods were to be transported at the risk of the consignor. There is no evidence in this case even to indicate that the damage in respect of which the plaintiff has sued the railway administration has resulted from a defective packing. As I have already stated before, if the railway administration wants to take protection under S. 74-A of the Act, it must be shown that the goods were liable to deterioration, leakage, wastage or damage in transit as a result of the defective packing. In other words, it is only when the damage complained of has resulted from a defective packing and in addition to this such defective packing is recorded by a sender in the forwarding note then only it is the duty of the plaintiff to show that the railway administration is guilty of negligence or misconduct. But if in a given case the damage is not in any way related to or is not a consequence of the defective packing, obviously the condition necessary for the operation of Section 74-A is not fulfilled. In

the instant case, therefore, even assuming that the alleged endorsement in the forwarding note amounts to an admission of the consignor that the packing was a defective packing, it is not the defendant's case, or it is at least not proved, that but for such a defective packing the goods would not have been damaged. On the other hand the plea of the defendant-railway administration is that the water which damaged the consignment must have gone through the door flaps. In this case the damage is caused by an external agency. It is not the case of the defendants that any defective packing was the cause of the damage caused to the consignment. It is not established in this case that the damage to the consignment was a result of any defective packing and in my view the instant case is not at all governed by the provisions of Section 74-A of the Act.

11. Both the Courts below have found as a fact, on evidence that the negligence of the railway administration has been proved. As already stated, the plaintiff was entitled to rely on the evidence tendered on behalf of the defendants for the purpose of showing this. The Courts were also entitled to take into account the fact that material witnesses have not been examined by the defendants-railway administrations. The case of the defendants in the written statement was that water must have entered the wagon as a result of heavy rains and stormy wind. But when the plaintiff called upon the defendants to answer such interrogatories in this matter, the defendants denied knowledge as to whether when the consignment was being dealt with there were rains at any places. Even with regard to the type of wagon described in the written statement as water-tight the description was not adhered to in the interrogatories and with regard to the kind of wagon the interrogatories stated that the wagon "was not marked NWT" (non-water tight). Thus one gathers an impression that the railway administration was reluctant to place on record all material facts. As a matter of fact, since the plea was that water must have entered the wagon because of heavy rain one would have expected the railway administration at least to tender evidence to show that at particular station there was heavy rain and strong wind, in which case their defence that damage was caused by reasons beyond their control may have been justified. But in spite of doing that, relevant material is suppressed by the defendants. The material witnesses have also not been examined. As observed by the lower appellate Court, the defendants have not cared to examine any clerk or Station Master or train examiner from

Ghorpadi or Tirora who would have been material witnesses and whose evidence would have been material to bring on record important material. Under such circumstances if the Courts have come to the conclusion that plaintiff has succeeded in proving that the defendants-railway administrations were negligent, it is difficult to understand how that finding is open to challenge in this second appeal. That finding, therefore, must be accepted for the purposes of the decision of this appeal. In view of that finding, the appellants' contention that the judgment of the lower appellate Court is based on an erroneous construction of S. 74-C cannot also be accepted, because on merits it has been found that the plaintiff has discharged his burden of showing that the railway administrations were negligent.

12. Another point which was raised by the learned counsel for the appellants was that the plaintiff had not disclosed as to how the consignment which was damaged consignment was dealt with and that he had suffered monetary loss as a result of the alleged damage, and unless that was shown he was not entitled to a decree for damages. It is not disputed that the consignment when it arrived at the destination was found in a damaged condition. The railway authorities have themselves assessed the damage in respect of 39 bags at 13 per cent. This fact is also not disputed. It is, therefore, clear that when the plaintiff has received the damaged consignment and the extent of the damage itself is ascertained, merely because the plaintiff has led no evidence to show as to the exact monetary loss caused to him, it cannot be said that the plaintiff is not entitled to damages. The very fact that the railway authorities have found that the consignment had deteriorated in value and the extent of that deterioration was estimated at 13 per cent, it is not now open to the railway administration to say that the plaintiff is not entitled to damages. The quantum of the damages has been fixed by both the Courts below on the basis of assessment made by the Railway Administration and the same is not liable to be interfered with. These were the only contentions raised by the learned counsel and since all of them have been negatived the result is that the appeal is liable to be dismissed. The appeal is dismissed with costs. The appellants' counsel requests for leave to file Letters Patent Appeal. Leave refused.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 BOMBAY 13 (V 56 C 3)

TARKUNDE AND WAGLE, JJ.

Union of India, Appellant v. Sugrabai
Wife of Abdul Majid and others, Respondents.

First Appeal No. 262 of 1965 D/- 4-12-1967, against decision of Joint Civil J. Senior Division at Nasik in Spl. Civil Suit No. 33 of 1962.

(A) Tort—Vicarious liability — Tort by Government servant — State is not liable if it is committed in exercise of sovereign power—Sovereign power, what is — Military driver driving motor truck, carrying Record Sound Ranging Machine from military workshop to military school of Artillery — By rash and negligent driving a cyclist killed on the road — Driver held was not acting in exercise of sovereign power — Union of India held liable — O. S. Suit No. 2704 of 1948 D/- 29-9-1952 (Bom.), Overruled.

The extent of the immunity of the State in respect of the torts committed by its servants during the course of their duty is the same as the extent to which the East India Company was immuned from liability for similar torts committed by its employees. The East India Company was not liable for a tort committed by its employees while performing a duty which amounted to the exercise of a sovereign power delegated to him. In other cases the vicarious liability of the East India Company was the same as the liability of an ordinary employer. (Para 5)

Where the defendant, a servant of the Union of India, while transporting a Record Sound Ranging Machine and other equipment by a military truck from the military workshop to the school of Artillery, by his negligent and rash driving killed a person who was on a cycle, by dashing the truck against the cycle, the Union of India would be liable for the tort of the defendant unless it is found that the defendant while driving the truck was doing a duty in discharge of a sovereign power delegated to him.

(Para 5)

By sovereign power is meant power which cannot be lawfully exercised except by a sovereign or private individual delegated by a sovereign to exercise them. (1868) 5 Bom HCR App A p. 1 & AIR 1962 SC 933 and AIR 1965 SC 1039, Rel. on.

(Para 6)

Sovereign powers are vested in the State in order that it may discharge its sovereign functions. For the discharge of that function one of the sovereign powers vested in the State is to maintain an army. Training of army personnel can be regarded as a part of the exercise of that sovereign power. The State

would clearly not be liable for a tort committed by an army officer in the exercise of that sovereign power. But it cannot be said that every act which is necessary for the discharge of a sovereign function and which is undertaken by the State involves an exercise of sovereign power. Many of these acts do not require to be carried out by the State through its servants. In deciding whether a particular act was done by a Government servant in discharge of a sovereign power delegated to him, the proper test is whether it was necessary for the State for the proper discharge of its sovereign function to have the act done through its own employee rather than through a private agency.

(Paras 9, 10)

In the case, the transport of the Records Sound Ranging Machine and other equipment from the workshop to the School of Artillery was necessary for the proper training of army personnel, but it was not necessary to transport the said equipment through a military truck driven by an employee of the defence department. The equipment could have been carried through a private carrier without any material detriment to the discharge by the State of its sovereign function of maintaining the army and training army personnel. It must follow that the defendant was not exercising any delegated sovereign power of the State when he transported the equipment in a military truck and caused the fatal accident by his negligence. The Union of India, is therefore liable for the tort of the defendant. AIR 1962 Punj 315 (FB) and AIR 1967 Delhi 98, Rel. on. AIR 1959 Punj 39, Ref. AIR 1915 Mad 993 and AIR 1932 Cal 834 and AIR 1967 Andh Pra 41, Expl. and Distinguished. O. S. Suit No. 2704 of 1948 D/- 29-9-1952 (Bom), Overruled. (Paras 10, 15)

(B) Tort — Damages — Military truck driver by his negligent and rash driving killing a cyclist on the road — Deceased 31 years old — His wife 27 years old — Deceased having two daughters and four sons, all minors, youngest being about six months old and the eldest 11 years old — Deceased working in cutlery shop doing petromax lamp repairing, preparing tin boxes, fixing glass panels to windows on salary of Rs. 150 P. M. — Besides this, deceased getting from employer Rs. 250 worth of clothes for him and his family twice a year — No evidence that deceased was in bad health at time of accident — Held that the life expectancy of deceased could reasonably be taken to be a further period of 30 years — Damages of Rs. 30,000 awarded by trial court held were not excessive, taking into consideration that the amount which was available for the maintenance and education of the wife and children from

the earning of the deceased was Rs. 125 per month or Rs. 1500 per year, capitalising the same for a period of 20 years and the fact that the pay of the deceased was being increased from time to time and the fact that the deceased died in a period of soaring prices. AIR 1966 SC 1750. Rel. on. 1942 AC 601, Ref. (Para 20)

Cases Referred: Chronological Paras (1967) AIR 1967 Andh Pra 41 (V 54)=

(1966) 2 Andh WR 196, State of Andhra Pradesh v. Peniseti

Ankanna 14

(1967) AIR 1967 Delhi 98 (V 54)=69

Pun LR (D) 125, Smt. Satya Wati

Devi v. Union of India 13

(1966) AIR 1966 SC 1750 (V 53)=(1966)

3 SCR 649, Municipal Corporation

of Delhi v. Subhagwanti 20

(1965) AIR 1965 SC 1039 (V 52)=(1965)

2 Cri LJ 144, Kasturi Lal v. State

of Uttar Pradesh 8, 11, 16

(1962) AIR 1962 SC 933 (V 49)=1962

Supp (2), SCR 989, State of Rajasthan

v. Mt. Vidhyawati 7, 11, 16

(1962) AIR 1962 Punj 315 (V 49)=ILR

(1962) 1 Punj 708 (FB), Union of

India v. Smt. Jasso 12

(1959) AIR 1959 Punj 39 (V 46)=ILR

(1958) Punj 923, Union of India v.

Harbans Singh 12

(1952) O. S. Suit No. 2704 of 1948

D/- 29-9-1952 (Bom.) 16

(1942) 1942 AC 601=111 LKJB 418,

Davies v. Powel Duffryn As-

sociated Companies Ltd. 20

(1932) AIR 1932 Cal 834 (V 19)=ILR

59 Cal 1289, Secy. of State v.

Shreegobindra Chaudhuri 14

(1915) AIR 1915 Mad 993 (V 2)=ILR

39 Mad 351, Secy. of State for India

v. A. Cockcraft 14

(1868) 5 Bom HCR App A p. 1=Bourke

AOC 166, Peninsular and Oriental

Steam Navigation Co. v. Secy. of

State for India 6, 8, 16

V. H. Gumaste Govt. Pleader, for Ap-

pellant; M. A. Rane, for Respondents

Nos. 1 to 7.

TARKUNDE, J.: On 13th September 1960 one Abdul Majeed was going on a bicycle from Bhagur to Deolali camp near Nasik. At that time defendant No. 1, who was a driver employed in the defence department, came in a military truck from the opposite direction. The military truck dashed against the bicycle of Abdul Majeed with the result that Abdul Majeed received severe injuries and died on the spot. He left behind his young wife and six minor children. The wife and the children filed a pauper suit for the recovery of damages estimated at Rs. 30,000 from defendant No. 1 and from the Union of India defendant No. 2. The plaintiffs alleged in the plaint that the accident occurred because of the rash and negligent driving of defendant No. 1, that defendant No. 1 was on Government

duty when the accident took place, and that both the defendants were liable for damages. In his defence, defendant No. 1 denied that he was rash or negligent in driving the truck and further pleaded that the amount of damages claimed by the plaintiffs was excessive. The Union of India took up the same defences and advanced a further plea that they were not liable for the tort alleged to have been committed by defendant No. 1 as the latter was in military service. On the evidence led before him the learned trial Judge found that the accident was occasioned by the rash and negligent driving of defendant No. 1, that the amount claimed by the plaintiffs by way of damages was fair and proper, and that the Union of India was liable for the tort along with defendant No. 1. On these findings the learned Judge passed a decree for the payment of Rs. 30,000 and costs by the defendants to the plaintiffs. From this decree the Union of India has filed the present appeal. No appeal was filed by defendant No. 1.

2. Adequate evidence was produced at the trial to show that at the time of the accident the deceased Abdul Majeed was riding on his bicycle on the left side of the road, that defendant No. 1 came in his truck at great speed from the opposite direction, that he swerved to his right to pass a tonga, that he dashed the truck against the bicycle of the deceased and that thereafter the truck went to a distance of 108 feet and struck against a tree. Defendant No. 1 was convicted by Court Martial under Section 304A I. P. C. for causing death by rash and negligent driving. In view of the evidence on record the learned Government Pleader, who appeared before us on behalf of the Union of India did not find it possible to contest the trial Court's finding that the accident was occasioned by the rash and negligent driving of defendant No. 1.

3. Two contentions were advanced by the learned Government Pleader before us: (1) that the Union of India was wrongly held liable for the tortious act of defendant No. 1, and (2) that the amount of damages allowed to the plaintiffs was excessive.

4. In deciding whether the Union of India is liable for the tort committed by defendant No. 1 it is necessary to notice the duty in which defendant No. 1 was engaged at the time of the accident. Defendant No. 1 was attached as a military driver to the School of Artillery conducted by the defence department of the Government of India at Deolali. A machine of the School of Artillery called "Records Sound Ranging" and some other equipment had been sent for repair to a military workshop, and after the work of repair was over defendant No. 1 was, at the time of the accident, transporting the

machine and the other equipment in the military truck from the workshop to the School of Artillery. It is in evidence that Records Sound Ranging is a machine for locating enemy guns. The machine was to be used at the School of Artillery for giving training to military officers.

5. The principles which determine the immunity of the State in respect of the torts committed by its servants during the course of their duty can now be taken as well settled. The extent of the immunity of the State is the same as the extent to which the East India Company was immuned from liability for similar torts committed by its employees. The East India Company was not liable for a tort committed by its employees while performing a duty which amounted to the exercise of a sovereign power delegated to him. In other cases the vicarious liability of the East India Company was the same as the liability of an ordinary employer. It follows that the Union of India would be liable for the tort of defendant No. 1 unless it is found that defendant No. 1, while driving the truck from the military workshop to the School of Artillery, was doing a duty in discharge of a sovereign power delegated to him.

6. The leading authority on the subject is the decision of the Supreme Court, *Calcutta, given in 1861 in the Peninsular & Oriental Steam Navigation Company v. The Secy. of State for India*, (1868) 5 Bom HCR App A p. 1. In delivering the judgment of the Court Sir Barnes Peacock, C. J., after pointing out that the East India Company was a trading Company to whom sovereign powers had been delegated, observed:

"There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them." In the latter part of the judgment the learned Judge said:

"But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie."

7. The above principle was approved and adopted by the Supreme Court in two recent cases. In *State of Rajasthan v. Mst. Vidyawati*, AIR 1962 SC 933, a person employed as a motor driver by the State of Rajasthan had caused a fatal accident while driving a Government jeep car in rash and negligent manner.

The car was meant for the use of the Collector. It had been taken to a repair shop and was being driven after the repair to the Collector's residence when the fatal accident took place. The trial Court had held that the State of Rajasthan was not liable for the tort of the driver because the car was being maintained for the use of the Collector in the discharge of his official duties. The High Court of Rajasthan disagreed with the trial Court and held that the State of Rajasthan was liable because at the time of the accident the car was not being used in the exercise of any sovereign power of the State. The decision of the High Court was upheld by the Supreme Court. Delivering the judgment of the Supreme Court, Sinha C. J. said:

"Can it be said that when the jeep car was being driven back from the repair shop to the Collector's place when the accident took place, it was doing anything in connection with the exercise of sovereign powers of the State? It has to be remembered that the injuries resulting in the death of Jagdishlal (the deceased in that case) were not caused while the jeep car was being used in connection with the sovereign powers of the State."

8. The other case in which the Supreme Court considered the extent of the vicarious liability of the State for the torts committed by its servants was *M/s. Kasturi Lal v. State of Uttar Pradesh*, AIR 1965 SC 1039. In that case a quantity of gold was attached by police officers from one Ralia Ram, who was a partner of the plaintiff firm, on suspicion that it was stolen property. The gold was kept at the police Malkhana in the custody of a Head Constable who, however, misappropriated the gold and fled to Pakistan. It was alleged by the plaintiffs that the loss was caused by the negligence of police officers in not taking proper care of the attached property and this plea of the plaintiffs was upheld by the Supreme Court. The Supreme Court, however, came to the conclusion that the tortious act of the police officers was committed by them in the discharge of sovereign powers and the State was, therefore, not liable for the damage caused. The Supreme Court observed in this connection:

"Now, the power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly characterised as sovereign powers; and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employees of the respondent during the course of its employment but the employment in question being of the category, which can claim the

special characteristic of sovereign power, the claim cannot be sustained."

Dealing with the general principle which determines the vicarious liability of the State in such cases, the Supreme Court referred to the aforesaid decision in (1868) 5 Bom HCR App A p. 1 and went on to say:

"Thus, it is clear that this case recognises a material distinction between acts committed by the servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to public servants, and acts committed by public servants which are not referable to the delegation of any sovereign powers. If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose. This distinction which is clear and precise in law, is sometimes not borne in mind in discussing questions of the State's liability arising from tortious acts committed by public servants".

9. Although the principle which determines the extent of the vicarious liability of the State for the torts committed by its servants is thus well settled, it is by no means easy to apply the principle to particular cases. Sovereign powers are vested in the State in order that it may discharge its sovereign functions. The ultimate sovereign function of the State which is relevant to the case before us is that of defence of the country. For the discharge of that function one of the sovereign powers vested in the State is to maintain an army. Training of army personnel can be regarded as a part of the exercise of that sovereign power. The State would clearly not be liable for a tort committed by an army officer in the exercise of that sovereign power. The learned Government Pleader, however, wanted us to go much further than this. He argued that all acts which are necessary for the discharge of a sovereign function of the State and which are carried out by the concerned

department of the State must be deemed to have been done in the exercise of the sovereign power delegated by the State. Thus, according to the learned Government Pleader the training of army personnel requires the maintenance of machines used in the training, that the maintenance of the machines requires that they should be kept in proper repair, that the work of repairing the machine requires its transport from the workshop to the military school, and that the transport of the machine is, therefore, a duty performed in the exercise of a sovereign power of the State. The learned Government Pleader argued that defendant No. 1 in the present case while transporting the Records Sound Ranging machine and other equipment from the workshop to the School of Artillery, was thus exercising a sovereign power delegated to him and the Union of India was, therefore, not liable for the tort committed in the course of that duty.

10. We are unable to agree that the immunity of the State for the torts committed by its servants can be extended in the manner suggested by the learned Government Pleader. In our view, there is a fallacy in the assumption that every act which is necessary for the discharge of a sovereign function and which is undertaken by the State involves an exercise of sovereign power. Many of these acts do not require to be carried out by the State through its servants. For instance, the army unit stationed at Deolali requires a regular supply of food. Food-grains purchased for the army unit may be transported to the military camp in trucks belonging to a private agency. They may also be transported in military trucks driven by employees of the defence department. The fact that the army unit is maintained in the exercise of the State's sovereign power and the further fact that supply of food is essential for the maintenance of the army unit do not justify the conclusion that, if the food is transported to the army camp in military trucks instead of private trucks, the drivers of the military trucks exercise a sovereign power delegated to them by the State. To take another instance, the maintenance of military barracks is necessary for the maintenance of the army unit and the military barracks have to be kept in proper repair. If, instead of entrusting the work of repairing the barracks by private contractors, the State sets up a departmental unit for the purpose, the work done by the State employees in repairing the barracks cannot be said to have been done in the exercise of delegated sovereign power, even if the work of repairing the barracks is essential for the maintenance of the army unit. It appears to us that in deciding whether a particular

act was done by a Government servant in discharge of a sovereign power delegated to him, the proper test is whether it was necessary for the State for the proper discharge of its sovereign function to have the act done through its own employee rather than through a private agency. In the case before us the transport of the Records Sound Ranging machine and other equipment from the workshop to the School of Artillery was necessary for the proper training of army personnel, but it was not necessary to transport the said equipment through a military truck driven by an employee of the defence department. The equipment could have been carried through a private carrier without any material detriment for the discharge by the State of its sovereign function of maintaining the army and training army personnel. It is easy to appreciate that in certain circumstances the transport of machines through military trucks can be regarded as an act done in the exercise of the State's sovereign power. The machines may have to be carried for the immediate use of an army engaged in active military duty. In such a case the transport of the machines through military trucks may be regarded as an exercise of the State's sovereign power. In the case before us the transport of the machine could have been arranged through a private carrier without any material detriment to the running of the School of Artillery. It must follow that defendant No. 1 was not exercising any delegated sovereign power of the State when he transported the equipment in a military truck and caused the fatal accident by his negligence.

11. What we have stated above appears to us to be in conformity with the approach adopted by the Supreme Court in *Vidhyawati's case*, AIR 1962 SC 933. The car in that case was meant for the use of the Collector who must have been exercising some of the sovereign powers delegated to him by the State. The mere fact, however, that the car was meant for the Collector's use and was required to be repaired was not held to justify the conclusion that its driver was exercising a delegated sovereign power when he caused the accident. The State was held liable for the tort of the driver because at the time of the accident the car was not being used in connection with the exercise of any of the State's sovereign powers. On the other hand, in *Kasturi Lal's case*, AIR 1965 SC 1039 the State was held not liable for the negligence of the police officers in failing to take care of the property attached by them, because it was the statutory duty of the police officers to seize the attached property and the Supreme Court held that the performance of this statutory duty amounted to an exercise of sovereign

power. It will be recalled that in that case, with reference to the duties which are not assigned to public servants by virtue of any delegation of sovereign power, the Supreme Court observed that the act of the public servant in such cases is "an act of a servant who might have been employed by a private individual for the same purpose." We have found in the present case that the act of defendant No. 1 in transporting the equipment in the truck was an act of a servant who might have been employed by a private individual for the same purpose.

12. Considerable support to the view which we are inclined to take is found in the decision of a Full Bench of the Punjab High Court in *Union of India v. Smt. Jasso*, AIR 1962 Punj 315. A reference to the Full Bench in that case was rendered necessary because of an earlier decision of a Division Bench of the Punjab High Court in *Union of India v. Harbans Singh*, AIR 1959 Punj 39. In the Division Bench case, an accident was caused by the negligence of a driver of a military truck when it was being used in supplying meals to military personnel on active duty. The Division Bench held that the Union of India was not liable for the negligence of the driver. In the subsequent Full Bench case, AIR 1962 Punj 315 a fatal accident was caused by the negligence of a driver of a military truck which was carrying coal to Army General Headquarters in Simla, and the question referred to the Full Bench was whether the Union of India was liable to be sued in respect of the tort committed by the military driver. The Full Bench held that the tort was not committed during the exercise of a sovereign power and that the Union of India was liable to be sued in respect of the tort. After referring to the distinction between acts done in the exercise of sovereign power and other acts the Full Bench observed:—

"Applying this test to the present case it is difficult to see how it can possibly be held that such a routine task as the driving of a truck loaded with coal from some depot or store to the General Headquarters' building at Simla, presumably for the purpose of heating the rooms, is something done in exercise of a sovereign power, since such a thing could obviously be done by a private person."

Referring to the Division Bench decision mentioned above, the Full Bench said:—

"It can be said regarding that case that the truck was being driven for supplying the needs of army personnel engaged on military duties which could not be performed by civilians.

It is at any rate safe to say that that case cannot be regarded as an authority for the general proposition that in no case can an action for damages be brought against the Government merely because

the vehicle involved in the accident is an army truck driven by a military employee in the performance of some duty or other."

13. A reference may also be made to a recent decision of the Delhi High Court in *Smt. Satya Wati Devi v. Union of India*, AIR 1967 Delhi 98. There an Air Force vehicle was engaged in carrying hockey and basket-ball teams to Indian Air Force Station, New Delhi, to play a match against a team of the Indian Air Force. After the match was over, the driver was going to park the vehicle when he caused a fatal accident by his negligence. On behalf of the Union of India it was argued before the Court that it was one of the functions of the Union to keep the army in proper shape and trim, that the hockey and basket-ball teams were carried by the vehicle for the physical exercise of Air Force personnel, and that the Union of India was therefore not liable for the tortious act of the driver of the vehicle. In rejecting the argument and holding that the Union of India was liable for the tort, the Court observed that carrying hockey and basket-ball teams to play a match can by no process of extension be termed as exercise of sovereign power.

14. The learned Government Pleader cited several precedents to show that the expression "sovereign power" has a wide connotation. In *Secretary of State for India v. A. Cockcroft*, ILR 39 Mad 351= (AIR 1915 Mad 993) the plaintiff had sued the Secretary of State for India in Council for damages in respect of injuries sustained by him in a carriage accident which was alleged to have been due to the negligent stacking of gravel on a military road maintained by the Public Works Department. It was held that the provision and maintenance of roads especially a military Road is one of the functions of Government carried on in the exercise of its sovereign powers and is not an undertaking which might have been carried on by private persons and that the Secretary of State for India in Council was, therefore, not liable for the damages claimed by the plaintiff. In *Secretary of State v. Shreegobindra Chaudhuri*, ILR 59 Cal 1289= (AIR 1932 Cal 834) the Calcutta High Court dealt with a suit against the Secretary of State for India for loss caused to the plaintiff's property by the alleged mismanagement of managers appointed by the Court of Wards. The Court held that the plaintiff had no cause of action against the Secretary of State for India. The Court observed that the jurisdiction exercised by the Court of Wards under the Court of Wards Act, 1879, was essentially an exercise of a sovereign power. In *State of Andhra Pradesh v. Piniseti Ankanna*, AIR 1967 Andh Pra 41 the State of Andhra

Pradesh was sued for damages alleged to have been caused by some illegal and malicious acts of certain officers engaged in the collection of land revenue. The Court held that the collection of land revenue is a sovereign function of the State and the State was therefore, not liable for the alleged tortious acts.

15. These cases, though they show that the State may have sovereign powers of various types, are not helpful in deciding whether the duty which was performed by defendant No. 1 in the present case at the time of the accident amounted to an exercise of a sovereign power delegated to him. We find that the duty which was being performed by defendant No. 1 could have been entrusted to a private individual without any material detriment to the State's function of running the School of Artillery at Deolali and that, therefore, defendant No. 1 was not acting in the exercise of any sovereign power when he committed the accident.

16. Towards the end of the hearing before us the learned Government Pleader referred to a judgment delivered by Mr. Justice J. C. Shah (as His Lordship then was) on 29th September 1952 in O.S. Suit No. 2704 of 1948 (Bom). That was a suit filed by the plaintiff to recover damages from the Dominion of India for injuries caused by the negligent driving of a motor vehicle by one Swami who was a motor driver employed in the military department. On a plea in the nature of demurrer raised by the defendants, the learned Judge dealt with the preliminary issue whether, on the allegations contained in the plaint, any cause of action was made out against the Dominion of India. No evidence was led before the learned Judge on the nature of the duty in which the motor driver Swami was engaged at the time of the accident. The learned Judge held that no cause of action was made out against the Dominion of India and dismissed the suit. He said in his judgment:

"The maintenance of the military department is certainly not an undertaking which could be carried on by a private person, and the running of motor vehicles maintained by the military department being an activity which is incidental to the military department it must be held that even though there is no direct connection between the exercise of sovereign authority and running of a motor vehicle by an employee of the military department, the running of a motor vehicle belonging to the military department being for the performance of duties connected with the exercise of the sovereign authority, any injury caused to the plaintiff as a result of rash and negligent driving by an employee in that department will not sustain a suit for damages against the sovereign.

When this decision was given by the learned Judge, it was generally assumed, on a certain interpretation of the judgment in (1868) 5 Bom HCR App A p. 1 that the functions of the Government can be classified into commercial and non-commercial functions and that the State is not liable for a tort committed by a servant in the course of his duty if the servant was employed in a non-commercial department. In view of the decision of the Supreme Court in Vidhyawati's case, AIR 1962 SC 933 and in view of the observations of the Supreme Court in Kasturi Lal's case, AIR 1965 SC 1039 this approach is no longer justified. It is clear from the judgments of the Supreme Court in these cases that the State is liable for a tort committed by an employee in any of its departments in the course of his duty, if it is found that the duty which was being performed by the employee at the time of the tort was not in exercise of a sovereign power delegated to him. With very great respect, therefore, we are unable to accept the above decision of Mr. Justice J. C. Shah as laying down the correct law.

17. We will now deal with the second contention of the learned Government Pleader, viz., that the amount of damages allowed to the plaintiffs by the learned trial Judge is excessive. At the time of the accident the deceased Abdul Majeed was 31 years old. The age of his wife, plaintiff No. 1 was then about 27 years. They had two daughters and four sons and all of them were minors. The youngest child was of about six months and the eldest of about 11 years at the time of the accident. According to the evidence of the wife plaintiff No. 1, Abdul Majeed was working in a cutlery shop of one Mohamed Shamsuddin. He was engaged in repairing petromax lamps, preparing tin boxes, fixing glass panels to windows and also in managing Mohamed Shamsuddin's shop. He was being paid Rs. 150 per month. Besides this, Mohamed Shamsuddin used to give clothes worth Rs. 250 for him and for members of his family on each of the two Id festival days of the year. Mohamed Shamsuddin was examined on behalf of the plaintiffs and he corroborated the evidence of plaintiff No. 1 with regard to the earnings of Abdul Majeed. He deposed that Abdul Majeed was working with him for the last 18 years, that at the beginning his pay was Rs. 60 per month, it was raised to Rs. 100 per month, and it was further raised to Rs. 150 per month about five years before his death.

18. Witness Mohamed Shamsuddin did not keep accounts and did not pay income-tax or sales tax. Because of this, the learned trial Judge held, rather arbitrarily, that the monthly earning of the deceased Abdul Majeed was Rs. 100. We

do not find any adequate reason to discard the evidence of plaintiff No. 1 and Mohamed Shamsuddin that Abdul Majeed was earning Rs. 150 per month at the time of his death and was given some clothes for himself and his family twice a year by his employer. A pay of Rupees 150 per month does not appear to be unusual for the type of work he was doing. On his earnings he was able to maintain a family of eight persons. It is in the evidence of Mohamed Shamsuddin that after Abdul Majeed's death he engaged another servant named Usman Balekhan and the salary of that servant was Rupees 160 per month. It appears that in his police statement also Mohamed Shamsuddin had stated that he was paying to Abdul Majeed Rs. 150 per month.

19. The monthly earning of the deceased may thus be taken to be a little higher than Rs. 150. Since he was maintaining a family of eight persons, the amount which he could spare for his wife and six children may be taken to be Rs. 125 per month or Rs. 1500 per year. He was 31 years old and there is no evidence that he was in bad health or that he had unhealthy habits. It can be reasonably held that he had a life expectancy of a further period of 30 years. The plaintiffs—his wife and minor children—were entirely dependant for their livelihood on his earnings.

20. In Municipal Corporation of Delhi v. Subhagwanti, AIR 1966 SC 1750 the Supreme Court approved the following passage from the judgment of Lord Wright in Davies v. Powell Duffryn Associated Companies Ltd., 1942 AC 601 as laying down the principle on which damages in cases of fatal accidents should be ascertained:

"It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend upon the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependant, and other like matters of speculation & doubt." The deceased in that case was 28 years old at the time of his death and the Supreme Court approved the assessment of damages by capitalizing for a period of 15 years the monthly sum which was available for the subsistence and educa-

tion of his dependants at the time of his death. In the present case the amount which was available for the maintenance and education of the plaintiffs from the earning of the deceased was, as held by us above, Rs. 125 per month or Rs. 1,500 per year. The damages of Rs. 30,000 granted by the trial Court would be equal to the capitalization of the above amount for a period of 20 years. The amount awarded may appear to be excessive, but in our opinion it is not. The pay of the deceased was being increased from time to time. It can be safely assumed that in the course of time his earnings would have been higher. Moreover, he died in a period of soaring prices. Like other employees, he would have received higher money wages as a result of a rise in the price level. The real value of the amount of Rs. 30,000 awarded by the trial Court is much less to-day than it was when the amount was claimed by the plaintiffs in the suit. Under the circumstances we are of the view that the damages awarded by the trial Court are proper and that reduction in that amount would not be justified.

21. In the result, the appeal fails and is dismissed with costs.

R.G.D.

Appeal dismissed.

AIR 1969 BOMBAY 20 (V 56 C 4)
VIMADALAL, J.

Ramchandra Govind Take and others,
Accused, Appellants v. The State, Respondent.

Criminal Revn. Appln. No. 977 of 1967,
D/- 6-3-1968.

(A) Criminal P. C. (1898), S. 439 — High Court, in revision, cannot disturb concurrent finding of fact. (Para 4)

(B) Penal Code (1860), Ss. 96, 97 — Prosecution under Ss. 324/34, I. P. C. — Plea of total denial of the offence, taken up by accused in their statements — It is open for them to raise alternative plea of right of private defence, if the same can be proved on strength of prosecution evidence itself. AIR 1933 Pat 568 and AIR 1944 Bom 274 (FB), Foll.; AIR 1954 Cal 258, Refd. (Para 6)

(C) Penal Code (1860), Ss. 97, 99, 425, 441 — Right of private defence of property — Offender asserting bona fide claim of his right — Offender, neither liable for mischief under S. 425, nor for criminal trespass under S. 441 — There is no right of private defence of property against such an offender. (Para 8)

Cases Referred: Chronological Paras
(1954) AIR 1954 Cal 258 (V 41)=1954
Cri LJ 774, Yusuf Shaikh v. The
State

(1944) AIR 1944 Bom 274 (V 31)=46

Bom LR 566 (FB), Emperor v.

Hasan Abdul Karim

(1933) AIR 1933 Pat 568 (V 20)=35

Cri LJ 92, Janki Mahto v.

Emperor

A. G. Sabnis for R. W. Adik, for Appellants (Nos. 1, 3 and 4); R. S. Bhonsle, Hon. Asstt. to Government Pleader, for the State.

ORDER: This is a revision application filed by original accused Nos. 1, 3 and 4, from the order of the Sessions Judge at Ahmednagar in appeal upholding the conviction of the said accused by the Judicial Magistrate, First Class, Shrirampur, on 13th July 1967. The original 2nd accused was acquitted by the said Judicial Magistrate. On appeal to the Court of Session, the Sessions Judge, whilst upholding the conviction of accused Nos. 1, 3 and 4, reduced the sentences of imprisonment passed against them to the period already undergone by them, maintaining the fine which was imposed by the trial Magistrate. It may, however, be mentioned that, on appeal, the Sessions Judge altered the conviction of accused No. 1 to Section 324 read with Section 109, I. P. C. from Section 324 read with Section 34, under which the trial Magistrate had found him guilty. As far as accused Nos. 3 and 4 are concerned, he, however, upheld their conviction under Section 324, I. P. C.

2. The facts of the case are that one Nabisaheb Nizamsaheb was one of the co-owners of a plot of land bearing Survey No. 96/2 situated in the village of Ekalahari, and accused No. 1 claimed to be in possession of the said Survey Number as a tenant under a registered Lease Deed dated 1st February 1958. Nabisaheb and his co-owners had filed a civil suit in the Court of the Civil Judge at Shrirampur for a declaration that the said Lease Deed was not binding upon them, and for an injunction restraining the 1st accused from entering upon the said land on 3rd September 1966. An application for an interlocutory injunction made on behalf of the plaintiffs in that suit was dismissed some time before the incident with which we are concerned in the present case. The suit, however, is still pending. The evidence shows that, even though the said suit is still pending, Nabisaheb has made attempts on three or four occasions to assert the right which he claims to the land comprised in the said Survey No. 96/2, on each of which he was obstructed by the 1st accused who claimed to be a tenant thereof, as already stated above. The actual incident which has given rise to the present proceedings occurred early in the morning of 1st October 1966, when Nabisaheb made one more attempt to as-

sert his right to the said land and to carry out sowing operations thereon. For that purpose, he went to the said land accompanied by witnesses Sitaram and Harishchandra, but on this occasion, unlike on the previous occasions when he had made similar attempts, the incident did not pass off as peacefully as before. The evidence of the main prosecution witnesses, namely, Nabisaheb, Sitaram and Harishchandra, shows that accused No. 1, accompanied by three other persons, resisted the attempt of Nabisaheb and his associates, that accused No. 1 had a stick in his hand, accused No. 2 who was acquitted by the trial Magistrate had nothing in his hand, and that accused No. 3 had an axe while accused No. 4 had a pen-knife in his hand. In the scuffle that ensued, Nabisaheb fell down and received several injuries on his person, including injuries with the axe and the pen-knife. The four accused were thereupon charged for offences under Sections 323 and 324 read with Section 34, I. P. C., and were convicted and sentenced by the trial Magistrate as already stated earlier in this judgment. The convictions and sentence are confirmed by the Sessions Judge in appeal, subject to certain modifications which have also been set out above.

3. Two questions are raised by Mr. Sabnis on behalf of accused Nos. 1, 3 and 4, and they are (1) that the incident itself is not proved to have occurred and alternatively (2) that, if it is held that such an incident did occur, the evidence led by the prosecution itself shows that accused Nos. 1, 3 and 4 acted well within the right of private defence, and they, therefore, committed no offence, by reason of the provisions of Section 96, I. P. C.

4. There is no substance in the first point raised by Mr. Sabnis which was founded on the single fact that Nabisaheb has somehow stated in his evidence that the incident in question occurred on Survey No. 195/1 which, Mr. Sabnis states, is another Survey Number belonging to him situate quite far away from Survey No. 96/2 on which the incident is alleged to have occurred. This point has been considered by both the lower Courts which have arrived at concurrent findings to the effect that Nabisaheb has merely made a mistake in regard to the number whilst giving his evidence on the point. There is no reason for me, sitting in revision, to disturb that concurrent finding of fact arrived at by the lower Courts, and this contention of Mr. Sabnis must, therefore, be rejected.

5. The second contention of Mr. Sabnis, however, requires careful consideration. That contention is that the evidence on record shows that accused No. 1

was the tenant of Survey No. 96/2, and was in possession of the said Survey Number on the material date viz., the 1st of October 1966, that Nabisaheb and his associates wrongfully attempted to interfere with that possession of the 1st accused, and thereby committed the offences of mischief and criminal trespass which the 1st accused was entitled to resist in exercise of his right of private defence under Section 97(2) of the Indian Penal Code, and, if in resisting the same, Nabisaheb has received injuries, the accused persons have not committed any offence, in view of the provisions of Section 96 of the Indian Penal Code.

6. It is contended by Mr. Bhonsle on behalf of the State that it is not open to accused Nos. 1, 3 and 4 to take up the plea of the right of private defence which is a plea wholly inconsistent with the plea taken up by them in their respective statements that no such incident as is alleged to have occurred on the 1st of October 1966 had occurred at all. The plea that is to be found in the statements is one of total denial, and the interesting question that arises is whether, when accused persons take up such a plea of total denial, they could be permitted to raise an alternative plea of the right of private defence, as Mr. Sabnis has urged before me in the present case. This question has been the subject of three judicial decisions. Mr. Sabnis has relied upon the decision of the Patna High Court in the case of Janki Mahto v. Emperor, AIR 1933 Pat 568 at p. 570 in support of his contention that an alternative and inconsistent plea of that nature can be raised by an accused person. The accused in that case was convicted under Section 326 of the Indian Penal Code, and sentenced to two years' rigorous imprisonment. He appealed from that conviction and sentence, and the facts of the case as set out in the judgment of the High Court were somewhat similar in regard to the point which I am now considering. There was some dispute about the rights in respect of a certain land between the two factions, and a serious fight took place in which one of them was killed, and another one received grievous injuries and five others were also injured. The trial Judge virtually accepted the defence case, and although he held that both parties were armed and ready to fight, he also found that the accused were entitled in exercise of the right of private defence of person and property, even to cause grievous injuries to the other party who were the aggressors. The trial Judge, however, denied the right of private defence to the appellant on the ground that it was not specifically pleaded by him, his main defence being that he had not taken any part in the occurrence, and had been falsely implicated

because of the previous litigation between the parties. A Division Bench of the High Court held that the trial Judge had taken a mistaken view of the law, that the right of private defence can be pleaded even alternatively with the plea of alibi, and that right should not be denied to an accused person merely because he does not specifically plead it, provided that the circumstances found by the Court are such as clearly entitle him to the exercise of that right. They, therefore, allowed the appeal and set aside the conviction of the appellant as well as the sentence passed upon him, and directed that he be acquitted. In the case of *Emperor v. Shaik Hasan Abdul Karim*, 46 Bom LR 566=(AIR 1944 Bom 274) a Full Bench of this Court has taken a similar view in a matter which went up before them on a certificate of the Advocate General under clause 26 of the Letters Patent. One of the points urged before the Full Bench was that the trial Judge had, in his summing-up to the Jury, failed to refer to exception 4 to Section 300 of the Indian Penal Code which refers to death caused in the heat of a sudden fight without premeditation. The accused in that case did not plead that exception, or any other exception, and N. J. Wadia, J. observed in his judgment (at pp. 571-572 of Bom LR)= (at p. 277 of AIR) as follows:

"Under Section 105 of the Indian Evidence Act, when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception is upon him and the Court shall presume the absence of such circumstances. This section does not relieve a Judge even in cases where the accused has not pleaded that his case comes within any particular exception, from pointing out to the jury such facts in the evidence as might justify the jury in taking the view that the accused's case was covered by one or other exception. It is admitted that this exception was not pleaded by the accused in the statements made by them. It was not even referred to by the two counsel who appeared for the accused at the trial in their arguments, and although these facts would not absolve a Judge from the duty of drawing the attention of the jury to circumstances in the evidence which might make the exception applicable to the facts of the particular case, they may legitimately be taken into consideration in dealing with the point now raised before us, that the learned Judge was wrong in not drawing the attention of the jury to exception 4."

N. J. Wadia, J. then proceeded to consider the question further, and came to the conclusion that a Judge was, however, not bound in his charge to the jury to explain exceptions which in his opi-

nion were not applicable and for which there was no foundation whatever laid in the cross-examination, and on the facts of that case came to the conclusion that, under the circumstances of that case, there was no misdirection on that point in the learned trial Judge's summing-up to the jury. The position in the case of 46 Bom LR 566 = (AIR 1944 Bom 274) was therefore, worse from the point of view of the accused than the position in the present case, in so far as, not only was the exception not pleaded in the statements of the accused persons, but even their counsel also had not referred to it in the course of their arguments. In the present case, on the other hand, though the accused have pleaded a defence of total denial in their respective statements, this point has been raised by the advocates for the accused at all stages of the trial. The decision of the Calcutta High Court in the case of *Yusuf Sk. v. The State*, 1954 Cri LJ 774=(AIR 1954 Cal 258) was also referred to in the course of the arguments, but I do not think it necessary to deal with the same. I agree with the view expressed by the Patna High Court in *Janki Mahto's case*, AIR 1933 Pat 568 and by the Full Bench of our High Court in the case of 46 Bom LR 566=(AIR 1944 Bom 274) and in fact, I am bound by the latter of those decisions. I, therefore, hold that, though the accused in the present case have in their respective statements, taken up a plea of total denial of the offence, it is open to the learned advocate for the accused to raise an alternative plea of the right of private defence, if he is able to prove the same on the strength of the prosecution evidence itself.

7. The trial Magistrate has, no doubt come to the conclusion that the evidence before him shows that the 1st accused was cultivating the whole of the said Survey Number as a tenant, and was in possession of the same at the material time. The learned Sessions Judge in appeal has, however, come to a slightly different conclusion. Whilst he has not come to a contrary conclusion he has observed, "It is not very clear from the evidence as to who was in actual possession of the land at the time of the occurrence". He has not proceeded to examine that question any further because, in his opinion, the Court was not concerned with that fact. In the view that I take of this matter also, it is not necessary for me to decide whether the tenancy claimed by the 1st accused has been established by the material on record, or whether it has been proved that he was in actual possession of the land at the time of the occurrence in this case.

8. Section 96 of the Indian Penal Code lays down that nothing is an offence which is done in the exercise of the right

of private defence, and Section 97 proceeds to divide the right of private defence into two parts, the first part dealing with the right of private defence of person, and the second part dealing with the right of private defence of property. We are concerned with the second part of the provisions of Section 97. The material portion of Section 97 enacts that every person has a right, subject to certain restrictions contained in Section 99 of that Code, to defend the property, moveable or immovable, of himself or of any other person against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass. In order to entitle the accused persons before me to the exercise of the right of private defence of property, it is, therefore, necessary for them to establish that Nabisaheb entered the land in question on the morning of the 1st of October 1966 with the intention of committing the offence of mischief or criminal trespass or with the intention of attempting to commit those offences. If Nabisaheb came upon the said land in bona fide assertion of the right which he claimed to the same, however ill-founded that right may be, it cannot be said that his dominant intention in making the entry was to commit, or attempt to commit, the offence of mischief or of criminal trespass. The offence of mischief is defined in S. 425 of the I. P. C. That section defines the offence of mischief as the causing of destruction of property, or any change in or in the situation of property which destroys or diminishes its value, or affects it injuriously, and which is caused with intent to cause wrongful loss or wrongful damage to the public or to any person. The mere fact that any loss or damage may be caused to property would not constitute mischief, unless the intention of the alleged offender was to cause wrongful loss or wrongful damage to the person concerned. It is the duty of the criminal Court in such a case to determine what was the intention of the alleged offender, and if it comes to the conclusion that the accused was attempting to assert a bona fide claim of his right, then he cannot be found guilty of the criminal offence of mischief as defined in S. 425 of the Indian Penal Code. The offence of criminal trespass is defined in S. 441 of the same Code. That section enacts that whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with that intent, is said to commit "criminal trespass". Here

also, the position is therefore the same. If an alleged offender is attempting to assert a bona fide claim of his right, however ill-founded in law that claim may be, he does not commit the offence of criminal trespass by entering upon the property or land in question. To establish criminal trespass, the prosecution must prove that the real or dominant intention was to commit an offence, or to intimidate, insult or annoy the occupant of the property. Turning to the facts of the present case in the light of this position, in my opinion, it is quite clear that Nabisaheb had effected entry into Survey No. 96/2 on the day in question in the bona fide assertion of his claim as a co-owner of that property. It is not as if his real or dominant intent in making that entry was to commit an offence or to intimidate, insult or annoy the 1st accused and his claim of right was a mere cloak to cover the real intent, or constituted no more than a subsidiary intent. His primary intention in the present case was to assert the right which he has all along been claiming to the said land, and that conclusion of mine receives support from the fact that he had actually filed a civil suit to establish that right which was then pending in a Court of law. The assertion of the right was not, therefore, in the nature of an afterthought or a cloak but was something which he had always been canvassing, and, in those circumstances his act of entry upon Survey No. 96/2 cannot constitute either the offence of mischief or the offence of criminal trespass. If that be the position by reason of Nabisaheb effecting that entry, the 1st accused does not get the right of private defence under the second part of Section 97 of the Indian Penal Code. Under that section, the right of private defence of property arises only against an act which falls under the definition of one of the four offences specified therein, namely, theft, robbery, mischief or criminal trespass, or an attempt to commit any of those offences. We are not concerned with the first two of those four offences. For reasons already stated by me, the act of Nabisaheb in effecting entry upon the land in question does not amount to the offence of mischief or criminal trespass. In that view of the matter, accused Nos. 1, 3 and 4 had no right of private defence as against Nabisaheb and his associates. The plea of private defence of property must, therefore, fail on the facts of the present case.

9. In that view of the matter, this revision application must be dismissed, and the order of the Sessions Judge confirmed.

10. Mr. Sabnis has pleaded for setting aside of the sentence of fine which is the only sentence that now survives, in view of the fact that the learned Sessions Judge

has reduced the sentence of imprisonment on each of the accused person to that already undergone by them at the date of his order. I see no reason to interfere in the matter of sentence after accused Nos. 1, 3 and 4 have already had the benefit of reduction in their substantive terms of imprisonment by the order of the Sessions Judge.

11. Though I have rejected the plea of private defence made by Mr. Sabnis on behalf of accused Nos. 1, 3 and 4, I must express my strong disapproval of the repeated attempts on the part of Nabisaheb to effect entry upon the land in question which is already the subject matter of a civil litigation between the parties and which has given rise to the ugly incident in this case. I do not think that the future repetition of such acts by Nabisaheb could any longer be said to be an attempt at bona fide assertion of his rights, and I do hope that both sides will refrain from taking the law into their own hands.

SSG/D.V.C.

Revision dismissed.

AIR 1969 BOMBAY 24 (V 56 C 5)

TAMBE AND MODY, JJ.

Sunder Parmanand Lalwani and others, Appellants v. Caltex (India) Ltd., Respondent.

Appeal No. 45 of 1962 and (Misc. Petn. No. 141 of 1961), D/- 20-8-1965.

(A) Evidence Act (1872), S. 18 — Information obtained from counsel across the bar — Counsel can state that he is unable to supply information for want of material — If counsel chooses to give information as to facts, it amounts to admission so far as it goes against interest of party — Information so obtained must form part of record in so far as it contains statements as to facts. (Para 30)

(B) Trade and Merchandise Marks Act (1958), S. 12 and Preamble — Trade marks — Modes of acquisition of proprietorship.

A proprietary right in a mark can be obtained in a number of ways. The mark can be originated by a person, or it can be subsequently acquired by him from somebody else.

One of the modes of acquisition of proprietorship may be if an Indian businessman happens to import and sell in India foreign goods of a foreign trader with the latter's foreign trade mark. If the Indian trader sells those goods in India, a question may arise who is entitled to that trade mark. It is quite clear that the trade mark being a foreign trade mark, the proprietorship as to India will be determined according to its use in the

market of this country. (1927) 44 RPC 405, Rel. on.

Now, if there is a specific agreement as to proprietorship of that mark, that agreement will govern as between the foreign owner and the Indian Importer. If, however, there is no specific agreement, diverse factors will govern the determination as to which of the two is the proprietor in India. That determination must depend on the facts of each case. If, for example, the Indian Importer has acted merely as an agent of the foreign owner, the probabilities would be that the trade mark continues to belong to the foreign owner and not to the Indian Importer. If, however, the transaction between the foreign owner and the Indian Importer has been on the basis of principal to principal, the position may be a little more complicated. There again, one of the more important considerations would be to whom was credit given that is, whether the purchasing public paid regard to the reputation of the foreign manufacturer or to the Indian Importer. In some cases, it may happen that the foreign manufacturer is so well known that which importer imported the goods and sold them in India would be immaterial. The converse may happen when a firm of great repute in India imports and sells goods, and the purchasing public attaches value to the reputation of the Indian Importer who selects to import the goods and not to the reputation of the manufacturer of the goods. AIR 1965 Bom 35 and (1927) 44 RPC 405 and (1922) 39 RPC 171, Rel. on; (1951) 68 RPC 178, Disting.; (1900) ILR 24 Mad 163, Ref.

(Paras 32, 33)

(C) Evidence Act (1872), Ss. 101-104 — Proprietorship of trade mark — Burden of establishing proprietorship of trade mark lies on applicant — It is for applicant to satisfy court as to his user.

(Para 35)

(D) Trade and Merchandise Marks Act (1958), S. 11 (a) — 'Likely to deceive or cause confusion' — Meaning of—Evidence — Admissibility — Factors creating confusion — All factors must be considered in combination — Onus of proving that mark is not calculated to deceive or cause confusion is on applicant.

Whether there is a likelihood of deception or confusion arising is a matter for decision by the Court, and no witness is entitled to say whether the mark is likely to deceive or to cause confusion. 1962 RPC 265, Rel. on.

Therefore evidence by a witness that it is likely that purchasers of the goods will be deceived is inadmissible, but the evidence which would be admissible would be of a witness who is accustomed to buy articles in question, and he can say that he himself would be deceived.

(Para 40)

All factors which are likely to create or allay deception or confusion must be considered in combination. Broadly speaking, factors creating confusion would be, for example, the nature of the mark itself, the class of customers, the extent of the reputation, the trade channels, the existence of any connection in the course of trade, and several others. Of course, it need not be stated that it would not be that all such factors would exist in each and every case. (Para 47)

In proceedings for application of registration, the onus of proving that the mark is not calculated to deceive or cause confusion lies on the applicant. (1890) 7 RPC 311 and (1942) 58 RPC 91, Rel. on. (Para 48)

Held that a large number of persons, if they saw or heard about the mark "Caltex" in connection with the applicant's watches, would be led to think that the watches were in some way connected with the opponents who were dealing in petrol and various oil products with the Caltex mark, or they would at least wonder whether they were in any way connected with the opponents'. Persons seeing the mark attached to watches, which was a new class of goods, would assume, or were most likely to assume, that they originated from the proprietor of the mark, namely the opponents. If, therefore, the application for registration was granted and the mark was used in connection with the watches in respect of which the application was made, it was likely to cause deception and confusion. (1890) 7 RPC 311 and (1942) 58 RPC 91 and (1898) 15 RPC 105 and (1945) 62 RPC 111 and (1902) 2 Ch D 282 and 1962 RPC 265, Rel. on. (Paras 49, 50)

(E) Trade and Merchandise Marks Act (1958), Ss. 11(e) and 18(4) — Discretionary power under — Scope — Prohibition under S. 11(e) must be restricted to some illegality inherent in mark itself.

The provision contained in clause (e) of S. 11 is discretionary. It is to be considered in cases when an application is made for registration. Such application has to be made under Section 18. Sub-section (4) of Section 18 also contains a provision for the exercise of discretion in accepting or refusing to register.

Both these provisions confer a discretion in accepting or refusing registration. It would be unreasonable to ascribe to the Legislature an intention to provide for such a discretion at two places in the same enactment, and that too without making any distinction as to the circumstances under which it can be exercised, or the objects for which it should be exercised. It leads to the conclusion that the Legislature intended to make a provision for the exercise of discretion but in different set of circumstances

under clause (e) of Section 11 and under sub-section (4) of Section 18.

The prohibition contained in clause (e) of S. 11 must be restricted to some illegality inherent in the mark itself and not de hors the mark itself. (1954) 71 RPC 281, Rel. on. (Para 51)

(F) Trade and Merchandise Marks Act (1958), S. 18(4) — Discretion to refuse registration — It is for protecting interests of general public.

There is no absolute right to registration, and the Registrar has discretion to refuse registration.

The discretion has been vested in the Registrar under S. 18(4), for protection of the interests of the general public so that the tribunal can satisfy its conscience and satisfy itself that registration of the mark would not operate as a fraud on the general public: (1948) 65 RPC 435, Rel. on. (Para 52)

(G) Trade and Merchandise Marks Act (1958), Ss. 18(4), 109—Discretionary power of Dy. Registrar — Exercise of — When can be interfered with.

The discretion under S. 18(4) is a judicial discretion, and the Dy. Registrar's exercise thereof should be overruled only if he has applied wrong principles of law or has not appreciated the facts before him. (1935) 52 RPC 136 and (1936) 53 RPC 355, Rel. on. (Para 55)

Held that when considering the question of the exercise of his discretion, the Dy. Registrar had taken into account a principle which had no application to the facts of the case and had also failed to appreciate, i.e. to take into consideration, all the relevant facts and the court was therefore entitled to interfere with such an exercise of discretion. (Para 58)

Cases Referred: Chronological Paras
(1965) AIR 1965 Bom 35 (V 52)=66

Bom LR 612, Consolidated Foods Corporation v. Bradon and Co., Pvt. Ltd. 36

(1962) 1962 RPC 265 (HL), Parker-Knoll Ltd. v. Knoll International Ltd. 40, 49

(1956) 1956 RPC 1=(1955) 3 All ER 827, In the matter of Vitamins Ltd's Application for Trade Mark 51

(1954) 71 RPC 281, Hassan El-Madi's Applications for Trade Mark 51

(1951) 68 RPC 178, In the matter of Gaines Animal Food Ltd's application 36

(1948) 65 RPC 435, Midland Counties Dairy Ltd. v. Midland Dairy Ltd. 52

(1945) 62 RPC 111, In the matter of an application by Ferodo Ltd. 45

(1942) 58 RPC 91, Edward Hack Case, 43, 47, 48, 49

(1936) 53 RPC 355, In the matter of J & P Coates Ltd. 56

(1935) 52 RPC 136, In the matter of William Bailey (Birmingham) Ltd. 56
 (1927) 44 RPC 405, Impex Electrical Ltd. v. Weinbaum 33, 36
 (1922) 39 RPC 171, In the matter of Isola Ltd. 36
 (1902) 2 Ch D 282=71 LJ Ch 839, Walter v. Ashton 46
 (1900) ILR 24 Mad 163, Ebrahim Currim v. Essa Abba Sait 37
 (1898) 15 RPC 105, Eastman Photographic Materials Co. Ltd. v. John Griffiths Cycle Corporation Ltd. and Kodak Cycle Co. Ltd. 44, 47
 (1890) 7 RPC 311=15 AC 252, In the matter of Dunn's Trade Mark 42, 47, 48
 K. H. Bhabha with I. M. Chagla instructed by R. Nagindas and Co. for, Appellants; Y. B. Rege with K. S. Shavaksha instructed by Wadia Gandhi and Co., for Respondent.

MODY, J.: This appeal concerns a dispute over a Trade Mark. The Trade Mark is the word "Caltex" per se.

2. One Parmanand Teckchand Lalwani, carrying on business under the name and style of Lalwani Brothers, filed an application for registration of the said Trade Mark in respect of Class 14, but confined to "Horological and other Chronometric instruments and parts thereof" included in Class 14. In the application, the applicant claimed to be proprietor of the mark on the ground that the mark had been used since "one and a half year." On the 11th September 1958, Caltex (India) Limited filed their opposition in the matter of the said application. The opponents contended that they were proprietors of the said mark in Class 4 and Class 19; that they had used that mark in India in respect of their goods since the year 1937; that they had carried on wide publicity; and that, therefore, the applicant's proposed trade mark being identical with their own was likely to deceive or cause confusion in the trade. The opponents further contended that in any event the registration should be refused in the exercise of the discretion available in law whether the mark should be refused or not. On the 20th November 1958, the applicant filed his counterstatement. In the counterstatement, the applicant contended that there would be no confusion as the class of goods in which the mark would be registered would be different from the class of goods in respect of which the opponents were using the mark. The applicant further stated that the mark "Caltex" had since long been registered in Switzerland in the name of M/s. Degoumois and Co. for goods in class 14, and that the applicant had first adopted, introduced and used the mark on his goods in India since 1955.

3. After certain affidavits were filed by the parties, the matter of the said opposition reached hearing before the Deputy Registrar on 23rd October 1959. At that hearing, the applicant's counsel raised a preliminary objection to the admissibility of the copies of certain affidavits which had been attached to other affidavits. The objection was upheld. As a consequence thereof, the Deputy Registrar allowed the opponents to file further evidence by way of affidavits in support of the opposition. Such affidavits were in fact filed by the opponents. Those affidavits consist of one affidavit by one Berry, an employee of the opponents and 36 affidavits by 36 other persons. All these 37 affidavits are on the point whether there was a tangible danger of confusion between the two marks. Under the leave given to him, the applicant also filed further affidavits in reply to the points raised by the said 37 affidavits. All these affidavits are of different dates in February 1960. One of them is of the applicant himself, four of his witnesses, and four of other persons.

4. The matter again reached hearing before the Deputy Registrar in June 1960. The opponents applied for leave to cross-examine the applicant in relation to his own affidavits filed by him. On that day, the applicant was not available in Bombay. The opponents gave up their application for his cross-examination. The applicant applied for leave to cross-examine three of the opponents' witnesses, who had made affidavits, namely, Berry, one B. M. Rajpal and one L. N. Pujara. The application was granted. The three witnesses were cross-examined. The hearing proceeded thereafter. The Deputy Registrar pointed out to the applicant the admission contained in paragraph 3 of his affidavit dated 22nd June 1959 to the effect that M/s. Degoumois and Co. were the owners of the trade mark for watches in Switzerland, and that the applicant had imported into India those watches from them. The applicant thereupon applied for an opportunity to produce evidence of his proprietorship of the mark applied for by him. The leave was granted. Thereafter the applicant filed a declaration dated 24th August 1960 of one Jean V. Degoumois, owner of the said firm of M/s. Degoumois and Co.

5. The matter was then heard and disposed of by the Deputy Registrar by his order dated 31st January 1961. He held that the opponent's marks had acquired a reputation in connection with the goods for which they had been used and were on the Register. He further held that an opportunity had been given to the opponents to file an affidavit in rebuttal to the declaration of Degoumois, but they did not do so. There was no material to doubt the statements contained in the

said declaration and that he accepted the same, and was thereupon satisfied that the mark applied for by the applicant was an Importer's mark, and that the applicant was the owner thereof by selection in so far as India was concerned. He further held that the competing marks were identical but the competing goods were entirely different in character. He further held that there was no connection in the course of the trade between the competing goods as they were never sold at the same shop. He further held that the trade channels through which the respective goods passed were entirely different, and that, as a matter of fact, the opponents' goods were exclusively available only at their own service stations or agencies where even similar goods of another trader were not permitted to be sold, much less the goods of others of a different character as those of the applicant in respect of which the mark was applied for a registration. He held that the reputation of the opponents was only in respect of the goods for which their marks were being used. He held that, therefore, despite the reputation of the opponents' mark, the use of the applicant's mark would not be likely to deceive within the meaning of Section 11 of the Trade and Merchandise Marks Act, 1958 (hereinafter referred to as "the Act"). The opponents had urged that the application had been actuated by dishonest intention and motive in selecting the mark, and that, therefore, the Registrar should exercise his discretion against registering the mark. The Deputy Registrar negatived that contention. He dismissed the opposition, the consequence whereof would be that the applicant's mark would be registered.

6. The opponents filed an appeal to this Court by way of a petition against the said order of the Deputy Registrar. The petition was heard and disposed of by Mr. Justice S. M. Shah. The learned Judge held that the applicant's mark was not an Importer's mark, and that the applicant was not the owner thereof. The learned Judge confirmed the Deputy Registrar's finding that there was no danger of confusion. The learned Judge, however, held that the applicant dishonestly selected the mark, and that in view of the existence of such dishonest intention the Deputy Registrar was wrong in exercising the discretion in favour of the applicant, and that the Deputy Registrar ought to have refused registration on that ground also. The learned Judge does not appear to have dealt in his judgment with the point whether he could interfere with the exercise by the Deputy Registrar of his discretion, and if so, on what particular grounds it would be competent for him to so interfere. The learned Judge allowed the appeal and

the petition, set aside the order of the Deputy Registrar and declared that the opposition had succeeded, the necessary consequences whereof would be that the applicant's application for registration would fail. The applicant has filed this appeal against the said judgment and order of Mr. Justice Shah.

7. Mr. Bhabha, learned Counsel for the applicant, stated that he would urge the following five points before us; viz:

(1) Whether there was any tangible danger of confusion between Caltex watches and Caltex petrol and various other oil products of the opponents?

(2) Whether there was any dishonesty in the applicant's adopting and introducing the trade mark "Caltex" in respect of watches in the Indian market?

(3) Whether the learned Judge should have interfered in the exercise of the discretion by the Deputy Registrar in ordering the applicant's mark to be registered?

(4) Whether the applicant is the proprietor in his own right of the mark in India in respect of the watches?

(5) Whether the applicant is entitled to the mark as an Importer's Mark?

8. In our opinion, the fourth and fifth points of Mr. Bhabha really concern one topic, namely, whether the applicant is the proprietor of the mark. We will, therefore, deal with that as but one point and will consider it first and the other three points afterwards.

9. Before proceeding to consider these contentions, however, we will first examine whether the opponents were entitled to maintain their opposition. There is evidence on record, and it is not disputed that the opponents are the registered proprietors of five marks as follows:

(1) Under Registration No. 10754, of the word "Caltex" in respect of all goods in class 4.

(2) Under Registration No. 10786, of the mark consisting of the word "Caltex" superimposed on a red coloured star, in respect of all goods under class 4.

(3) Under Registration No. 10787, of the mark consisting of the words "Caltex" superimposed on a red coloured star, in respect of all goods under class 19.

(4) Under Registration No. 151261, of the mark consisting of a label with the word "Caltex", in respect of goods in class 4.

(5) Under Registration No. 151262, of the mark consisting of the words "Caltex" superimposed on a red coloured star enclosed by a circle, in respect of goods under class 19.

The first three marks were registered on 14th January 1943 and the last two on the 2nd November 1951. The affidavit of Hansraj Berry, Acting Manager (Marketing) of the opponents, dated 8th De-

cember 1959 contains diverse statements as to the opponents' user of their said marks. He states that the opponents have used the trade mark "Caltex" since the year 1937 on a very large scale on Industrial oils and greases, lubricants, fuels (including motor spirit), illuminants (including kerosene), asphalt, pitch, bitumen and building materials. He further stated that the goods of the opponents were sold in every part of India and he has given figures of the annual turnover of the years 1937 to 1958. The turnover in 1938 was over Rs. 1,63,00,000 and in 1956, it was over Rs. 30,60,00,000. He has also stated that the goods of the opponents are widely advertised in India as also in the literature published in other countries but received in India. He has given figures of the annual advertisement costs in India for the years 1937 to 1958. In each of the four years 1953 to 1956, those costs have exceeded over a million rupees. He has further stated that the opponents have hundreds of petrol pumps in India which sell petrol for motor cars and aviation petrol, and also all kinds of fuels, lubricants and greases etc., and that the trade mark "Caltex" is not only prominently displayed on the pumps but also on the petrol stations. He has further stated that kerosene under the trade mark "Caltex" is sold mostly in the villages and that the villagers are well acquainted with the trade mark "Caltex". He has further stated that there is no other company in India of the name of "Caltex", and that that fact is well known to the public. He has further stated that the opponents have applied for Defensive Registration for a large number of their goods in classes 2, 3, 5, 11, 16, 18, 19, 24, 25 and 26, and that the same had been accepted by the Trade Marks Registry. None of the above statements of fact have been disputed by the applicant. It may, however, be stated that the said application for Defensive Registration was made sometime after the applicant's said application dated 14th August 1956, the exact date thereof has not been brought on the record. It is, however, clear that the opponents did not apply for defensive registration in respect of class 14, in respect of which class the applicant has made the said application for registration. On these facts, there is no doubt that the opponents were qualified to maintain their said opposition and as a matter of fact, the applicant has not even contended to the contrary. Before proceeding to discuss the contentions on the law on the subject, it is more convenient to refer to the facts in the evidence in this case.

10. The application, although it is filed on 14th August 1956, actually bears the date 30th July 1956. The applicant has stated that he was the proprietor of

the mark, because it was in use since one and a half year. According to the applicant, therefore, he had been using the mark since about February 1955. The applicant filed his affidavit dated 18th April 1957 in support of his application. He has stated in the affidavit that he was importing various articles including watches, and was manufacturing presentation articles. He has further stated that he adopted the trade mark "Caltex" in or about the year 1955, and that he placed the first order for Caltex watches with the manufacturers in Switzerland in April 1955. A photostat copy of that order has been annexed as Ex. A to that affidavit. We will presently refer in more detail to the contents of that order. The applicant has further stated in his said affidavit that he had continuously used the said mark on the imported watches from that date upto the date of his affidavit, and that the total imports during that period had amounted in 1955-56 to about Rs. 32,000 and in 1956-57 to about Rs. 63,000. This particular statement of the applicant is extremely vague. He has not stated that those two amounts were in respect of import of watches much less of watches with the mark "Caltex". The years have been given as 1955-56 and 1956-57, the dates of commencement and end of each year have not been mentioned; nor do they appear anywhere else on the record. The dates are somewhat material, because the date of application is 14-8-1956 and without the date of commencement of the year being known, it is not possible to know whether any part of the period 1st January to 14th August 1956 at all falls within the second year 1956-57, and if so, what part. He further states that the watches etc. under the mark "Caltex" had been sold throughout the Indian dominion, and that annexed to the affidavit were a few copies of the invoices to show that the goods were sold under the mark "Caltex". Although the affidavit states that what the applicant had sold under the mark "Caltex" were "watches, etc.," i.e., goods other than watches also, there is no evidence whatsoever on the record that the applicant had sold any goods whatsoever other than watches with the mark "Caltex" at any time before he filed his application for registration. There are copies of 9 memos annexed to the affidavit as Ex. "B". The last four refer to sales after the 14th August 1956 and are irrelevant for the purposes of this appeal. The relevant date as on which the applicant's application for registration is to be considered, is the date of the application itself, namely, 14th August 1956. That is the position in law, and that is common ground between the parties. The last four memos being after that date must, therefore, be ignored. The first five memos are between the

dates 19th November 1955 and 18th May 1956. They are in the nature of invoices. Between the five of them, they show sales in the aggregate of 215 watches with the mark "Caltex". The memos being by way of invoices do not show by themselves that the watches were in fact delivered and paid for. What has been annexed to the affidavit are copies of the memos and not the original memos. The originals, of course, would be with the parties to whom they were sent. Mr. Rege, the learned Counsel for the opponents, sought to cast doubt as to the genuineness and veracity of the copies which have been annexed. In our opinion, however, the opponents applied for permission to cross-examine Lalwani. The Deputy Registrar granted it. On that date, Lalwani was not available in Bombay. The opponents thereupon chose to omit to cross-examine him. The case before the Deputy Registrar was not to finish on that day. It is nobody's case that after granting permission to cross-examine, the Deputy Registrar would have made it infructuous by refusing to adjourn the matter for sufficient time to enable Lalwani to come to Bombay for being cross-examined. Having had a proper opportunity to cross-examine Lalwani on these copies of memos, but not having availed themselves of it, the opponents cannot now cast doubt on the genuineness of these copies. The rates of sales as mentioned in these memos of "Caltex" watches vary between Rs. 180 & Rs. 21 per watch, less 6¼% discount. The selling price would, therefore, be about Rs. 17 to Rs. 20 per watch. Even bearing in mind that those were comparatively good though not very old days of 1955 of cheaper prices, it is clear that the watches were really of, what might be said to be, cheap quality. It is further stated in the affidavit that the mark "Caltex" had been popularised by the applicant through regular propaganda and campaign through his agents and representatives and other media of advertisements. Before Mr. Justice Shah, however, Counsel for the applicant stated that during the period from June 1955 to August 1956, the only watches which were advertised by the applicant were those bearing the mark "Royce" and that no other type of watches was advertised during that period. That statement has been recorded by the learned Judge in his judgment, and its accuracy has not been challenged. It is, therefore, clear that the statement about propaganda, campaign and advertisement of the mark "Caltex" in respect of the applicant's watches is not true.

11. As stated earlier, the annexure Ex. "A" to the said affidavit of Lalwani is a photostat copy of an order. The photostat copy shows that the Order was dated

6th April 1955. The document is in French, at least partly. There is no translation and it is not easy to understand the contents of the document. There appear to be 7 heads of items of watches. The Brand-name of the watches appears to have been mentioned only in 5 out of 7 items, the name originally mentioned in all the five items being "Sandy". In each of the five items, the word "Sandy" has been scored out, and in the first item substituted by the word "Linda" and in the other four items by the word "Caltex". The quantities, i.e. the number of watches ordered, also appear to have been scratched out and altered in many of the items. We will revert to this memo later on in connection with the other evidence.

12. In their grounds of opposition, the opponents raised the point about likelihood of deception and confusion. They also contended that the Registrar should exercise his discretion against registering the application of the applicant. The grounds lastly stated that the applicant has alleged user since 1955, but that the opponents did not admit the same and put the applicant to the strict proof thereof. It is the applicant's contention that the applicant's proprietorship of the mark "Caltex" in respect of class 14 was not disputed by the opponents before the Registrar. It is, however, pertinent to note that in the very first document, namely, the grounds of opposition, the opponents have stated that they do not admit the allegation about the applicant's user since 1955 and put him to the strict proof thereof. The opponents did, therefore, make it clear that the opponents wanted the applicant to prove his allegation about his user since 1955. In his application, the sole ground on which the applicant claimed proprietorship was by reason of such user. Challenge to such user, therefore, amounted to a challenge to the applicant's proprietorship.

13. Applicant Lalwani filed his counter statement to the notice of opposition, which is dated 20th November 1958. In the counter statement, he has stated that the marks claimed by the opponents were registered in classes 4 and 19, which were altogether a different class than class 14, in respect of which he had applied for registration, and that the opponents had never been in the trade in respect of class 14. In the counter statement, the applicant even denied that the opponent's mark was well known throughout India. The counter statement also contains the following statement:

"The mark Caltex is since long registered in Switzerland and in the name of M/s. Degoumois and Co. S. A., Fabrique

De Monthes Avta, Meuothatel, Switzerland for goods in class 14 and has been first adopted, introduced and used by the Applicant on his goods in India since 1955 on articles manufactured by the said Company for the applicant and imported by him....."

By this passage, the applicant appears to convey that after the applicant adopted the mark "Caltex" in India, the mark "Caltex" was used on watches, and that it was at the instance and under the instructions of the applicant that the Swiss Company applied that mark on the watches ordered from them by the applicant.

14. Thereafter, the opponents filed an affidavit of one Mayne, their Manager (Marketing), dated 18th February 1959. In that affidavit, he has stated that the opponents-company was incorporated in the year 1937, that since then the opponents had done large business in India and had extensively used the trade mark "Caltex" on its products and in their business; and that the trade mark "Caltex" of the opponents had become so well known in respect of the goods in relation to which it was registered and used that the use thereof in relation to other goods by other parties would be likely to be taken as indicating a connection in course of trade between those goods and the opponents. He further stated that the word "Caltex" was derived from the words "California" and "Texas", which appear in the names of the companies, which were the opponents-company's parent organisations, and that "Cal" and "Tex" were the abbreviations also of the two States of United States, California and Texas.

15. The applicant thereafter filed his affidavit dated 22nd June 1959. The statements therein are not material. The opponents thereafter filed the affidavit of Bery dated 30th July 1959, in which he denied in so many words that the applicant was the proprietor of the trade mark "Caltex".

16. to 28. (After examining the documentary evidence his Lordship proceeded):

29. The judgment of Mr. Justice Shah contains the following passage:

"It appears that the first consignment of watches that the respondent received from the Swiss Manufacturers was covered by an invoice dated 3rd June 1955. Under that invoice as many as 1400 watches were imported by the respondent. Only 100 watches out of them however bore the trade mark "Caltex". In this consignment of 1400 watches 200 watches bore the mark "Linda" and the invoice shows that no particular mark was em-

bossed upon the remaining 1100 watches. The respondent then appears to have placed a further order on 21st November 1955 for 300 pieces out of which only 100 pieces were required to be under the mark "Caltex". In course of the arguments I enquired of the learned counsel for the respondent as to the number of watches which the respondent had imported from the Swiss Manufacturers between 3rd June 1955 and 14th August 1956 on which date the application for registration of the mark was made and I was informed that the total number of watches imported by the respondent from the Swiss Manufacturers were 2771 out of which 200 watches bore the mark "Linda" and 200 watches bore the mark "Caltex". I was further told by the learned counsel for the respondent that many other types of watches were also imported by the respondent from other manufacturers in Switzerland, that the total number of watches so imported including the watches imported from the Swiss manufacturers referred to above was about 25000 and that the watches so imported bore different marks such as "Lucky Star", "Royce", "Lily", "Navado", "Tourise", etc."

30. Mr. Bhabha argued that obtaining information from counsel across the Bar as to important facts in this manner was unfair to the applicant. He argued that it would be unfair in diverse ways. He contended that information orally conveyed immediately in answer to unexpected questions may not be accurate as the person giving information would not have the necessary documents then available to him and may not have time to check them. He further contended that obtaining information across the Bar would deprive further evidence being led to bring on record other additional facts which may be necessary to supplement or explain the information so obtained. It is not necessary for us to deal with this argument in great detail. If the learned Judge had felt that some more material was required to be brought on the record, he could in law either send the matter back to the Registrar for recording further evidence, or he could possibly have recorded further evidence himself. To shorten the proceedings, however, he could have asked the necessary questions to counsel. Counsel were not under any obligation to answer those questions, and they could certainly have pointed out to the learned Judge that the reason for his not answering the questions was that the material was not available at short notice. The very fact that all the material mentioned in the above passage was in fact stated shows that it was possible for the Counsel to obtain the necessary instructions and for those giving instructions to gather in-

formation and give the necessary instructions. If inability to give replies had been stated in Court, it is possible that the learned Judge, if he thought fit, might have taken other steps to obtain the necessary material. The grievance against having obtained information across the Bar in this way has also been made in ground No. 9 in the memo of appeal. We do not think the grievance is justified. Counsel could have stated that he was not in a position to give the correct information. He, however, chose to give it. It is as to facts, in the sense that it is not as to law. Information so collected amounts to an admission in so far as it goes against the interest of the applicant. It must, therefore, legitimately form part of the record of this case in so far as it contains statements as to facts. It cannot go unnoticed that the objection is to the method, but not to the accuracy either of what was furnished to counsel by way of instructions or even as to what the counsel stated to the Court. If the information or its recording as contained in the Judgment had happened to be in any way inaccurate, one would have found at least a statement in the grounds of appeal or even across the Bar in the arguments before us to that effect. There is no such statement. Mr. Bhabha did argue that the watches with the "Caltex" mark imported by the applicant into India were more than 200 as mentioned in the above passage from the judgment. That was, however, an argument based on the documents already on the record. It was not stated as on a basis that books of account or other documents of the applicant had been checked up, and that it revealed that the true position was in any way different.

31. We will now to consider whether the applicant is the proprietor of the mark "Caltex" in respect of "Horological & other chronometric instruments". Mr. Bhabha urged that this point was not taken in the Registry, and that point also finds a place in the ground No. 2 contained in the memo of appeal. Mr. Rege, however, stated that the point did arise on the affidavits filed before the Deputy Registrar and was in fact urged before the Deputy Registrar. Law requires that in the application for registration, the applicant must state how he claims proprietorship. In compliance with the statutory requirements, the applicant did state in his application that he claimed to be the proprietor by reason of user for one and a half years. That statement was, as noticed earlier, put in issue by the opponents in the very first document filed before the Deputy Registrar, namely, the grounds in support of the Notice of opposition, dated 11th September 1958. The point has also been

again taken in the other affidavits of Mayne and Bery. As a matter of fact, Bery in his affidavit dated 30th July 1959 in so many words denies that the applicant was the proprietor of the trade mark "Caltex" in respect of watches or any other goods, whether as alleged by the applicant or otherwise whomsoever. This point has also been adjudicated upon by the Deputy Registrar. It must, therefore, be held that the point had been properly put in issue by the opponents, that the applicant had notice of it, that the Deputy Registrar dealt with it, and that it, therefore, properly arose before the learned Judge for his decision.

32. A proprietary right in a mark can be obtained in a number of ways. The mark can be originated by a person, or it can be subsequently acquired by him from somebody else. Our Trade Marks law is based on the English Trade Marks law and the English Acts. The first Trade Marks Act in England was passed in 1875. Even prior thereto, it was firmly established in England that a trader acquired a right of property in a distinctive mark merely by using it upon or in connection with goods irrespective of the length of such user and the extent of his trade, and that he was entitled to protect such right of property by appropriate proceedings by way of injunction in a Court of law. Then came the English Trade Marks Act of 1875, which was substituted later by later Acts. The English Acts enabled registration of a new mark not till then used with the like consequences which a distinctive mark had prior to the passing of the Acts. The effect of the relevant provision of the English Acts was that registration of a trade mark would be deemed to be equivalent to public user of such mark. Prior to the Acts, one could become a proprietor of a trade mark only by user, but after the passing of the Act of 1875, one could become a proprietor either by user or by registering the mark even prior to its user. He could do the latter after complying with the other requirements of the Act, including the filing of a declaration of his intention to use such mark. See observations of Llyod Jacob J. in 1956 RPC 1, In the matter of Vitamins Ltd's Application for Trade Mark at p. 12, and particularly the following:

"A proprietary right in a mark sought to be registered can be obtained in a number of ways. The mark can be originated by a person or can be acquired, but in all cases it is necessary that the person putting forward the application should be in possession of some proprietary right which, if questioned, can be substantiated".

Law in India under our present Act is similar.

33. One of the modes of acquisition of proprietorship may be if an Indian businessman happens to import and sell in India foreign goods of a foreign trader with the latter's foreign trade mark. If the Indian trader sells those goods in India, a question may arise who is entitled to that trade mark. It is quite clear that the trade mark being a foreign trade mark, the proprietorship as to India will be determined according to its use in the market of this country. See *Impex Electrical Ltd. v. Weinbaum*, (1927) 44 RPC 405. Now, if there is a specific agreement as to proprietorship of that mark, that agreement will govern as between the foreign owner and the Indian Importer. If, however, there is no specific agreement, diverse factors will govern the determination as to which of the two is the proprietor in India. That determination must depend on the facts of each case. If, for example, the Indian Importer has acted merely as an agent of the foreign owner, the probabilities would be that the trade mark continues to belong to the foreign owner and not to the Indian Importer. If, however, the transaction between the foreign owner and the Indian Importer has been on the basis of principal to principal, the position may be a little more complicated. There again, one of the more important considerations would be to whom was credit given that is, whether the purchasing public paid regard to the reputation of the foreign manufacturer or to the Indian Importer. In some cases, it may happen that the foreign manufacturer is so well known that which importer imported the goods and sold them in India would be immaterial. It would happen, for example in the case of goods so well known as, for example "Bovril" or "Pears Soap". The converse may happen when a firm of great repute in India imports and sells goods, and the purchasing public attaches value to the reputation of the Indian Importer who selects to import the goods and not to the reputation of the manufacturer of the goods.

34. Now, it is common ground that the point as to proprietorship is to be decided as on 14th August 1958, being the date of the application. The applicant contends that he imported watches in his own right under contracts with Degoumois and Co. as between principal and principal. He thereafter sold those watches in India and thereby used the trade mark "Caltex" in India in his own right, and by reason of such user he acquired the proprietorship. The present dispute as to the ownership of the trade mark is not a dispute between the foreign manufacturer and owner of the trade mark viz. Degoumois and Co. on the one hand, and the applicant, an Indian Importer, on the other. In this case there is no com-

petition as to ownership between the two of them. In any event, in view of the said declaration of Degoumois, it is clear that Degoumois does not and cannot claim any ownership in himself in that trade mark in respect of Watches in India. If the applicant, therefore, establishes his user in India, he can be said to be the proprietor of the trade mark in India in respect of the goods which he claims.

35. The evidence, however, in this respect is not very satisfactory. The shortcomings in the different pieces of evidence have been noticed earlier when we referred to each of them. There is no satisfactory evidence that any watches were in fact imported into India by the applicant under any of the said three orders. The evidence however, can lead to an inference that very probably some watches were in fact imported. Even on that assumption there could be only 100 watches under the 1st Order and only 300 watches under the second Order under the mark "Caltex". The statement made across the Bar before Mr. Justice Shah mentions the number of watches imported under the mark "Caltex" at 200. It is not necessary to discuss and adjudicate upon this discrepancy, because the figures of 100 and 300 are only in respect of the orders and the invoices, but not in respect of the actual imports, and possibly the actual imports might have been less than the aggregate of the said two numbers of 100 and 300. But whether the actual number be 200 or 400 or somewhere in between or even a small quantity more than 400, that cannot make the number very large. What we have to examine is the actual user in India of the mark by the applicant. In this connection, the evidence of the said five sale-memos shows that the applicant sold 215 watches in India with the mark "Caltex". As contended by Mr. Rege, there is of course no direct evidence that a single watch out of the said 215 watches was actually sold and delivered. But these five sale-memos do in any event make it highly probable that the majority of them must have been sold and delivered. If the opponents wanted to contend to the contrary, they had an opportunity to cross-examine the applicant. They did not avail themselves of that opportunity. It is not disputed that the burden of establishing proprietorship lies on the applicant, and that it is for the applicant to satisfy the Court as to his user. But nonetheless, in this particular respect, we feel that on this evidence, the applicant has established that he did sell in India at about the dates of those five sale-memos a substantial quantity out of these 215 watches.

36. The Deputy Registrar found that the mark "Caltex" applied

THE All India Reporter 1969

Calcutta High Court

AIR 1969 CALCUTTA 1 (V 56 C 1)

SPECIAL BENCH

D. N. SINHA, C. J., B. N. BANERJEE,
A. N. RAY, AMARESH ROY AND
B. C. MITRA, JJ.

In the matter of Hiren Bose, Con-
temner.

Matter No. 588 of 1967, D/- 7-11-1967.

(A) Contempt of Courts Act (1952),
Ss. 2 and 3 — Scandalizing the court
— Right of press to criticise — (Constitu-
tion of India, Arts. 19, 215)—(Penal Code
(1860), S. 228) — (Criminal P. C. (1898),
S. 480).

A person who was the editor, printer
and publisher of a newsweekly published
an article headed "Demonstration in the
High Court. Revolt of the exploited mas-
ses against the law in force" which accus-
ed the Chief Justice of the Court (a) of
being a puppet of the law, and (b) of
moving with the framework of a grind-
ing machine (meaning the present legal
system). About the judges generally, it
said that the country had no necessity for
judges such as they were. It invoked the
dire but untold lesson of history because
the court in question proceeded against
the Labour Minister for contempt for
which the latter had to apologise.

Held that the article was more than a
mere libellous statement against the judges
concerned. It painted a dismal picture of
the highest judiciary of the State which
act was likely to undermine the dignity
of and impair the respect for the High
Court and therefore the editor was guilty
of contempt. (Paras 10 & 11)

Though the press is free to criticise a
system under Art. 19 (1) (a) of the Con-
stitution and though justice cannot claim

to be a cloistered virtue as cannot tole-
rate adverse criticism, such freedom is
still subject to the limitations under Art.
19 (2). In the garb of criticism the press
cannot commit contempt of Court. AIR
1954 SC 10, Rel. on. (Paras 8 & 9)

(B) Contempt of Courts Act (1952), Ss.
4 and 3 — Apology — Principles — It
only minimises the gravity of the offence
and does not wholly absolve the contemn-
er of his guilt.

Submission of an apology as an apo-
logia to the contemner's other contentions
is to exhibit a desire to escape punish-
ment without really being contrite. Courts
should not accept such qualified apolo-
gies. It is also not a matter of course that
a Judge can be expected to accept any
apology. Apology cannot be a weapon of
defence forged always to purge the guilty.
It is intended to be evidence of real con-
trition, the manly consciousness of a wrong
done, of an injury inflicted and the
earnest desire to make such reparation as
lies in the wrong doer's power. Only then
is it of any avail in a Court of justice.
But before it can have that effect, it
should be tendered at the earliest stage,
not the latest. Even if wisdom dawns at
a later stage, the apology should be ten-
dered unreservedly and unconditionally,
before the Judge has indicated the trend
of his mind. Unless that is done, not only
is the tendered apology robbed of all
grace but it ceases to be an apology. It
ceases to be full, frank and manly con-
fession of a wrong done, which it is in-
tended to be. (Para 13)

An apology certainly has this virtue
that it minimises the gravity of the offence
committed by the contemner, but it does
not wholly absolve him of the guilt.
(Para 14)

Cases Referred: Chronological Paras
(1954) AIR 1954 SC 10 (V 41) =

1954 Cri LJ 238, Brahma Prakash
Sharma v. State of Uttar
Pradesh

9

N. Roy Choudhury. for Contemner.

BANERJEE, J.: "Darpan" is a weekly newspaper, published in the Bengali language. The contemner, Hiren Bose, is the Editor, Printer and Publisher of the weekly, all in one. In the issue of the weekly paper, dated September 15, 1967, there appeared an article headed "Demonstration in the High Court: Revolt of the exploited masses against the law in force."

2. At the sitting of the Special Bench on September 19, 1967, then engaged in hearing certain applications against "gheraos" practised by labourers against the management and the managerial staff of certain concerns, Mr. A. K. Dutt, Advocate, brought the Article to the notice of the Special Bench. The Article was also brought to the notice of the Special Bench by Mr. Samiran Sen, Registrar, Original Side of this Court. The article appeared to have been written in the context of an exhibition of 'gherao' inside court room No. 1 and the noisy demonstration held inside and outside the court premises by certain persons. Upon reading the article the Special Bench felt that the article was contumacious in nature and suo motu issued a Rule against the Editor calling upon him to show cause why he should not be dealt with or committed for contempt of court. The Rule was made returnable on September 26, 1967.

3. On being served with the Rule, the contemner appeared before this Court, on September 26, 1967, and asked for time to use an affidavit showing cause. The matter thereupon adjourned till November 6, 1967, that is to say, until the re-opening of this Court after the long holidays. The contemner did file an affidavit, dated November 4, 1967. In paragraph 2 of the said affidavit he tendered an unqualified apology. In paragraph 3 of the said affidavit, however, he pleaded the following justification for publishing the article:—

"I say that the whole purpose and spirit of the article which appeared in the Bengali Newsweekly 'Darpan' on 15th September, 1967 hereinafter referred to as "impugned article" is to focus the attention on the certain inequities of the present legal system which is an inheritance from alien rule and to show that the entire body of law which although has undergone changes from time to time is not in keeping with the aspiration of the people in general or their needs. I feel that the contemporary agitation all over the world is an expression of popular urge for change and the impugned

article, if read in its entirety, has expressed its support for such popular urge and was never intended to show any disrespect or disregard to this Hon'ble Court or the judiciary. I did not intend to lower the dignity, honour and authority of this Hon'ble Court or to undermine the confidence of the public in the administration of justice or to lower this Hon'ble Court in the estimation of the public. I did not intend to criticise the Hon'ble Judges of this Hon'ble Court and/or justice administered by them. Since the impugned article is considered to be disrespectful to this Hon'ble Court I sincerely regret and offer my unqualified, unconditional and genuine apology."

Mr. Roy Choudhury, learned Counsel for the contemner, also verbally tendered apology on behalf of the contemner in his presence. When we pointed out to him that paragraph 3 of the affidavit contained a justification, which ill-matched with the apology, Mr. Roy Choudhury prayed for an opportunity to use a second affidavit and to withdraw the first one. Thereupon, we adjourned the matter till to-day. The second affidavit has been filed to-day. Paragraph 2 of the second affidavit reads:—

"I sincerely and truly regret for writing and publishing the article "High Courtey Bikshov Prachalita Ainer Birudhe Sosita Janasadharaner Bidroha" in the Bengali Newsweekly 'Darpan' of the 15th September, 1967, the official translation whereof has been annexed with the Rule and served upon me.

I humbly and sincerely tender my unqualified and unconditional apology."

4. Before I deal with the affidavit filed and the apology tendered by the contemner, I propose to deal with the article published in 'Darpan'. In my reading, the article has been written in bad taste and is the product of confused thinking. The language used in the article is intemperate and disparaging to the dignity of this Court. The article accuses the Chief Justice of this Court, (a) of being a puppet of the law, and (b) of sitting down and getting up (i.e. moving) with the framework of a grinding machine (meaning the present legal system).

5. Of Judges generally, the article says, "It is just the same legal system which in the pre-independence days helped the judiciary to stifle the just demands of man and the freedom movement. This body of Judges sent thousands of patriots to the gallows and threw many thousands into the prison on the strength of this very legal system. Just a few among the Judges gave vent to their denunciation against it. (We) feel interested to know how many Judges resigned their office in protest against this legal system. They claim to be educated persons, the elite of

the society. There is no necessity for this education and (these) elites."

6. The last paragraph of the article refers to another case in which the present Labour Minister, Mr. Subodh Mukherjee, was charged with contempt and made amends by offering apology before My Lord S. K. Datta, J. The article takes an adverse view of what happened to the Labour Minister and says "The respectable Law Minister Sri Subodh Banerjee is free from doubt as to the inequity of this legal system. In consequence he has had to bow low down before the court to-day. Let him know that this humiliation is not his alone (but) of the people of the country as a whole. It is just the beginning of the agitation. History knows its end."

7. Now, the author of this article does not appear to be a well-informed person. He does not even know that Mr. Subodh Banerjee is not the Law Minister but is the Labour Minister. Then again, his hope that the feeling of the Chief Justice is in favour of an organised agitation against the entire set up (meaning the prevailing legal system in this country) is too much of an assumption.

8. I do not doubt that the press is free to criticise a system. A free press stands as one of the great interpreters between the Government and the people. To allow this to be fettered is to fetter ourselves. This freedom is enshrined in Article 19 (1) (a) of the Constitution but is subject to the limitations as in Article 19 (2). In the garb of criticism, the press cannot commit contempt of court.

9. I do not claim that justice is a cloistered virtue and should not tolerate adverse criticism. In the case of *Brahma Prakash Sharma v. State of Uttar Pradesh*, AIR 1954 SC 10 the Supreme Court emphasised upon the following preliminary considerations which should weigh with the Court when called upon to exercise its summary power in cases of contempt of scandalising the court itself:-

"In the first place, the reflection on the conduct or character of a Judge in reference to the discharge of his judicial duties, would not be contempt if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. It is not by stifling criticism that confidence in courts can be created....."

In the second place, when attacks or comments are made on a Judge or Judges disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the Judge and what amounts really to contempt of court. The fact that a statement is defamatory so far as the Judge is concerned does not necessarily make it a contempt."

10. Now, if the article had been merely libellous to the Chief Justice and the Judges of this Court, we would not have exercised our summary jurisdiction. But the article is more than that. It describes the Chief Justice as a puppet, that is to say, a person who may be pulled and does not act in his judicial discretion. It further describes him as working within the framework of a grinding machine and as such exercising his duties oppressively. About the Judges generally, it says, that the country has no necessity for Judges such as they are. It invokes the dire but untold lesson of history because this Court proceeded against the Labour Minister for contempt for which the latter had to apologise.

11. This picture of the High Court as a Court composed of uselessly educated Judges, presided over by a Chief Justice who is a puppet of law and part of an oppressing machine is a dismal picture of the highest judiciary of the State. Such an article is likely to undermine the dignity of and impair the respect for the High Court. I, therefore, hold that the Editor of the weekly is guilty of contempt.

12. I now turn to his apology. The apology is the product of a second thought. It was at first offered along with a justification which I have already quoted. When it appeared to the contemner that this Court may not accept an apology mated with a justification, he wanted to withdraw the affidavit containing the first apology and only thereafter offered an unqualified and a proper apology.

13. Now, to submit an apology as an apologia to the contemner's other contentions is to exhibit a desire to escape punishment without really being contrite. Courts should not accept such qualified apologies. It is also not a matter of course that a Judge can be expected to accept any apology. Apology cannot be a weapon of defence forged always to purge the guilty. It is intended to be evidence of real contrition, the manly consciousness of a wrong done, of an injury inflicted and the earnest desire to make such reparation as lies in the wrong-doer's power. Only then is it of any avail in a Court of justice. But before it can have that effect, it should be tendered at the earliest possible stage, not the latest. Even if wisdom dawns only at a later stage, the apology should be tendered unreservedly and unconditionally, before the Judge has indicated the trend of his mind. Unless that is done, not only is the tendered apology robbed of all grace but it ceases to be an apology. It ceases to be the full, frank and manly confession of a wrong done, which it is intended to be.

14. I consider the apology tendered by the contemner as bereft of its full grace, firstly, because it was offered coupled with a justification and, secondly, because it was offered at a late stage. The apology certainly has this virtue that it minimises the gravity of the offence committed by the contemner, but it does not wholly absolve him of the guilt. I, therefore, propose that the contemner should not be let off unpunished but should be punished with a fine amounting to Rs. 200 (Rupees Two hundred only).

15. The fine must be paid in course of tomorrow in the office of the Sheriff of Calcutta. In default, the matter be placed for further orders before this Bench. If the fine is paid, the Rule shall be deemed to have been disposed of.

16. The Sheriff to act on a signed copy of the minutes.

17. SINHA, C. J.: I agree.

18. RAY, J.: I agree.

19. AMARESH ROY, J.: I agree.

20. B. C. MITRA, J.: I agree.

TVN/D.V.C.

Orders accordingly.

AIR 1969 CALCUTTA 4 (V 56 C 2)

B. N. BANERJEE AND K. L. ROY, JJ.

Commissioner of Income-tax, Applicant v. Sri S. K. Bose, Respondent.

Income-tax Ref. No. 62 of 1964, D/- 28-3-1968.

(A) Income-tax Act (1922), Ss. 30, Proviso 2, 23(5) — Second proviso not applicable to assessment of unregistered firms — Where second proviso applies explained.

The second proviso to S. 30 has no application to a case where the assessment has been made on the firm as an Unregistered Firm. The aforesaid proviso applies to a case where the partners of a firm are independently assessable on their own shares in the total income of the firm under the provision of S. 23(5) of the Act. It is only in the case of an assessment of a registered firm that the sum payable by the firm itself is not determined, but the total income of each partner, including therein his share income from the firm is assessed and the sum payable by him on the basis of such assessment is determined. The aforesaid proviso could, therefore, apply only in the case of the assessment of a registered firm or of a firm treated as such and not to the assessment of an unregistered firm.

(Para 13)

(B) Income-tax Act (1922), Ss. 44, 2(2) — Firm, dissolution of — Each partner at the time of dissolution liable to tax

jointly and severally — Each partner becomes an assessee under S. 2(2).

Under the provisions of S. 44, even if the firm is to be assessed after its dissolution, the liability to pay the tax is on the partners who were partners at the time of the discontinuance of the business of the firm. If the assessment has been properly made under S. 44 then the partners are jointly and severally liable to pay the tax and accordingly each of them must be held to be an assessee within the meaning of S. 2(2) of the Act. AIR 1965 Raj 205, Rel. on. (Para 13)

(C) Income-tax Act (1922), Ss. 30(1), 30(2) — Income-tax Rules (1922), R. 21 — Appeal, right of — Right arises only after notice of demand is served — Subsection (2) provides limitation — Dissolved unregistered firm — Demand notice served on each ex-partner — Each ex-partner gets right of appeal.

Section 30(1) entitles any assessee, either objecting to the amount of income assessed or denying his liability to be assessed under the Act, to appeal to the Appellate Assistant Commissioner against the assessment. As in the prescribed form B in Rule 21 of appeal against an assessment the intending appellant has to annex the notice of demand with the memorandum of appeal, a right of appeal arises only on the service of the notice of demand. Section 30(2) provides for a period of limitation for filing such appeals viz. a period of thirty days from the date of receipt of the notice of demand. Where notices of demand are served for the full amount of the tax on each of the ex partners of a dissolved unregistered firm, each of them gets a right of appeal against such demand. (Para 13)

(D) Income-tax Act (1922), Ss. 30, 23 — Res judicata — Estoppel — Appeal — Unregistered firm — Dissolution — Assessment of tax — Each ex partner is an assessee — Decision, in appeal filed by one will not be binding as "res judicata" or "estoppel" on others.

In the case of a dissolved unregistered firm each ex partner is liable to tax and each of the ex partners has a separate right of appeal against the order of assessment and the demand made thereon. Decision in appeal filed by one of them, does not bar subsequent appeals filed by the other partners on any principle of res judicata and estoppel, constructive or otherwise. AIR 1953 SC 419, Rel. on. (Para 14)

(E) Income-tax Act (1922), Ss. 26, 44 (Prior to amendment in 1958) — Constitution of firm, change in — Five persons A1 to A5 constituting firm doing transport business — A1 to A4 selling their share to B1 to B4 — On same day A5 selling his share to B1 to B4 by separate deed — B1 to B4 continuing transport

business for some time — In both transactions only assets transferred without any mention of liability — Held that the transfer was of business as a whole that the firm was only reconstituted and that there was only change in ownership of firm and no discontinuance of business — Assessment of firm for period when A1 to A5 were partners taken up after B1 to B4 had become partners — Held A1 to A5 were not liable to assessment under S. 44 as it stood prior to its amendment in 1958. AIR 1953 SC 455 and (1929) 14 Tax Cas 407 and AIR 1967 SC 617, Disting. (Para 20)

(F) Income-tax Act (1922), S. 44 — A dissolved firm is liable to be assessed. AIR 1961 SC 609 and AIR 1964 SC 1095, Rel. on. (Para 22)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 617 (V 54)=1964-51
 ITR 849, Sait Nagjee Purushottam and Co., Calicut v. Commr. of Income-tax Madras 19
 (1965) AIR 1965 Raj 205 (V 52)=1966-62
 ITR 411, Daya Ram v. Addl. Collector, Jaipur 13
 (1964) AIR 1964 SC 1095 (V 51)=
 1964-51 ITR 823, Shivaram Poddar v. Income Tax Officer Central Circle II Calcutta 16, 20, 22
 (1962) AIR 1962 SC 970 (V 49)=1962-44
 ITR 739, Commr. of Income Tax, Madras v. S. V. Angidichettiar 16
 (1961) AIR 1961 SC 609 (V 48)=1961-41
 ITR 425, C. A. Abraham v. Income-tax Officer Kottayam 15, 22
 (1953) AIR 1953 SC 419 (V 40)=1951
 SCA 178, Narhari v. Shankar 14
 (1953) AIR 1953 SC 455 (V 40)=
 1953-24 ITR 405, Commr. of Income Tax, West Bengal v. A. W. Figgis and Co. 17
 (1929) 14 Tax Cas 407, Wilson and Barlow v. Chibbett 18

B. L. Paul with Dipak Sen, for Applicant; D. K. Dey with P. Majumdar, for Respondent.

K. L. ROY, J.: Four persons, namely Gostodhan Chatterjee, Krishna Chandra Chatterjee, Prithwis Chandra Biswas and Santosh Kumar Bose, started a business in co-partnership in the firm name of Popular Transport Service, under a deed of partnership dated the 1st July, 1945 with equal shares in the firm. Subsequently the aforesaid four partners agreed to introduce one Dharendra Nath Banerjee as the fifth partner of the firm. The original four partners reduced their joint holding in the firm to 29/30th part of the business and the new partner was allotted the remaining 1/30th share. The aforesaid five partners carried on the business of the firm till the 21st July, 1952. On that date a deed, described as a deed of transfer, was executed by and between the said Prithwis Chandra Bis-

was, Santosh Kumar Bose, Gostodhan Chatterjee, Krishna Chandra Chatterjee and Dharendra Nath Banerjee described therein as parties of the first, second, third, fourth and fifth part respectively and Bhagwan Shaw, Lachmi Narayan Shaw, Munilal Shaw and Sunitendra Mohan Tagore, described therein as parties of the sixth, seventh, eighth and Ninth part respectively. The following are some of the recitals in the aforesaid deed:

Whereas the parties of the First to Fourth parts are desirous of transferring and assigning their 29/30th share or interest in all the assets, goodwill, stock-in-trade, stage carriages and structures of the tenanted land and premises No. 14 Ultadange Road free from encumbrances and liabilities at or for Rs. one lakh forty-five thousand.

And whereas the parties hereto of the sixth, seventh, eighth and ninth parts are willing to purchase the said undivided 29/30th part or share in the business of Popular Transport Service its goodwill, assets, properties, stage carriages fully described in the Schedule free from liabilities and encumbrances at or for Rs. One lakh forty-five thousand provided the party hereto of the Fifth part consent to such transfer and assignment and will agree to admit them as partners to the firm and reconstitute the firm accordingly and whereas the party hereto of the fifth part has agreed to consent to the transfer in favour of parties of the sixth to ninth parts by the parties hereto of the first to fourth parts in the manner hereinafter appearing upon their agreeing to purchase the undivided 1/30th part or share in the business of Popular Transport Service its goodwill, assets, properties, four stage carriages free from liabilities and encumbrances at or for Rs. 5000 which the parties hereto of the sixth to ninth parts have agreed.

2. The operative clause of the deed provided that in consideration of the payment of the said sum of Rs. 1,45,000 the parties of the first to fourth parts granted, transferred, conveyed and assigned and the party of the fifth part confirmed unto the parties of the sixth to ninth parts of all that the undivided 29/30th part of or share in all that business of Popular Transport Service with goodwill, assets, stage carriages, structures on rented land, benefits of road permit and of the tenancy fully described in the schedule and all their right, title and interest therein absolutely and for ever free from all encumbrances.

3. Subsequently on the same date, namely the 21st July, 1952 another deed described as a deed of sale, was executed by Dharendra Nath Banerjee as the vendor in favour of the aforesaid Sunitendra Mohan Tagore, Lachmi Narayan Shaw,

Manilal Shaw and Bhagwan Shaw described as the purchasers. In the said Deed it was recited as follows: Whereas the parties hereto are the partners of the Popular Transport service and whereas the vendor has 1/30th part or share in the said business while the Purchasers are holders of the remaining 29/30th part of or share in the said business and whereas the vendor has agreed to sell and the purchasers have agreed to purchase his undivided 1/30th part of or share in the said partnership business of Popular Transport Service its assets, stock-in-trade, book-debts, goodwill including the Public Stage Carriages, Nos. WBS-729 WBS-730, WBS-760, and WBS-811 free from all liabilities at or for Rs. 5000. The deed went on to witness that in consideration of the payment of Rs. 5000 the Vendor granted, transferred conveyed, assigned and assured unto the purchasers all that his undivided 1/30th part or of share in the business of Popular Transport Service its goodwill, book-debts, stock-in-trade, public stage carriages etc. and all other assets absolutely and for ever free from all liabilities and encumbrances.

4. There is no dispute that the firm of Popular Transport Service ceased to carry on any business on and from the 11th November 1953. Long after the firm discontinued its business, the Income-tax Officer found that the income of the firm for the Assessment year 1949-50 had escaped assessment and as he was of the opinion that by the two deeds of transfer executed on the 21st July, 1952, which form a composite part of a single transaction, the firm consisting of five partners was in effect dissolved on that date, he issued notices under S. 34 of the Indian Income-tax Act, 1922 (hereinafter referred to as the Act) to all the aforesaid five partners of the firm as representing firm requiring them to submit returns of the total income of the firm. All the ex partners with the exception of S. K. Bose, filed returns showing nil income along with statements denying their liability to be assessed. S. K. Bose took the plea that he never represented the firm. As the returns submitted were on behalf of an "Association of Persons" and not on behalf of the dissolved firm, the I. T. O. held the returns to be invalid. He served a notice on C. D. Chatterjee, one of the ex partners, under S. 22(4) calling upon him to submit the return of the dissolved firm. This notice was not complied with and the I. T. O. made an assessment under S. 34/23(4) of the Act on M/s. Popular Transport Service (dissolved) C/o, Sri Gostodhan Chatterjee (Partner) in the status of an Unregistered Firm on a total income of Rs. 48,000. The I. T. O. also served separate notices of demand under S. 29 on each of the five ex partners, re-

quiring each of them to pay the tax demanded on the basis of the assessment on the dissolved firm.

5. Five separate appeals were filed by the five ex partners against the order of assessment on the dissolved firm before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner did not consolidate the five appeals and passed one consolidated order thereon. He dealt first with the appeal by G. D. Chatterjee, rejected all the contentions raised by the appellant in that appeal and sustained the assessment order. One of the contentions raised in that appeal was that as under S. 44 the liability for the tax assessed on a dissolved firm was on the partners who were partners at the date of discontinuance of the business of the firm and as in this case the business of the firm was discontinued only in November, 1953 the partners who had retired from the firm in 1952 could not be made liable for the tax. The Appellate Assistant Commissioner held that when all the assets of the firm were transferred, it had to be concluded that the business of the firm was discontinued. Though the four purchasers continued the business in the name of Popular Transport Service, that was a new business. An appeal was taken to the Tribunal against the aforesaid order of the Appellate Assistant Commissioner and the Tribunal in I. T. A. No. 7680 of 1960-61 upheld the decision of the Appellate Assistant Commissioner. The Tribunal was of the opinion that as in the two deeds executed on the 21st July, 1952 there was no provision for taking over the liabilities, the business as a whole was not transferred as a going concern. The Tribunal further held that there was no succession as the purchasers were not responsible for any of the debts or liabilities created by the firm prior to the date of sale. Accordingly the Tribunal held that for all practical purposes the firm of the original partners was dissolved on sale and hence under S. 44 they would be liable for the tax on the pre-dissolution profits of the firm. This order is dated the 19th February, 1962.

6. The remaining appeals, including the appeals preferred by S. K. Bose and P. C. Biswas, were taken up by the Appellate Assistant Commissioner after the decision of the Tribunal in the aforesaid appeal of Gostodhan Chatterjee and by four separate orders the Appellate Assistant Commissioner dismissed the appeals following the aforesaid decision of the Tribunal.

7. Both Santosh Kumar Bose and Prithwis Chandra Biswas went up on further appeal to the Tribunal against the orders of the Appellate Assistant Commissioner dismissing their appeals. The Tribunal heard the appeal preferred by

Santosh Kumar Bose and for reasons stated in its order allowed the appeal. In the appeal preferred by Prithwis Chandra Biswas the Tribunal followed its decision in the appeal by Santosh Kumar Bose and also allowed that appeal.

8. Before the Tribunal a preliminary objection was raised by the departmental Representative as to the maintainability of the appeal. It was contended, *inter alia* that (i) as an appeal by the firm Popular Transport Service filed by Gostadhan Chatterjee, an ex partner, has already been heard and decided by the Tribunal, another appeal by another partner on behalf of the same firm and for the same assessment year was not maintainable. The latter appeal must be held to be barred by the principles of constructive res judicata:

(ii) that as only one appeal on behalf of the firm by any of its partners was contemplated by S. 30 of the Act, as evidenced by the second proviso thereto, there could be only one appeal on behalf of the firm by any of its partners. As such an appeal has already been heard and disposed of, no further appeals were competent. The preliminary objections were disposed of by the Tribunal by a separate order described as an "Interlocutory Order". The Tribunal held that in income-tax proceedings the principle of res judicata had an extremely limited application. Whether an assessee had a right of appeal or not must be decided on a strict interpretation of the provisions of the Act and not on any principles of res judicata. The Tribunal was further of the opinion that as S. 30(1) of the Act conferred a right of appeal to "any assessee objecting to the amount of income or denying his liability to be assessed" and as an ex partner of a dissolved firm on whom a notice of demand had been served for recovery of the tax due for a pre-dissolution accounting period was an assessee within the definition of S. 2(2) of the Act he had a right of appeal under Section 30(1) against such demand. So far as the argument based on the second proviso to S. 30 was concerned the Tribunal was of the opinion that the words "any such partner" in the aforesaid proviso meant any of such partners and not the partner who was the first to appeal on behalf of the firm. In any event, the Tribunal was of the opinion that the aforesaid proviso was not applicable to the case of a dissolved firm. Accordingly the Tribunal dismissed the preliminary objections raised on behalf of the Department and proceeded to hear the appeal on the merits.

9. The Tribunal's decision on the merits has been printed in the Paper Book as its appellate order. On a consideration of the provisions of S. 44 of the Act, as applicable to the year of assessment

under reference, the Tribunal was of the opinion that every person who was a partner of the firm at the time of its discontinuance would be jointly and severally liable to assessment and for the amount of tax payable. The Tribunal, therefore mooted two questions to be considered and answered, namely: (1) whether the business of the firm, M/s. Popular Transport Service, was discontinued on 21st July 1952? (2) was the appellant, as an ex partner of the firm liable to assessment for the year 1949-50 and for the amount of tax?

10. After considering the terms of the two aforesaid deeds executed on 21st July, 1952 the Tribunal held that there was no discontinuance in the business of the firm on the 21st July, 1952 and what happened on that date was a mere change in the constitution of the firm. The Tribunal was unable to accept the contention of the Department that on that date the five original partners transferred only the assets of the business to the four new incoming partners. Such a contention was, in the opinion of the Tribunal, clearly ruled out by the express provisions of the said two deeds. The Tribunal held that under the first of the said two deeds four of the partners of the firm retired and the firm was reconstituted with Dharendra Nath Banerjee and the four purchasers as the Partners. Later, in the course of the same day, Dharendra Nath Banerjee sold away undivided 1/30th share in the business to the four new partners and thereafter there was again a reconstitution of the firm, which was thereafter constituted of four partners, namely, the purchasers. As there was no discontinuance or cesser of the business of the firm, it must follow that the firm continued to do its business till the 11th November, 1953, when the business of the firm was discontinued. Accordingly, the Tribunal answered the two questions mooted by itself in the following manner viz., (i) that there was no discontinuance of the business on the 21st July, 1952; and (ii) that the business was effectively discontinued on the 11th November 1953 when neither the appellant nor any of the other original partners were partners of the firm and as such the appellant could not be made liable for the amount of tax of the firm for the assessment year 1949-50. The Tribunal accordingly allowed the appeal. Following its own decision in this appeal, the Tribunal also allowed the appeal of another ex partner Prithwis Chandra Biswas.

11. The Commissioner of Income-tax applied under S. 66(1) of the Act for reference of certain questions of law arising out of the aforesaid order of the Tribunal. At the hearing of the application the respondent suggested that certain additional questions should also be referred

and the Tribunal accepted that suggestion and referred to this Court the following questions of law:

QUESTIONS SUGGESTED BY THE APPLICANT COMMISSIONER OF INCOME TAX

(1) Whether on the facts and in the circumstances of the case, the appeal filed by the respondent lies under the second proviso to S. 30 of the Indian Income-tax Act, 1922?

(2) Whether in the facts and circumstances of the case, the said appeal is barred by the principles of *res judicata* and estoppel?

(3) Whether in the facts and circumstances of the case and on a consideration of the relevant deeds, the Tribunal was justified in law in holding that there was no discontinuance or cesser of the business of the firm on 21st July, 1952?

(4) If the answer to question No. 3 is in the negative, was the respondent, Sri Santosh Kumar Bose, liable for the amount of tax assessed on the firm for the year 1949-50?

QUESTIONS SUGGESTED BY THE RESPONDENT:

(5) Whether the assessment on the firm after its dissolution was in accordance with law?

It would be convenient to deal with and dispose of questions Nos. 1 and 2 before dealing with the main question which is question No. 3 in this reference.

12. Mr. B. L. Pal, the learned counsel for the Commissioner, submitted that under S. 44 of the Act, as it stood on the relevant date, the assessment of the income of a firm, which has since been dissolved, must be made on the firm as if no such dissolution has taken place. As the assessment was on the firm, the firm was the assessee, though under the provisions of the aforesaid section the tax might be realised from any of the ex partners. As such an appeal against the assessment could only be filed by the firm and once such an appeal has been filed on behalf of the firm by one of the partners, there was no scope for the filing of further appeals by the other partners also on behalf of the firm. There could not be several appeals in respect of the same assessment. Because the Act allowed any of the partners to file the appeal on behalf of the firm, it did not make the partners the assessees. Mr. Pal referred to the provisions of S. 2(2), S. 30(1) and the 2nd proviso thereto, and S. 44 of the Act as applicable to the year of assessment concerned in this reference and which are as follows:

Section 2(2)—Assessee means a person by whom income-tax is payable

Section 30(1)—Any assessee objecting to the amount of income assessed under S. 23 or S. 27, or the amount of loss computed

under S. 24 or the amount of tax determined under S. 23 or S. 27 or denying his liability to be assessed under this Act..... may appeal to the Appellate Assistant Commissioner against the assessment or against such refusal or order.

Provided further that where the partners of the firm are individually assessable on their shares in total income of the firm, any such partner may appeal to the Appellate Assistant Commissioner against any order of the Income-tax Officer determining the amount of the total income or the loss of the firm or the apportionment thereof between the several partners, but in respect of matters which are determined by such order may not appeal against the assessment of his own total income.

Section 44—Where any business, profession or vocation carried on by a firm or association of persons has been discontinued or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall, in respect of the income, profits and gains of the firm or association be jointly and severally liable to assessment under Chapter VI and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment.

13. Mr. Pal also referred us to Form B in Rule 21 of the Income-tax Rules, 1922, which is the form prescribed for an appeal against an order of assessment. In the foot-note to the said form it is provided that the appeal and the verification shall be signed, in the case of a firm, by a partner. Mr. Pal, therefore, argued that both under the aforesaid proviso to S. 30 and under the prescribed form for filing an appeal, the appellant is the firm, though the form of the appeal and verification is to be signed by a partner. There could, therefore, be only one appeal and once such an appeal has been filed there was no scope for the filing of any further appeals. We are unable to accept the above submission of Mr. Pal. The second proviso to Section 30 has no application to the facts of this case as the assessment in this case has been made on the firm as an Unregistered Firm. The aforesaid proviso applies to a case where the partners of a firm are independently assessable on their own shares in the total income of the firm under the provision of S. 23(5) of the Act. It is only in the case of an assessment of a registered firm that the sum payable by the firm itself is not determined, but the total income of each partner, including therein his share income from the firm is assessed and the sum payable by him on the basis of such assessment is determined. The aforesaid proviso could, therefore,

apply only in the case of the assessment of a registered firm or of a firm treated as such and not to the assessment of an unregistered firm. Further, under the provisions of S. 44, even if the firm is to be assessed after its dissolution, the liability to pay the tax is on the partners who were partners at the time of the discontinuance of the business of the firm. In this case the I. T. Officer has served notices of demand for the entire amount of tax on each of the partners of the dissolved firm. If the assessment has been properly made under S. 44, then these partners are jointly and severally liable to pay the tax and accordingly each of them must be held to be an assessee within the meaning of S. 2(2) of the Act. This view is supported by the decision of the Rajasthan High Court in *Dayaram v. Additional Collector, Jaipur*, (1966) 62 ITR 411=(AIR 1965 Raj 205) which was brought to our notice by Mr. D. K. Dey, the learned counsel for the assessee. In that case the Rajasthan High Court held that since S. 44 enacted a fiction by which a dissolved firm was to be taken to be a firm in existence for the purposes of assessment of tax and the term 'assessment' included even processes for recovery of the tax, a partner of a dissolved firm would have to be regarded as an assessee within the meaning of S. 2(2) and would be a person by whom the tax is payable under the Act. Section 30(1) entitles any assessee, either objecting to the amount of income assessed or denying his liability to be assessed under the Act, to appeal to the Appellate Assistant Commissioner against the assessment. As in this case the ex partners were denying their liability either to be assessed or to pay the tax demanded, each of them must be held to be entitled to appeal against the assessment and the demand. In the prescribed form of appeal against an assessment, already referred to, the intending appellant has to annex the notice of demand with the memorandum of appeal. It would thus appear that a right of appeal arises only on the service of the notice of demand. Section 30(2) provides for a period of limitation for filing such appeals viz. a period of thirty days from the date of receipt of the notice of demand. As in these cases, the notices of demand had been served for the full amount of the tax on each of the ex partners, it must be held that each of them had a right of appeal against such demand.

14. If each of the ex partners had a separate right of appeal against the order of assessment and the demand made thereon, there is no question of any principle of res judicata and estoppel, constructive or otherwise, barring the subsequent appeals filed by the other partners. In *Narhari v. Shankar*, 1951 SCA 178=(AIR

1953 SC 419) it was held that where two separate appeals are filed by two sets of defendants from one and the same decree and the Appellate Court hears and allows both the appeals and two decrees are drawn up in accordance with the judgment of the Appellate Court, the question of res judicata does not arise at all. It is to be noticed in this case that though five appeals were filed before the Appellate Assistant Commissioner against the order of assessment, the Appellate Assistant Commissioner did not consolidate the appeals, but passed five separate orders dismissing the said appeals. In the circumstances, we are of the opinion that the Tribunal was right in holding that separate appeals filed by the ex partners were maintainable and that such appeals were not barred by the principles of res judicata and estoppel. Accordingly question No. 2 must be answered in the negative and against the Department.

15. We now come to the main contention in this reference. Section 44, as it stood before its amendment in 1958, has been considered by the Supreme Court on several occasions. In *C. A. Abraham v. Income-tax Officer, Kottayam*, (1961) 41 ITR 425=(AIR 1961 SC 609) the Supreme Court observed as follows:

"Section 44 sets up machinery for assessing the tax liability of firms which have discontinued their business and provides for three consequences: (1) that on the discontinuance of the business of a firm, every person who was at the time of its discontinuance a partner is liable in respect of the income, profits and gains of the firm, to be assessed jointly and severally, (2) each partner is liable to pay the amount of tax payable by the firm, and (3) that the provisions of Chapter IV, so far as may be, apply to such assessment In effect, the legislature has enacted by S. 44 that the assessment proceedings may be commenced and continued against a firm of which business is discontinued as if discontinuance has not taken place. It is enacted manifestly with a view to ensure continuity in the application of the machinery provided for assessment and imposition of tax liability notwithstanding discontinuance of the business of firms. By a fiction, the firm is deemed to continue after discontinuance for the purpose of assessment under Chapter IV".

16. The aforesaid observations of the Supreme Court were approved of and applied in a later case reported in *Commissioner of Income-tax, Madras v. S. V. Angidi Chettiar*, (1962) 44 ITR 739=(AIR 1962 SC 970). The section again came to be considered by the Supreme Court in *Shivaram Poddar v. Income-tax Officer Central Circle*

II. Calcutta, (1964) 51 ITR 823=(AIR 1964 SC 1095). In that case the following observation was made:

"Section 44 operates in two classes of cases; where there is discontinuance of business, profession or vocation carried on by a firm or association, and where there is dissolution of an association. It follows that mere dissolution of a firm without discontinuance of the business will not attract the application of S. 44 of the Act. It is only where there is discontinuance of business, whether as a result of dissolution or other cause, that the liability to assessment in respect of the income of the firm under S. 44 arises

"Discontinuance of business has the same connotation in S. 44 as it has in S. 25 of the Act; it does not cover mere change in ownership or in the constitution of the unit of assessment. Section 44 is, therefore, attracted only when the business of a firm is discontinued, that is, when there is complete cessation of the business and not when there is a change in the ownership of the firm, or in its constitution, because by reconstitution of the firm, no change is brought in the personality of the firm, and succession to the business and not discontinuance of the business results".

17. In view of the aforesaid observations of the Supreme Court Mr. Pal tried to convince us that on the 21st July, 1952 the business of the firm as then constituted was discontinued and a fresh business was started by the reconstituted firm. Mr. Pal referred to both the recitals and the operative part of the two deeds and submitted that under the deeds what were transferred were the vendor's undivided shares in the assets, goodwill, etc. of the firm and as expressly the liabilities were not transferred, there was no transfer of the business as a whole. Mr. Pal is undoubtedly right when he contends that the vendors, under both the aforesaid deeds, purported to transfer the assets of the business free from encumbrances and liabilities. Mr. Pal submitted that where only assets are transferred and not the liabilities, there could not be a transfer of the business as a going concern. Mr. Pal wanted to support his contention by reference to an observation of the Supreme Court in the case of Commissioner of Income-tax, West Bengal v. A. W. Figgis and Co., (1953) 24 ITR 405=(AIR 1953 SC 455). In that case the question was, whether, when some of the partners of a firm retired and new partners were taken in there was a mere change in the constitution of the firm or a dissolution of the firm. In this connection a reference was made to the partnership deed in that case and the Supreme Court observed as follows:

"This document is silent on the question as to what happened to the assets and liabilities of the firm that was constituted under the Deed of 1939."

18. We cannot see what assistance Mr. Pal can derive from the aforesaid observation. The Supreme Court said that there was nothing in the Deed to show what happened to either the assets or liabilities of the firm. The Supreme Court did not say that if the document only dealt with the assets and not with the liabilities then there would be no transfer of the business. The Supreme Court had no occasion to consider the contentions raised by Mr. Pal before us. Mr. Pal also referred us to a decision of the King's Bench Division in *Wilson and Barlow v. Chibbett*, (1929) 14 Tax Cas 407 where Rowlatt J. had to consider whether the assessee had succeeded to a business previously carried on by a company. The Commissioners held that the assessee had not so succeeded. Rowlatt J. thought that he could not possibly interfere with the decision of the Commissioners. In that case a firm purchased the stock-in-trade and the business premises of a company and continued the work which was going on with the employees of the old company. Nothing was said in the deed of transfer, about book-debts or liability to the creditors or anything of that kind and the assessee never made any attempt to produce any material before the Commissioners to say that the business as a going concern has been transferred. It was in this connection that the Learned Judge observed that he could not possibly interfere with the decision of the Commissioners. We do not think that this decision can be of any assistance to Mr. Pal in his contention.

19. Mr. Pal next cited the case of *Saif Nagjee Purshottam & Co. v. Commissioner of Income-tax, Madras*, (1964) 51 ITR 849 = (AIR 1967 SC 617). In that case a firm consisting of six partners carried on business in banking, piece-goods, yarn and later on started the manufacture and sale of soap. Three of the partners died and subsequently in 1939 two fresh agreements of partnership were executed, the first of which recited that the manufacture and sale of soaps was being carried on by the three partners along with a fourth partner and the second deed recited that the three partners continued to carry on the business in banking, piece-goods and yarn. Later by an instrument executed in 1943, after the retirement of certain partners, new partners were introduced and the parties agree to carry on as one single partnership the business carried on by the two partnership firms constituted under the Deeds of 1939. By a subsequent agreement made in 1948 the business was taken over by a company. The firm claimed relief under Sec. 23(4)

on the basis of succession. It was in this connection that the Supreme Court observed that the two instruments executed in 1939 clearly showed that the business that was carried on by the firm originally till that date was discontinued and its business was split up into two and carried on by two independent firms then brought into existence. When this happens it is impossible to say that the pre-existing business was continued. We fail to see what relevance this case has with the facts of the case or the arguments advanced before us.

20. We are of the opinion that there is no authority for the broad proposition propounded by Mr. Pal that where only the assets of the business are transferred and not the liabilities there is no transfer of the business as a whole. Whether there has been a discontinuance of the business or whether the business as a whole has been transferred must be gathered from the two deeds of transfer both executed on the 25th July, 1952, the recitals and the operative portions whereof have been quoted above. We agree with the Tribunal that the recitals in the first of the aforesaid deeds envisage transfer of the interest of four of the five original partners in the firm to the four purchasers on condition that the purchasers are taken in as partners in place of the four vendor partners. The remaining partner Dhirendra Nath Banerjee, agreed to the aforesaid agreement and was in fact a confirming party to the deed. The second deed recites that the parties thereto, namely, the four purchasers and Dhirendra Nath Banerjee are the partners of Popular Transport Service and that the fifth partner Dhirendra Nath Banerjee has agreed to sell his share in the firm to the four remaining partners. The Tribunal was therefore right in holding that under the first deed there was only a reconstitution of the firm by the retirement of four partners and the introduction of four new partners in their place and by the second deed there was a further reconstruction by the fifth partner retiring from the firm and the remaining partners continuing the business of the firm. In conformity with the principles laid down in the case of Shivaram Poddar, 1964-51 ITR 823 = (AIR 1964 SC 1095) (supra) it must be held that by the two aforesaid deeds the firm, Popular Transport Service, was merely reconstituted, there being mere changes in the ownership of or in the constitution of the firm. The Tribunal was therefore correct in holding that there was no discontinuance of the business of the firm on the 25th July, 1952. As there is no dispute that the business of the firm was ultimately discontinued on the 11th November, 1953, it must be held that S. 44 of the Act was not attracted and the partners of the firm as on the 21st

July, 1952 were neither liable to be assessed, nor liable for the tax of the firm either jointly or severally.

21. In the above view Q. No. 3, referred to this Court must be answered in the affirmative and in favour of the assessee. In view of our answer to Q. No. 3, Q. No. 4 does not arise for our consideration.

22. In view of the pronouncement of the Supreme Court in the cases of (1961) 41 ITR 425 = (AIR 1961 SC 609) and Sivaram Poddar's case, 1964-51 ITR 523 = (AIR 1964 SC 1095) (supra) it must be held that an assessment on the firm after its dissolution was perfectly valid under S. 44 of the Act and Q. No. 5 must accordingly be answered in the affirmative and against the assessee.

23. Our answers to the questions referred, therefore, are as follows:

Q. No. 1—The second proviso to S. 30 of the Indian Income-tax Act, 1922 has no application to the appeal filed by the respondent and as such the appeal filed by the respondent was maintainable.

Q. No. 2 — The Respondent's appeal is not barred either by the principles of res judicata or estoppel.

Q. No. 3 is answered in the affirmative that is to say that there was no discontinuance or cesser of the business of the firm on July 21, 1952.

Q. No. 4 — In view of our answer to Q. No. 3, Q. No. 4 does not arise for consideration.

Q. No. 5 must be answered in the affirmative and against the assessee.

In the circumstances of this case we make no order for costs of this reference.

24. B. N. BANERJEE, J.: I agree.
BDB/D.V.C. References answered.

AIR 1969 CALCUTTA 11 (V 56 C 3)

P. CHATTERJEE, J.

State of Jammu and Kashmir, Petitioner v. M/s. Lucky Glass Works (Plaintiff) and another, Opposite Party.

Civil Revn. No. 2867 of 1961 D/- 21-4-1966.

Civil P. C. (1908), Ss. 80(c) and 2(7B) — Applicability of the Section — Jammu and Kashmir is now a State — Notice under S. 80 is necessary before a suit can be maintained against it at a place where the Code applies.

The territory of Jammu and Kashmir was formerly in Part B but by the 7th Amendment of the Constitution, the territory has become a State within Part A. Therefore, the State of Jammu and Kashmir and the Government of that State is a State Government, and it is a State within the meaning of the Constitution.

FL/CL/C701/68

the defendant because the performance contemplated under that section is actual performance, i.e., performance of his obligation as laid down in the West Bengal Premises Tenancy Act. Moreover the right under the contract but a special one given by the Rent Act.

(Para 8) Held on facts that the defendant had not even complied with the provision under S. 17(1) in that he had not deposited rents for the months in respect of which there was default within one month from the date of service of summons on him.

(C) Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), S. 17 — Default — Expression does not refer to any blameworthy conduct on the part of tenant — It merely refers to the fact of non-payment of rent for any particular period.

(D) T. P. Act (1882), S. 106 — Nature of tenancy depends on how the tenancy agreement itself describes it — Intention of the tenant or even the actual user of the tenant after the taking out of the tenancy is not material.

Cases Referred: Chronological Paras (1966) 70 Cal WN 676, Ganesh C. Nandy v. M/s. J. N. Chatterjee and Bros.

S. P. Sen, A. N. Ghose, for Appellants; ARUN K. MUKHERJEE, J.: These are two appeals by two tenants against a judgment dated December 17, 1959 of the Judge, 4th Bench of the Court of Small Causes, Calcutta, by which a decree of eviction was passed against both the two defendants separately in favour of the same plaintiff, namely, Sm. Amala Bala Dassi, who is the respondent in both the appeals. M/s. Shree Nursing Electric Stores was the defendant in ejectment Suit No. 1403 of 1957 while Jiwandas Mundhra carrying on business under the name and style of Shree Nursing Timber Works was the defendant in Suit No. 1058 of 1957. The suits were heard analogously by the learned trial Judge along with another Suit, namely, Suit No. 1159 of 1957. All the three suits were ejectment suits on the grounds of default in payment of rent and also on the ground of the plaintiff's reasonable requirement of the premises in the possession of the respective defendants in the suits. All the suits were decided in favour of the plaintiff-respondent and decrees of eviction passed against the defendants. Three separate appeals were filed against the one judgment which was delivered in respect of all these three suits. The appeal in respect of suit No. 1159 of 1957 has already been disposed of by a consent order. The present two appeals are, however, contested and we heard them together analogously.

Controller, without previous tender is not valid payment — Tender by cheque, when valid — T. P. Act, (1882), S. 108(1). The defendant tenant paid rents to the landlady for the months of July to September 1956 by cheques which the landlady did not encash. The defendant deposited the rent for October 1956 before the Rent Controller on the 1st of December 1956. Subsequently he deposited rents from November 1956 to April 1957 with the Rent Controller. There was no previous tender before the rents for November 1956 to April 1957 were deposited before the Rent Controller.

Held that even if the payment by cheque for the months of July to October 1956 could be taken to be valid, there was default in respect of the months subsequent to November 1956 since the rent was deposited beyond the deposits time and for the reason that the deposits were invalid there being no prior tender to the landlord. The defendant could not claim any protection under the Act. (Para 6)

Held further that delivery of a cheque to be a valid tender must be accepted by the payee as such. In the absence of any agreement between the parties that rents could be paid by cheques, there can be no valid tender of rent.

(B) Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), Ss. 21, 22 and 17(1) — Refusal of landlord to accept cheque — Protection under Act

A valid tender of rent before a landlord when available to tenant.

By itself does not absolve the tenant from his obligation to pay rent. Section 21 of the Act makes it clear that what the Act insists upon is actual payment. If after a due tender of rent by cheque the landlord refuses to accept the tender, the Act has provided in Section 21 the manner in which the defendant could in those circumstances discharge his obligation namely by depositing the same before the Rent Controller. The Act nowhere suggests that a mere tender is as good as payment. Even tender in cash is not, by itself, a good payment unless followed by a valid deposit before the Rent Controller. Where the defendant discovers that his cheques had not been cashed, the most that he can say is that he the defendant had made a valid tender though the plaintiff landlord had made such tender in-tractuous by not sending the cheques to the bank. The defendant cannot by any stretch of imagination say that he had actually made the payment. Even if it was conceded that the defendant had made a valid tender, that tender not having been followed by a valid deposit before the Rent Controller, one must take that there was default.

In such a case S. 38 of the Contract Act, does not also come to the rescue of

dants had defaulted in payment of rents since July, 1956. The defendant denies it. The basic facts about the payment of rent are more or less admitted by both sides and understand the respective contentions of the parties to the suit it is necessary to recapitulate those facts. The defendant paid its rents and taxes by cheques to the plaintiff for the months of July, August and September, 1956. These cheques were not, however, encashed by the plaintiff. By a letter dated 14th September, 1956 the defendant told the plaintiff that the defendant had already sent a cheque for Rs. 126/12/- towards the rent of the godown for the month of July, 1956. The defendant also enclosed in that letter a cheque dated 13th September, 1956 for Rs. 126-12-0 as rent for the month of August, 1956. The defendant asked for acknowledgment of the cheques. Thereafter by another letter dated 15th November, 1956 the defendant again reminded the plaintiff that cheques for rents for premises No. 43-D, Nimtala Ghat Street, Calcutta, for the months of July, August and September, 1956 had been already sent to the plaintiff. As for October, 1956 the rent had been sent by money order on 9th November, 1956. The defendant states in this letter that the defendant had found out from its accounts that the plaintiff had not cashed the aforementioned cheques and that the plaintiff had not also communicated to the defendant any reason for not encashing the cheques. The plaintiff, it appears, did not send the defendant any reply to this letter. The rent for October, 1956 which was sent by money order was not accepted by the plaintiff and the defendant deposited it with the Rent Controller on December 1, 1956. It is nobody's case that the plaintiff deposited any rent for the months of July, August or September, 1956 with the Rent Controller. In respect of these months the defendant remained satisfied with the fact that it had already paid cheques to the plaintiff though the plaintiff had not cashed those cheques. Thereafter from November, 1956 to April, 1957 the defendant deposited rents with the Rent Controller and from May, 1957 onwards the defendant deposited rents with the trial Court after it had received summons of the suit. On these facts the question arises whether the delivery of the cheques by the plaintiff to the defendant could be regarded as payments of rent for the months of July, August and September 1956. The learned trial Judge held that there was no valid payment of rent for the month of October, 1956 as the defendant's deposit of rent for that month with the Rent Controller was out of time. The learned trial Judge, however held in favour of the defendant that since the plaintiff had accepted the cheques for the

months of July to September, 1956 she could not be heard to complain that rents had not been tendered to her in cash. According to the learned trial Judge the fact that the plaintiff did not send any reply to the defendant's letter of 15th November, 1956 shows conclusively that the defendant's story made out in that letter that the plaintiff had accepted the cheques must be taken as correct and, that since the plaintiff did not give any notice to the defendant intimating to the defendant the fact of her intention of not accepting the cheques, the defendant cannot be said to be defaulter within the meaning of the Act of 1956 for these three months. We do not think that the learned trial Judge was correct in disposing of the issue of default on this ground. It is well known that a cheque is never a valid tender unless it is accepted by the payee as a valid tender of payment. The plaintiff in this case denies that she ever accepted the cheques. The defendant on the other hand, insists that she did. Fortunately, it is not necessary for us to decide in the state of this conflicting evidence as to what actually did happen in this matter. Even assuming that the plaintiff had accepted the defendant's cheques without demur the defendant cannot avoid the charge of default for grounds which are quite different and are at the same time incontrovertible. The defendant's own story is that after the rent for October, 1956 had been deposited with the Rent Controller on 1st December, 1956 the defendant deposited rents from November, 1956 to April, 1957 with the Rent Controller. There is no evidence anywhere to show that there was any previous tender before the rents for November, 1956 and January to April, 1957 were made before the Rent Controller. In a recent judgment given by this Bench we have decided that under the provisions of Section 21 of the Act of 1956 it is necessary to make a tender of rent on each occasion before a valid deposit with the Rent Controller can be made. The defendant's counsel wanted to reargue the matter before us. We were of course, prepared to listen to him and, if necessary, to re-consider our finding. But the learned counsel appearing for the plaintiff-respondent told us that he would not rely on this point at all. He contended that even after abandoning the point about requirement of a tender on each occasion, he was in a position to establish that the deposits of rent before the Rent Controller were all invalid. He argued that unquestionably there must be at least one valid deposit of rent before the Rent Controller, before a tenant could claim that once having made a deposit before the Rent Controller after a prior tender to the landlord, it was no longer necessary for him to tender the rent on

the month of May, 1956 had been dishonoured. It is strange that even after the cheque had been dishonoured the defendant did not take care to send that amount again to the plaintiff either in cash or by cheque. In fact, so far as the default for May, 1956 is concerned, the defendant did not at any stage make any attempt to cover up that default. As regards the subsequent months defendant has given evidence to say that once a month he got statement of accounts. Though he says in his evidence in a vague sort of way that statements of accounts are not always verified, he did admit that he "saw" from the statement that the "cheque was not cashed". In any case, it is only reasonable to assume that he, a businessman of some standing, should have discovered from his accounts that his cheques had not been encashed by the plaintiff. Further, as we have already said, even a valid tender of rent before a landlord does not absolve the tenant from his obligation to pay rent. Section 21 of the West Bengal Premises Tenancy Act makes it clear beyond any doubt that what the Act insists upon is actual payment. If after a due tender the landlord refuses to accept the tender, the Act has provided in S. 21 the manner in which the defendant could in those circumstances discharge his obligation. The Act nowhere suggests that a mere tender is as good as payment. Even tender in cash is not, by itself, a good payment unless followed by a valid deposit before the Rent Controller. In this case when the defendant discovered that his cheques had not been cashed, the most that he could say was that he the defendant had made a valid tender though the plaintiff had made such tender infructuous by not sending the cheques to the bank. The defendant could not by any stretch of imagination say that he had actually made the payment. Even if we concede that the defendant had made a valid tender, that tender not having been followed by a valid deposit before the Rent Controller one must take those months as months of default. The learned counsel appearing on behalf of the appellant relied on Section 38 of the Indian Contract Act in this connection. The terms of S. 38 which are relevant for our purpose are as follows:

"Section 38. Where a promisor has made an offer of performance to the promisee and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions:

(1) it must be unconditional:

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8. It is argued that since the defendant had made an offer of performance to the

plaintiff and the plaintiff had not accepted the offer, the defendant is not responsible for non-performance, nor can he lose his rights under the contract of tenancy. This, to our mind, is putting an entirely wrong construction upon the section. What has to be offered by the promisor and refused by the promisee to bring a case within the ambit of S. 38 of the Indian Contract Act is actual performance and the offer has to be in any case unconditional. It has neither been pleaded nor proved in this case that the defendant had merely promised to deliver cheques to the plaintiff. Therefore, it is not possible to argue that non-acceptance of cheques by the plaintiff can absolve the defendant from further performance of his obligations under the contract of tenancy. Obviously, so far as the defendant is concerned, he had promised actual payment. Had the plaintiff refused to accept actual cash payment there might have been some justification for invoking section 38. Nobody can say that handing over a cheque is as good as making a payment. A creditor is never bound to accept a cheque. Besides, even refusal to accept payment on the part of the plaintiff does not necessarily exonerate the defendant from his obligation to deposit the amount of rent with the Rent Controller in accordance with the provisions of sections 21 and 22 of the Act of 1956. To say that without making such deposit the defendant cannot seek for protection from eviction on the ground of default is not tantamount to saying that the defendant loses any rights under the contract of tenancy. All that S. 38 of the Contract Act provides is that when a real offer of performance is refused by the promisee, the promisor is no longer responsible for non-performance and does not therefore lose his rights under the contract. But the right to resist eviction in certain circumstances given by the West Bengal Premises Tenancy Act is not a right under the contract at all. It is a special right given by the West Bengal Premises Tenancy Act and to be entitled to that right it is not enough for the tenant to invoke S. 38 of the Contract Act; the tenant has also to show that he has performed his obligations laid down in the West Bengal Premises Tenancy Act before he can claim to be entitled to protection from eviction under the Act of 1956.

9. There are further infirmities in the defendant's case. Under Section 17(1) of the Act a tenant could get the benefit of protection against eviction if within one month after the service of the writ of summons on him he deposited in Court or paid to the landlord the amounts for which there have been default. So far as this suit is concerned, the defendant does not appear to have made any deposits

another legal person not to enter into contractual relations with the petitioner.

In the non-statutory sphere, i.e., the sphere of business unaffected by any Control Order, the Government has the freedom, no less than that of a private trader, to choose the parties with whom it would have its transactions and no individual has any legal or constitutional right to insist that Government must enter into contracts with him. Government is free to take an administrative decision in this behalf, independent of the requirements of any statutory provision. Nor was there any question of application of Art. 301 of the Constitution in this sphere inasmuch as there being no control or monopoly in the non-statutory sphere, the exclusion of one particular party could not amount to an absolute prohibition of trade or business. (Paras 17, 18)

Nor was there any infringement of Article 14 because the ground upon which the petitioner was sought to be excluded, offered a reasonable basis of classification, namely, that the petitioner had defaulted in carrying out the terms of a license issued by the Government. As it had not been shown by the petitioner that there were other traders who had committed similar default but had not been visited by similar action, there could not be any complaint of violation of Art. 14. AIR 1959 SC 490 and (1939) 310 US 113, Rel. on. (Paras 19, 20)

Though Government had the right to say that it would not enter into business transactions with a particular person or persons, it had no such right under the common law to induce another legal person that he should not enter into business dealings with a third party. (Para 33)

■(B) Constitution of India, Article 77 — Provision is directory — Order not expressed in name of President — Government can, by independent evidence, show that order was in fact made by Government. AIR 1964 SC 1823, Rel. on. (Para 27)

(C) Constitution of India, Arts. 19(1)(g), 301 — Essential Commodities Act (1955), S. 3 — Licensee under Imports (Control) Order (1955) carrying on iron and steel business apart from import business — Violation of terms of licence — Government cannot take any other measure apart from provisions of statute — Any action taken to deny licensee any rights or privileges with respect to iron and steel business is ultra vires.

The right to import any goods is an incident of the fundamental right to carry on business which belongs to every citizen under Art. 19(1)(g) of the Constitution. This right was subjected to restrictions in the public interest by the Order issued in exercise of powers conferred by the Essential Commodities Act. But for

the Imports (Control) Order 1955, licensee would have a right, free of any restrictions, to import steel goods. The violation of the terms of the licence was created a statutory offence by the Control Order and therefore the penalty for such offences, namely, the cancellation of the licence, must be held to be the exclusive remedy for the offence and the procedure laid down in the Control Order under Cls. 8 and 10 must also be complied with in order to impose such penalty. (Para 36)

Any action that may be taken by the Controller to deny the licensee any rights or privileges with respect to the Iron & Steel business, which he was carrying on apart from import business and which was, at the material time, subject to Iron and Steel Control Order, 1956, must accordingly be held to be ultra vires. (Para 37)

The licensee is, accordingly, entitled to have a declaration that the decision of the Government to suspend non-statutory business dealings with the licensee cannot be applied to the acquisition, supply or distribution of any goods which is subject to statutory control for the time being, because if the Government excludes the licensee from such business, it would amount to an absolute deprivation of his fundamental right to carry on business in such goods as well as upon the freedom of movement of such goods guaranteed by Art. 301, which can be imposed only by law and not by administrative action. (Para 45)

Further, the exemption of iron and steel from the operation of the Iron & Steel Control Order, 1956, does not put an end to the Imports (Control) Order which prescribes statutory remedies for the violation of the terms of the licences granted thereunder. Hence, the licensee is also entitled to a declaration that the impugned decision referred to above cannot be applied to exclude the licensee from the business of import of iron & steel goods, the import of which is subject to the Imports (Control) Order, 1955. The granting of licences and the remedies for violation of the terms of such licences are governed by the provisions of that Order and they cannot be substituted by any non-statutory action by the Government. Case Law Ref. (Para 46)

(D) Constitution of India, Art. 226 — In order to maintain application under Article, petitioner need not show that he has already suffered actual injury — Apprehension of injury or threat of injury is enough. AIR 1955 SC 661 and AIR 1959 SC 725, Rel. on. (Para 42)

(E) Constitution of India, Art. 226 — Petitioner acting as handling agents to Government under contract not governed by any statutory provision — Government can engage any person as its

in Court for the months of May to November, 1956. The defendant's counsel argued that the word "default" connotes a blameworthy conduct on the part of the defendant. But since the defendant had paid the cheques and it was the plaintiff who had refused to accept them one cannot say that the defendant had committed default. We are not inclined to accept this plea. This period of non-payment of rent had started in May, 1956 when the defendant's cheque had been dishonoured. Therefore, so far as the month of May, 1956 is concerned, there is no question that the defendant was at fault. After starting with a month like this the defendant should have taken pains to see that his cheques were encashed. He should not have assumed that the mere handing over of the cheque would have saved him from further liability to pay. Therefore, it is difficult to argue that his conduct was not blameworthy. In any case, we do not consider that the word "default" has been used in Section 17 in the sense suggested by the defendant. From the scheme of the Act it is quite clear that by the word "default" the framers of the Act merely wanted to refer to the fact of non-payment of rent for any particular period. In any case, there was nothing to prevent the defendant from having asked for an adjudication under Section 17 (2) of the Act about the amount of rent that was due from him to the landlord and that had to be deposited in accordance with the provisions of sub-section (1) of Section 17. For all these reasons we agree with the learned trial Judge that the defendant had committed default in respect of four months prior to the filing of the suit and was not, therefore, entitled to protection from eviction under the Act of 1956.

(In paragraphs 10 to 12 the judgment agrees with the trial Court's finding about the reasonable and bona fide requirement of the suit premises by the plaintiff for her own use and occupation.

In paras 13 to 15 the Court rejects an application for adducing additional evidence about some additional accommodation having already been available to the plaintiff on grounds that the default has been proved and further that such additional accommodation was also not sufficient for expansion of the business. The judgment then proceeds:)

16. It was faintly argued on behalf of the appellant in Appeal No. 251 of 1961 that the lease was for manufacturing purpose. This obviously was done to support the contention that the defendant was entitled to a longer notice. There is however, no evidence that the tenancy was for a manufacturing purpose. As is well known, it is not enough to prove that

the tenant manufactures certain commodities or that the tenant uses the premises for such manufacture. The intention of the tenant or even the actual user of the tenant after the taking out of the tenancy are immaterial. What must be pleaded and proved is that the tenancy agreement itself was for manufacturing purpose. There is no evidence on record on this point and we have no hesitation in rejecting this contention of the appellant.

17. In this view of the matter both the appeals fail and we order as follows: Both the appeals are dismissed with costs. Save as to the question of default in appeal No. 250 the judgment dated 17th December, 1959 and the decree passed by the learned trial Judge are upheld.

18. In view of our finding in the appeals the cross-objections in Appeal No. 250 are not pressed and we pass no order in regard to the same.

19. SINHA, C. J.: I agree.
TVN/D.V.C. Appeals dismissed.

AIR 1969 CALCUTTA 18 (V 56 C 5)

D. BASU, J.

Ram Krishna Kulwant Rai and others,
Petitioners v. Union of India and others,
Respondents.

Civil Revn. Nos. 710(W), 718(W), 757-58 (W), 810(W) of 1966, D/- 2-4-1968.

(A) Constitution of India, Articles 14, 301, 226 — Petitioner failing to carry out his obligation under licence issued under Imports (Control) Order (1955) — Government suspending only non-statutory business dealings with petitioner — Held, Art. 301 was not applicable nor Art. 14 infringed — Held further that Government had no right to induce another legal person not to enter into contractual relations with petitioner.

In pursuance of the provisions of the Imports (Control) Order, 1955 Import Licences were granted to the petitioner under certain conditions. On failure of the petitioner to fulfil one of the conditions the Government issued the banning order according to which only non-statutory 'business dealing' between the petitioner and the Government was to be suspended for three years from the date of the order. The order was circulated not only to the other Ministries of the Government but also to the statutory corporations with the intention that they also should boycott the petitioner in their dealings:

Held there was no question of application of Article 301 nor there was any infringement of Article 14. The Government, however, had no right to induce

EL/GL/C415/68

another legal person not to enter into contractual relations with the petitioner.

In the non-statutory sphere, i.e., the sphere of business unaffected by any Control Order, the Government has the freedom, no less than that of a private trader, to choose the parties with whom it would have its transactions and no individual has any legal or constitutional right to insist that Government must enter into contracts with him. Government is free to take an administrative decision in this behalf, independent of the requirements of any statutory provision. Nor was there any question of application of Art. 301 of the Constitution in this sphere inasmuch as there being no control or monopoly in the non-statutory sphere, the exclusion of one particular party could not amount to an absolute prohibition of trade or business. (Paras 17, 18)

Nor was there any infringement of Article 14 because the ground upon which the petitioner was sought to be excluded, offered a reasonable basis of classification, namely, that the petitioner had defaulted in carrying out the terms of a license issued by the Government. As it had not been shown by the petitioner that there were other traders who had committed similar default but had not been visited by similar action, there could not be any complaint of violation of Art. 14. AIR 1959 SC 490 and (1939) 310 US 113, Rel. on. (Paras 19, 20)

Though Government had the right to say that it would not enter into business transactions with a particular person or persons, it had no such right under the common law to induce another legal person that he should not enter into business dealings with a third party. (Para 33)

■(B) Constitution of India, Article 77 — Provision is directory — Order not expressed in name of President — Government can, by independent evidence, show that order was in fact made by Government. AIR 1964 SC 1823, Rel. on. (Para 27)

(C) Constitution of India, Arts. 19(1)(g), 301 — Essential Commodities Act (1955), S. 3 — Licensee under Imports (Control) Order (1955) carrying on iron and steel business apart from import business — Violation of terms of licence — Government cannot take any other measure apart from provisions of statute — Any action taken to deny licensee any rights or privileges with respect to iron and steel business is ultra vires.

The right to import any goods is an incident of the fundamental right to carry on business which belongs to every citizen under Art. 19(1)(g) of the Constitution. This right was subjected to restrictions in the public interest by the Order issued in exercise of powers conferred by the Essential Commodities Act. But for

the Imports (Control) Order 1955, licensee would have a right, free of any restrictions, to import steel goods. The violation of the terms of the licence was created a statutory offence by the Control Order and therefore the penalty for such offences, namely, the cancellation of the licence, must be held to be the exclusive remedy for the offence and the procedure laid down in the Control Order under Cls. 8 and 10 must also be complied with in order to impose such penalty. (Para 36)

Any action that may be taken by the Controller to deny the licensee any rights or privileges with respect to the Iron & Steel business, which he was carrying on apart from import business and which was, at the material time, subject to Iron and Steel Control Order, 1956, must accordingly be held to be ultra vires. (Para 37)

The licensee is, accordingly, entitled to have a declaration that the decision of the Government to suspend non-statutory business dealings with the licensee cannot be applied to the acquisition, supply or distribution of any goods which is subject to statutory control for the time being, because if the Government excludes the licensee from such business, it would amount to an absolute deprivation of his fundamental right to carry on business in such goods as well as upon the freedom of movement of such goods guaranteed by Art. 301, which can be imposed only by law and not by administrative action. (Para 45)

Further, the exemption of iron and steel from the operation of the Iron & Steel Control Order, 1956, does not put an end to the Imports (Control) Order which prescribes statutory remedies for the violation of the terms of the licences granted thereunder. Hence, the licensee is also entitled to a declaration that the impugned decision referred to above cannot be applied to exclude the licensee from the business of import of iron & steel goods, the import of which is subject to the Imports (Control) Order, 1955. The granting of licences and the remedies for violation of the terms of such licences are governed by the provisions of that Order and they cannot be substituted by any non-statutory action by the Government. Case Law Ref. (Para 46)

(D) Constitution of India, Art. 226 — In order to maintain application under Article, petitioner need not show that he has already suffered actual injury — Apprehension of injury or threat of injury is enough. AIR 1955 SC 661 and AIR 1959 SC 725, Rel. on. (Para 42)

(E) Constitution of India, Art. 226 — Petitioner acting as handling agents to Government under contract not governed by any statutory provision — Government can engage any person as its

agent for such business — Action of Government infringing rights of petitioner under contract — Remedy is under law of contract and not under Art. 226.

(Para 48)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 81 (V 53)=(1965)

3 SCR 536, Dwarkanath v. I-T.

Officer

49

(1966) AIR 1966 SC 1686 (V 53)=(1966)

1 SCR 865, Kalyani Stores v. State of Orissa

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(1964) AIR 1964 SC 1006 (V 51)=(1964)

6 SCR 261, State of Madh Pra v. Bhailal Bhai

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(1964) AIR 1964 SC 1680 (V 51)=

(1964) 3 SCR 55, Tewari v. District Board

49

(1964) AIR 1964 SC 1823 (V 51)=

(1964) 6 SCR 368, Chitralekha v. State of Mysore

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(1962) AIR 1962 SC 486 (V 49)=

1962 Supp (1) SCR 381, B. B. L. & T. Merchants' Association v. State of Bombay

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(1962) AIR 1962 SC 745 (V 49)=

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(1962) AIR 1962 SC 922 (V 49)=1962

Supp (2) SCR 741, Abdulkadir v. State of Kerala

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(1961) AIR 1961 SC 268 (V 48)=

(1961) 1 SCR 668, Bullion & Grain Exchange Ltd. v. State of Punjab

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(1959) AIR 1959 SC 490 (V 46)=(1959)

Supp (1) SCR 787, Achutan v. State of Kerala

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(1959) AIR 1959 SC 725 (V 46)=(1959)

Supp (2) SCR 316, Kochunni v. State of Madras

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(1955) AIR 1955 SC 661 (V 42)=(1955)

2 SCR 603, Bengal Immunity Co. v. State of Bihar

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(1954) AIR 1954 SC 440 (V 41)=

(1955) 1 SCR 250, Basappa v. Nagappa

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QB 443, Brown v. Allweather Mechanical Grouting Co.

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(1939) 310 US 113 =84 L Ed 1108,

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(1898) 1898 AC 387=67 LJQB.635,

Pasmore v. Oswaltwistle U.D.C.

36

(1891) 1 QB 747=60 LJMC 124, R. v.

Hall

36

A. K. Sen, S. Roy, D. Gupta, D. Sen, A. Mitra, S. C. Bose, B. K. Lal and G. S. Khetry, for Petitioners; Subrata Roy Chowdhury and P. K. Ghosh, for Respondents.

ORDER: The petitioners in these five cases have brought Petitions under Article 226 of the Constitution to challenge the validity of a step taken by the respondents to prevent undesirable persons from carrying on dealings with the Government of India or its agencies in the sphere of public business or like transactions.

2. Though these petitions raise common issues, it would be convenient to take up the facts of C. R. 710(W)/66 in the first instance.

C. R. 710 (W)/66

3. The petitioner firm, Ram Krishan Kulwant Rai, is a firm carrying on, inter alia, the business of export and import of Iron and Steel materials and acts as 'handling agents' of the Union of India (Respondent No. 1) in respect of the imported Iron and Steel materials.

4. At the material time iron and steel was a controlled commodity under the provisions of the Iron & Steel (Control) Order, 1956, under which no one could purchase or sell iron and steel materials except in pursuance of permits issued by the Iron and Steel Controller (Respondent No. 2, hereinafter referred to as 'the Controller'). In 1960, the Union of India decided to enter into a barter deal in respect of the import and export of steel goods and in pursuance of this policy, Respondent 2 the Iron & Steel Controller, (hereinafter referred to as 'the Controller') granted the Import Licences in Annexure A series to the petition (vide also pages 35-36 of the Petition), on the following conditions, inter alia—

(a) The Petitioner was to export a certain quantity of slabs, ingots etc. produced by the Hindusthan Steel Ltd., which were surplus in their hands.

(b) In consideration of the said export the petitioner would be permitted to import steel materials of various descriptions against the total F. O. B. value of the exported goods.

(c) The steel materials so imported by the petitioner would be subject to distribution control by Respondent No. 2 (vide page 35 to the Petition).

5. So far as the import part of the aforesaid barter is concerned, the petitioner has duly imported the materials covered by and in terms of the licences.

6. As to how the petitioner could carry on imports before making any export under the barter deal, it must be pointed out that it has been due to leniency shown by the Respondents themselves at a latter stage of the barter arrangement. On 5-5-60 (Annexure 'E' to the Affidavit-in-opposition) while finalising the terms of the barter deal, the Deputy Controller intimated that though export of the steel materials under the deal should normally precede the corresponding import,

"proposals for pre-import may also be considered if satisfactory irrevocable letters of credit for exports are produced and suitable Bank Guarantees are furnished".

It must be said that this softness has been at the root of the loss of foreign exchange which the respondents have to complain

of later on. In a battle of wits I may be constrained to say, the petitioner has eventually won against the public servants whose duty it was to safeguard the national interests. In this context, it may be noted that though in his letter of 2-2-60 (Annexure 'A' to the counter Affidavit), the Officer on Special Duty recommended to the Controller that

"it should be made clear to the exporter that in case of failure to export, Iron & Steel Controller will have no further dealings with him", this term was not incorporated in the final embodiment of the terms on 5-5-60 by Annexure 'E' to the counter-affidavit.

7. The dispute between the parties has arisen over the export part of the barter deal, after the petitioner had reaped the full advantage of the other part which was 'normally' to follow the export. The petitioner's case, in short, is that the petitioner placed orders with the Hindusthan Steel Ltd. for the supply of a huge quantity of slabs and ingots for export (Ann. B to the Petition) but that they have failed to supply such materials of an exportable quality as would be acceptable to foreign buyers and that it is on this account that the petitioner has failed to carry out its condition of export. It is stated in the Petition that this dispute between the Petitioner and the Hindusthan Steel Ltd. is the subject-matter of an arbitration proceeding which is pending (para 10 of the Petition).

8. Though Respondents 2 and 3 (Deputy Iron and Steel Controller, hereinafter referred to as the 'Deputy Controller') were kept informed by the Petitioner of the aforesaid failure of the Hindusthan Steel Ltd. to supply exportable materials, the Petitioner received the letter of the Controller dated 21-4-64 which is at p. 102 of the Petition. This letter stated that though the export of iron materials was a condition of the licences to import granted to the Petitioner, by a letter of 5-5-60, the Petitioner had been allowed to make a pre-import of steel materials under its licence, subject to its furnishing a bank guarantee to cover the liability to export, and alleged that the Petitioner had failed to earn the foreign exchange to cover the pre-import already made by it and had failed to carry out the orders of the Controller to earn the requisite amount of foreign exchange, and, accordingly, called upon the petitioner to show cause within 10 days of receipt of this letter "why suitable action should not be taken against them for failure to comply with the order of the Iron & Steel Controller."

9. By its letter of 30-4-64 (p. 103 of the Petition), the Petitioner showed cause, stating that its failure to export the Hindusthan Steel Products was due to default

on the part of the Hindusthan Steel Ltd., in respect of which arbitration proceedings were pending and requested the Controller not to take action until those proceedings were concluded. This explanation, apparently, was not acceptable to the Respondents and on 7-5-66, respondent No. 4, the Deputy Director (Administration) and Vigilance Officer of the Ministry of Iron & Steel, Government of India, issued the impugned letter to the Petitioner, the contents of which are—

"Due to your failure to meet the export commitments under the pre-import licences issued in your favour during 1960-61 resulting in loss of foreign exchange vital for national economy, it has been decided by Government to put you on the banning list for a period of three years from the date of issue of this communication."

10. The decision mentioned in the aforesaid impugned communication has been challenged as illegal and without jurisdiction on various grounds, which will be taken up seriatim. The Petition under Art. 226 was filed on 25-5-66. Separate affidavits-in-opposition have been filed on behalf of Respondent No. 1 by the Secretary of the Ministry of Iron & Steel; and by the Deputy Controller on behalf of all the respondents.

11. I. Before entering into the points taken on behalf of the petitioner, it would be useful to examine the effects of the impugned order, which has been referred to at the hearing as 'the banning order'. Though in para 16 of the petition it was alleged that the banning order had "severely affected" the trade and business of the Petitioner, the details of the injury or the mode in which it had been caused were not elaborated in the Petition; but that has been done by the further Affidavit filed by the petitioner on 8-5-67.

12. In para 19 of the original affidavit-in-opposition of the Deputy Controller, it was stated that the banning order was 'an administrative order of the Government to protect its own interests' and its effect 'was merely that the Government did not desire to enter into any business dealings with him.'

13. There was a hearing on the proceeding averments in the petition and the counter-affidavit on 20-4-67 and it was held that the averments on either side were not clear enough to enable the Court to come to a determination of the question raised by the petitioner that the impugned banning order was nothing but an exercise of the same power as was conferred by cl. 8 of the Import Control Order of 1955, but without going through the statutory procedure to resort to such action, as laid down in cl. 10 of the same order. At that hearing, counsel for the respondents made a statement from the Bar that "statutory transactions of the

petitioner would not be affected by the impugned order" and that it was only aimed at those businesses

"as regards which the petitioner had not got any 'legal right' to be dealt with by the Government, which has its freedom to select its own contractor or agents in matters not governed by statute." I, therefore, allowed both parties to file supplementary affidavit to make their stands clearer.

14. In the further Affidavit filed by the petitioner on 8-5-67, the petitioner stated that in pursuance of the impugned decision, Government of India has issued a circular on 1-6-66 (Ann. A to the further Affidavit) by which—

(i) the Government has suspended business or dealings of the petitioner not only with the Government Departments, but also with other non-Governmental organisations, such as Hindusthan Steel Ltd., the Bokaro Steel Ltd. and Hindusthan Construction Ltd.;

(ii) the suspension, on account of the alleged fault of the petitioner to Associate Firms such as Aminchand Payerelal Ltd.;

(iv) By circulating a copy of the said circular to the "Joint Plant Committee" who is responsible for allocation and distribution of indigenous Iron and Steel materials, the Government has affected the business of the petitioner in indigenous steel materials also, with private parties;

(v) by issuing copies of the circular to the Iron & Steel Controller, the petitioner's statutory rights under the Control Orders have also been affected because the Steel Controller, after receipt of this circular, cannot possibly consider according to law, the applications of the petitioner for licences for the import of steel materials which are governed by the Import Control Order;

(vi) the Steel Controller, on receipt of the circular, is not likely to appoint the petitioner any longer as "handling agents" of the imported steel materials, which is made by the Controller, by issuing Letter of Authority to a licensee, in his statutory capacity under the Import Control Order.

15. Respondents' rejoinder to the aforesaid Further Affidavit is dated 12-6-67, filed by the Deputy Controller (C. B. Mathur). The contents of this rejoinder may be summarised as follows:

(a) It is denied that any copy of the circular of 1-6-67 was circulated to the "Joint Plant Committee". This again is contradicted by the affidavit-in-reply of the Petitioner. The circular of 1-6-67 does not however show ex facie that any copy thereof was forwarded to the Joint Plant Committee.

(b) It is stated that by a letter of 18-7-66, addressed to the Petitioner's Solicitors,

the petitioner was informed that the circular of 1-6-66 has been withdrawn.

(c) The Controller or any other statutory authority would exercise his statutory functions under the Control Orders, in issuing the import or export licences and in considering the Petitioner's applications therefor, uninfluenced by the impugned banning order of 7-5-66.

(d) The only effect of the impugned order, according to the Respondents is that only non-statutory 'business dealings' between the petitioner and the Government will be suspended for three years. Without being exhaustive, two illustrations of such business dealings have been given in the rejoinder, namely—

"(i) handling agency contracts in respect of Iron and Steel materials imported on Government account by or on behalf of the Government;

(ii) Contracts or orders for supply of goods or materials to Government departments, projects etc. with whom business dealings have been banned."

16. Let us first see whether the foregoing admitted encroachments upon the petitioner's dealings are unlawful or unconstitutional, as alleged by the petitioner and thereafter we shall take up additional encroachments, if any, as alleged in the Petitioner's Further Affidavit.

17. I. So far as banning of the dealings between the petitioner and the Government Departments in the non-statutory field is concerned, the plea in the respondents' rejoinder of 12-6-67, as quoted above, is in accord with the plea taken in para 29 of the affidavit-in-opposition filed by the respondents on 18-6-66 which was dealt with in my interlocutory judgment dated 11-1-67. The contention of the respondents, in short, is that in the non-statutory sphere, i.e., the sphere of business unaffected by any Control Order, the Government has the freedom, no less than that of a private trader, to choose the parties with whom it would have its transactions and that no individual has any legal or constitutional right to insist that Government must enter into contracts with him, and that Government is free to take an administrative decision in this behalf, independent of the requirements of any statutory provision.

18. The above contention of the Respondents is supported by the observations of the Supreme Court in *Achutan v. State of Kerala*, AIR 1959 SC 490 which are similar to those of the American Supreme Court in *Perkins v. Lukens Steel Co.*, (1939) 310 US 113. Nor is there any question of application of Art. 301 of the Constitution in this sphere inasmuch as there being no control or monopoly in the non-statutory sphere, the exclusion of one particular party cannot amount to an absolute prohibition of trade or business.

19. Nor is there any infringement of Art. 14, because the ground upon which the petitioner is sought to be excluded, offers a reasonable basis of classification, namely, that the petitioner has defaulted in carrying out the terms of a license issued by the Government. It has not been shown by the petitioner that there are other traders who have committed similar default but have not been visited by similar action. In these circumstances, there cannot be any complaint of violation of Art. 14. It is, therefore, needless to enter into the further plea raised on behalf of the respondents that Art. 14 has no application where the impugned action has been taken by Government, not as a Sovereign but as a trader.

20. Petitioner cannot, therefore, have any legal complaint if the Government Departments, in pursuance of the impugned order, cease to enter into any contracts with the petitioner relating to any goods in respect of which the petitioner may not have any statutory rights or the respondents any statutory obligations.

21. On behalf of the petitioner, however, a number of objections has been raised to the above principle being applied to this case:

(A) Firstly, it has been urged that it is not the Government but a statutory authority, namely, the Controller, who has issued the impugned order of excluding the petitioner.

22. So far as the impugned order at Ann. C to the petition (p. 108) is concerned, it clearly states that "it has been decided by Government to put you on the Banning List....." and from the letter being issued by the Deputy Director (Administration) in the Ministry of Iron and Steel of the Government of India, it is evident that the decision to exclude the petitioner from Government business has been taken by the Government of India and not by any statutory authority.

23. The situation has, however, been muddled by the Office Memorandum of 1-6-66 issued by the Under-Secretary of the same Ministry of Iron & Steel, which is at Ann. A to the further Affidavit of the petitioner (p. 19), which says—

"The undersigned is directed to say that in pursuance of the decision to suspend business dealings with the firms detailed below and their associates the Steel Controller has placed these firms on the Banning list....."

24. It is this communication which has given the petitioner the footing to contend that the decision to ban the petitioner has not been taken by the Government but by the statutory authority, i.e., the Steel Controller. I must say that the Under Secretary did not know what was the implication of what he wrote. I am

pained to say that as a Judge I have had other instances of want of comprehension of the legal position by responsible administrative Officers which has brought embarrassment to the Government, leading to a discomfiture resulting from some well-intentioned policy of the Government. The anomaly in the statements made in the instant Memorandum is patent on its face. If the Steel Controller had ordered the banning, there was no reason why the circular should have been issued by the Ministry instead of the Controller who was competent to issue such a Memorandum nor was there any reason why copy of the Memorandum was issued to the Controller himself. Fortunately, for the Respondents, the word 'decision' at the beginning of the Memorandum leaves room for corroborating the statement in the impugned communication of 7-5-66 that the 'decision' had been taken by the Government of India. In fact, the Steel Controller was seeking to implement the decision of the Government referred to in the impugned communication at Ann. C to the Petition (p. 108); but, owing to the ingenuity of the plan, which it is difficult for the Court to appreciate, the implementation was sought to be made by the roundabout method of issuing a Memorandum by the Ministry and by the Controller circulating a copy of that Memorandum to his subordinates and to the petitioner.

25. At any rate, Ann. A to the Further Affidavit does not by itself displace the statement made in the impugned communication at Ann. C that the decision to ban the petitioner had been taken by the Government of India. For the same reason, any higher weight cannot be given to the averment in para 22 of the Counter-Affidavit filed by the Deputy Controller dated 20-7-66, which cannot but be characterised as a careless statement of which Respondent No. 1 should take note if India is to maintain her house against heavy winds raging all around.

26. (ii) It was, accordingly, contended on behalf of the petitioner that the impugned communication at Ann. C is not issued in the form required by Art. 77 of the Constitution and that the recital therein of a decision having been taken by the Government is not true.

27. It is now established that though an order is not expressed in the name of the President, it is open to the Government to show by independent evidence that the order was in fact made by the Government of India, inasmuch as the provision in Art. 77(1) is merely directory.

28. In *Chitralekha v. State of Mysore*, AIR 1964 SC 1823 it has been held by the Supreme Court that where a letter issued by an Under-Secretary to the Government stated that the Government had

taken a particular decision, it is open to the Court to hold that there was such a decision, if there is an affidavit filed on behalf of the Government to support that recital. In the instant case, the Secretary of the Ministry of Steel, Mines and Metals has filed a supplementary affidavit on 17-8-67 which shows that the proposal to ban the petitioner and its allied firms was made by the then Secretary and that the proposal was accepted by the Minister-in-charge on 26-4-66, directing the banning for a period of three years. Anything stated in the subsequent Memorandum issued by the Under-Secretary on 1-6-66, cannot belie the notings of the Secretary or the Minister and the affidavit of the Secretary affirming the authenticity of the notings.

29. I do not think that there is any proper reason in this case to hold that the decision to ban the petitioner was not taken by the Government of India, though the implementation of that decision by the Steel Controller had independent implications, which I shall have to consider separately.

30. The next objection of the petitioner to the action of the respondents is, however, justified.

31. Though the impugned communication at Ann. C of the petition does not show to which authorities or persons it was circulated, Ann. A. (P. 19) to the Further Affidavit of the petitioner shows that the Office Memorandum of 1-6-66 was circulated not only to the other Ministries of the Government of India but also to the statutory corporations such as the Hindusthan Steel Ltd., Bokaro Steel Ltd. This was done not with the object of an idle information but with the intention that they also should boycott the petitioner in their dealings as is evident from the Respondents' rejoinder dated 12-6-67 where it is pleaded that the object of the impugned banning order was not only to prevent the Government Departments but also the 'Government projects' from dealing with the petitioner.

32. Here is another confusion in thought which the administrative authorities should get rid of as soon as possible. The statutory corporations are legal entities separate from and independent of the Government and they were set up with the specific object of the Government avoiding the legal and political liabilities for the working of these statutory corporations to their employees and to the world at large. It would be hardly justifiable for Government to avoid that responsibility either morally or legally if the Government officials give it to the world to understand that these corporations are nothing but the limbs of the Government and are managed and administered from the same Secretariat as Government Departments are.

33. Be that as it may, though Government has the right to say that it would not enter into business transactions with a particular person or persons, it has no such right under the common law to induce another legal person that he should not enter into business dealings with a third party. Interference with a subsisting contract between third parties is already an actionable wrong. Whether it constitutes a similar wrong to induce another person not to enter into contractual relations with a third party is still a problem in this developing branch of the law of Torts with which we are not concerned in the instant case but this much is clear that the Government's common law right not to enter into any business dealings with the Petitioner as enunciated in Achutan's case, AIR 1959 SC 490 will not extend to the Government's issuing an injunction or direction upon independent legal entities. The action of the Government in the instant case, with respect to the Hindusthan Steel Ltd. has been more precarious and illegitimate particularly because of the fact that there is a pending arbitration to which the contractual disputes between the petitioner and the Hindusthan Steel Co. has been referred, and of which the Government is aware.

34. Though it has been averred in the subsequent affidavit of the Respondents that the Memorandum of 1-6-66 has eventually been revoked (as to which I shall advert in another context), it should be the duty of the Court to point out to the respondents that they cannot make such use of the impugned order at Ann. C to the petition as to induce the statutory corporations in which the Government may be financially interested or any other authority outside the Governmental organisation to boycott the petitioner in pursuance of the impugned decision.

35. Let us now take up the complaints of the petitioner regarding the iron and steel business. This topic has to be dealt with under two heads—

(a) The position at the date of the Rule nisi;

(b) The position as altered subsequently by the revocation of the control alleged by the respondents.

(a) At the date of the petition under Art. 226 and of the Rule nisi, iron and steel was a controlled commodity. By the Iron and Steel (Control) Order 1956, the acquisition and disposal of all varieties of iron and steel was subject to the control of the Controller, so that none could deal in steel goods without the written order of the Controller, who had also the power to fix the maximum prices of such goods. The import of these goods was also subject to similar control by the Controller under the provisions of the Imports (Control) Order, 1955.

The agreement entered into between the Petitioner and the Controller in respect of the 'barter deal' as to the export of the products of the Hindusthan Steel Co. and the licence in favour of the petitioner for importing a corresponding quantity of steel materials from abroad in lieu of the exported products was issued in pursuance of the provisions of the Imports (Control) Order.

The impugned decision at Ann. C to ban the petitioner was *prima facie* intended as a penalty for the default of the petitioner to comply with the terms of the pre-import licences granted to the petitioner under the said Imports (Control) Order. The petitioner's case in the petition was that the said Control Order contains specific provisions as to what action could be taken and under what procedure, (vide Cls. 8 and 10 of the Order), for the violation of the terms of the licence or of the provisions of the Control Order, and that, accordingly, no action outside the provisions of that Order could be taken except in compliance with the terms of that Order. The contention of the respondents was that the impugned action was an administrative action apart from and in addition to the statutory provisions of the Control Order: Para 10 of the affidavit of Jayanti Sarkar D/- 16-12-66. This question was dealt with by me in an interlocutory judgment when the Respondents, during the pendency of this Rule, made an application for permission of the Court to proceed under the provisions of the Control Order for the cancellation of the petitioner's licence for default in carrying out its requirements.

It is not disputed that apart from import business, the Petitioner also carries on retail business in indigenous steel products (para 6 of the Further Affidavit, dated 8-5-67). At the material time, this business was subject to control under the Control Order of 1956. The question is whether the Government could exclude the petitioner from this business for the alleged violation of the petitioner to carry out his obligations under the licence issued under the Imports Control Order.

36. The answer is in the negative, for the following reasons:

It is evident that the right to import any goods is an incident of the fundamental right to carry on business which belongs to every citizen under Article 19 (1) (g) of the Constitution. This right was subjected to restrictions in the public interest by the Order issued in exercise of powers conferred by the Essential Commodities Act. But for the Control Order, the petitioner would have a right, free of any restrictions, to import steel goods. It is the Control Order which has put this right subject to statutory

restrictions, created certain offences for violation of the provisions of the Control Order and the licences issued thereunder and also laid down the penalties for the said offences and violation of its statutory requirements. The violation of the terms of the licence was created a statutory offence by the Control Order, if so, the penalty for such offences, namely, the cancellation of the licence, must be held to be the exclusive remedy for the offence and the procedure laid down in the Control Order must also be complied with in order to impose such penalty. This proposition is established by numerous decisions. Cf. *Pasmore v. Oswaldtwistle U. D. C.* (1898) AC 387 (394) (HL); *Brown v. Allweather Co.*, (1953) 1 All ER 474; *R. v. Hall*, (1891) 1 Q. B. 747 (770).

37. I have therefore, no hesitation to hold that in the face of the statutory provisions of the Control Order under which admittedly the pre-import licence had been issued, the Respondents cannot take any other measure against the petitioner for violation of the terms of the licence, apart from the provisions of the statute. The implementation of the impugned decision by the Controller by his endorsement of the Office order of 1-6-66 and any action that may be taken by the Controller to deny the petitioner any rights or privileges with respect to the Iron and Steel business must accordingly be held to be *ultra vires*.

38. II. It has however been contended on behalf of the Respondents in para 7 of the Affidavit-in-Opposition filed on 12-6-67 by Chanda Babu Mathur that by a letter of 18-7-66, addressed to the petitioner's Solicitor the petitioner has been informed that the Office Memorandum of 1-6-66 has been withdrawn. That communication is to be found at Ann. F. (P. 78) of the Further Affidavit of the petitioner, dated 8-5-67. The contents of this letter, however, show that the withdrawal of the Controller's letter of 10-6-66 took place after this Court's interim injunction, issued on 25-5-66 was received by the Respondents. As regards the Memorandum, it is stated that this Court's interim injunction superseded it; that of course, is not the same thing as a withdrawal by the respondents.

39. But the question before me now is not whether the Memorandum of 1-6-66 or the communication thereof by the Controller has subsequently been revoked but what was the scope of the impugned decision at Ann. C. It cannot be overlooked that the impugned communication at Ann. C did not explain what was meant by "Putting upon the Banning List", which words were as vague as possible. Not being any technical expression, its implications cannot be found out from any other objective material. Its implications or possible use can, therefore, be gather-

ed from the subsequent conduct of the respondents themselves. Hence, even though the Memorandum of 1-6-66 or the circulation thereof by the Controller on 10-6-66 be subsequently withdrawn it is evident that the decision at Ann. C was capable of being circulated to or implemented by statutory authorities so as to cause inroads upon matters governed by statutory provisions. Hence, the declaration just proposed should be made notwithstanding the alleged subsequent withdrawal of the Memorandum of 1-6-66.

40. It has also been urged that since the period of the existing licences in favour of the petitioner has already expired, he cannot have any grievance. This also does not solve the problem, because so long as the Imports Control Order remains, the petitioner, if he wants to carry on the business of Import shall have to obtain fresh licences or renewal thereof and the respondents shall be obliged to act in accordance with the provisions of that Order and not outside them.

41. The petitioner has also expressed his apprehensions that his applications for renewal or the like will not be duly considered in view of the Bombay Order having been circulated to different Departments of the Government, which must include the Import Controller. Of course, in this sphere, the Controller will have to act in accordance with statutory provisions but there is no knowing how far the Controller will be influenced by the Banning Order, in so far as his function is discretionary.

42. Since the relief proposed by me will be declaratory in nature, the question of locus standi falls into the background because it has been established that in order to maintain an application under Article 226, it is not necessary for the petitioner to show that he has already suffered an actual injury; apprehension of injury or threat of injury is enough: *Bengal Immunity Co. v. State of Bihar*, AIR 1955 SC 661; *Kochunni v. State of Madras*, AIR 1959 SC 725.

43. It is next contended on behalf of the respondents that with effect from 29-4-67, the control over iron and steel materials has itself been withdrawn by the Government by notification No. S/ESS, COMM/Iron & Steel-2A/29-4-67, which has been produced before me.

44. By this notification, all varieties of iron and steel have been exempted from the provisions of cls. 4, 5, 15, 18, 20 and 27 of the Iron & Steel (Control) Order, 1956. The result of this is that the acquisition, disposal or dealing in these materials are now free from any control by the Controller, so that any action on the part of the Iron Controller to ban the petitioner would not affect the right of the petitioner to deal in these goods in

the free market, in any manner. But this has taken place during the pendency of the Rule and, as experience goes, essential goods like iron, cement or the like, are subjected to control and decontrol from time to time, according to the exigencies of the economic and financial situation for the time being. Hence, there is no assurance that control under the Order of 1956 shall not be re-imposed again at any future time.

45. It has also been rightly pointed out by Mr. Sen on behalf of the petitioner that the Notification just referred to has not repealed or abrogated the Control Order of 1956 altogether and that the Controller is still capable of doing something to the prejudice of the petitioner in exercise of his remaining powers under this Order. My attention has, for instance, been drawn to cl. 10 of this Order, which the Controller retains, that is, the power to make an order directing the petitioner

"to release by way of loan or sell the whole or part of any iron and steel in the possession of such party (i.e., including indigenous materials) to such person or class of persons on such terms and conditions as may be specified in the Order".

Petitioner is, accordingly, entitled to have a declaration that the impugned decision at Ann. C to the petition cannot be applied to the acquisition, supply or distribution of any goods which is subject to statutory control for the time being, because if the Government excludes the petitioner from such business, it would amount to an absolute deprivation of the fundamental right of the petitioner to carry on business in such goods as well as upon the freedom of movement of such goods guaranteed by Art. 301, which can be imposed only by law and not administrative action.

46. Further, the exemption of iron and steel from the operation of the Iron & Steel Control Order, 1956, does not put an end to the Imports Control Order which prescribes statutory remedies for the violation of the terms of the licences granted thereunder. Hence, the petitioner is also entitled to a declaration that the impugned decision at Ann. C cannot be applied to exclude the petitioner from the business of Import of Iron and Steel goods the import of which is subject to the Imports Control Order, 1955. The granting of licences and the remedies for violation of the terms of such licences are governed by the provisions of that Order and they cannot be substituted by any non-statutory action by the Government.

47. It was contended in some of the counter-affidavits that the petitioner was not entitled to any relief in this behalf inasmuch as the Controller of Imports was not impleaded. The question before

the Court, however, is the legality of the impugned decision of the Government of India and the circulation thereof to all the Departments of the Government of which the Imports Controller is obviously a part. In the present context, the Court has to point out what uses of the impugned decision cannot be lawfully made. The answer of the Court on the instant point is that the impugned decision cannot be used in any manner so as to affect the petitioner in respect of its business of importing iron and steel goods which is governed by the Imports Control Order, 1955.

48. Let us now take up the petitioner's business of acting as 'handling agents' to the Government.

The nature of that business will be appreciated from a specimen contract, dated 12-10-65 which has been placed before me. Under such contract, the goods which are imported by the Government under a licence issued in favour of the Controller, will be taken delivery of by the petitioner as agent of the Government and then delivered to the respective consignees. It is clear that this contract is not governed by any statutory provision (vide para 29 of Further Affidavit of Chanda Babu Mathur) and, therefore, Government is free to engage any person as its agent for this business, for which the petitioner cannot have any grievance. Even if such action infringes any of the rights of the petitioner under any existing contract, the petitioner may have his remedy under the law of contract, but not under Art. 226 of the Constitution.

49. The question of form of relief remains. It has been laid down by the Supreme Court in *Basappa v. Nagappa*, (1955) 1 SCR 250=(AIR 1954 SC 440), *Dwarkanath v. I. T. Officer*, AIR 1966 SC 81 (84) that the jurisdiction under Art. 226 is not confined to the issue of the English 'prerogative writs' nor do the technicalities of those writs fetter the plenary jurisdiction of the High Court under Article 226 to grant appropriate writs or order in the facts of a case before it. The Court has, indeed, approved of the granting of declaratory relief in various cases e.g., *Abdulkadir v. State of Kerala*, AIR 1962 SC 922 (928); *AIR 1959 SC 725 (732-3)*; *B. B. L. & T. Merchants' Association v. State of Bombay*, AIR 1962 SC 486(496); *Mathra Parshad & Sons v. State of Punjab*, AIR 1962 SC 745 (750); *State of M.P. v. Bhailal Bhai*, AIR 1964 SC 1006 (1011); *Tewari v. District Board*, AIR 1964 SC 1680 (1683); *Bullion & Grain Exchange Ltd. v. State of Punjab*, AIR 1961 SC 268 (272); *Kalyani Stores v. State of Orissa*, AIR 1966 SC 1686 (1692).

50. In the instant case, it is indeed the interpretation and applicability of

the impugned decision at Ann. C to the Petition which is the subject matter of controversy between the parties. A declaration as to the legality or illegality of the possible uses of this decision is therefore the proper mode of resolving that controversy. A declaration is all the more necessary because of the fact that the respondents' own explanation of the object of the impugned decision, as given in para 19 of the Counter-Affidavit of 20-7-66 is very wide, namely, that "the Government did not desire to enter into any business dealings with him", and of the fact that at the hearing counsel for the respondents stated that the respondents were not prepared to give an undertaking to the effect that the banning decision would not affect the statutory rights, if any, of the petitioner relating to iron and steel materials, in so far as any part of that business is controlled or governed by statutory provisions.

51. In the result, this petition will succeed in part and the Rule shall be made absolute, without any order as to costs, with the declaration that the respondents cannot so use or apply the impugned decision at Ann. C to the petition—

(a) as to induce any statutory corporation or other authority outside the Governmental organisation to boycott the petitioner in their dealings with the petitioner;

(b) as to enable any statutory authority, including the Iron and Steel Controller, or the chief controller of imports to take any action in respect of the Iron and Steel business, outside or contrary to the statutory provisions by which the powers and obligations of such statutory authority may, for the time being, be governed.

(c) as to affect the acquisition, import, supply or distribution of any goods which is or in so far as it is subject to statutory control for the time being.

52. Petitioner shall be at liberty to come to Court again if the respondents do apply the impugned decision to any use which is negatived by the declarations made herein.

53. In view of the declarations made above, no separate orders are necessary on the application made by the Chief Controller of Exports and Imports because the declarations made herein do not prevent him from taking any steps in accordance with the provisions of the statutory order. Nor will the Government be prevented from taking any action in any sphere not affected by the declarations made herein.

C. R. 718 (W), 757-58 (W), 810 (W) of 1966

54. After hearing the learned Counsel, on either side, it appears that though there may be minor differences in facts in the other cases, the point involved, is

the same, and therefore, those Rules, namely, C. R. 713(W) of 1966, C. R. 757-58 (W) of 1966 and C. R. 810(W) of 1966 will be governed by the judgment passed in C. R. 710(W) of 1966 and similar orders will be passed therein.

MBR/D.V.C. Petition partly allowed.

AIR 1969 CALCUTTA 28 (V 56 C 6)

A. K. DAS AND S. K. CHAKRAVARTI, JJ.

Sivapada Senapati and others, Appellants v. The State, Respondent.

Criminal Appeal No. 764 of 1965, D/- 22-3-1968.

(A) Penal Code (1860), Ss. 100, 97, 99 — Private defence, right of — Persons in possession of land have a right to defend the land from those who obstruct ploughing it — They have a right to defend themselves when they attempt to remove obstruction — When such right extends to causing death explained.

The owners in possession of the land have a right to remove the obstruction by force from the land. They have undoubtedly a right of private defence of property to throw the obstructionists. They have also the right of private defence of the person as well if in course of throwing them out they have any reasonable apprehension of bodily injury. Section 100, Penal Code provides the circumstances when the right of private defence of the body extends to the voluntary causing of death. This section provides for a right of private defence extending to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is such as may reasonably cause the apprehension that death will otherwise be the consequence of such assault.

The accused numbering 40, who were in possession of the field came to the field for purposes of ploughing. Though they came with ploughs, they were armed with deadly weapons including tangis, spears, axes, lathis etc. They were met with opposition by the opposite party who were already on the field. In the fight that ensued, only one of the accused got an injury on the head of a minor nature.

But several persons of the opposite party died as the result of the attack by the accused. Held that the injury on the head of one of the accused was not of such an extent as would reasonably cause an apprehension in the minds of the accused and others that unless they inflicted blows they would themselves be killed. Although it was true that this

right of private defence could not be weighed in a golden scale in times of excitement, the facts disclosed that the situation was not such as would justify making murderous assault on many persons as a result of which three died on the spot and one died in the hospital same night while fifth had at least grievous hurt. Though accused had the right of private defence, they had exceeded it. (Paras 8, 9)

(B) Penal Code (1860), Ss. 147, 149 — Unlawful assembly — Accused owning and possessing land wanting to plough it — Other party obstructing — Melee ensuing — Accused who had a right to defend their land and persons cannot be said to form unlawful assembly and S. 149 can have no application for any other offence committed by them.

(C) Penal Code (1860), Ss. 34, 149 — Common object and common intention are different — However both deal with groups of persons who share one offence — Charge under S. 149 is no impediment to conviction under S. 34.

(D) Criminal P. C. (1898), Ss. 423, 403 — Autrefois acquit — Acquittal on charge under Sec. 302/34 Penal Code — No appeal against acquittal — Accused convicted under other charges filing appeal — Appellate Court cannot convict under S. 302/34 but can convict under S. 304/34 Penal Code.

When there is no appeal against an order of acquittal under S. 302/34 I. P. C. Court sitting in appeal against conviction under other charges should not convict the accused for murder read with Section 34 but their conviction under Section 304, I. P. C. read with Section 34 is not hit by earlier acquittal under Section 302/34 and is perfectly legal and proper. (Para 12)

S. S. Mukherjee and S. Roy Chowdhury, for Appellants; Amiyalal Chatterjee (Sr.), for the State.

DAS, J.:— This is an appeal against conviction under Section 302/149 I. P. C. The appellants were sentenced to imprisonment for life. The appellants Shivapada Senapati and Motilal Loher were also convicted under Section 148 I. P. C. and the rest of the appellants under Section 147 I. P. C., but no separate sentence was inflicted.

2. The prosecution case is as follows:

The deceased Monsaram Mahato and his sons, deceased Abhoy, Debu alias Debendra and Jagat and Parikshit were in possession of a paddy field known as Bara-khet and the adjoining khets within Burir-bandh-namo khet. This appertained to a Jama of 11-30 acres in Plot No. 1460 of Manpur Mouza. Monsaram took settlement of the land from Pan-

chakote Raj Estate at a rental of Rs. 35 and he got an Amalnama dated Pous 17, 1345 BS. They were in possession of the land for cultivation. On 27th Sraban, 1371 B. S. in the morning, corresponding to August 12, 1964 Mansaram with his sons Abhoy, Debu and Jagat and his brother Paresh went to the field for scraping the ail. While they were so engaged in scraping the western ail of the Burir-bandh-namo khet, the appellants and others — about forty in number—arrived at the spot armed with various weapons including tangis, spears, axes and lathis.

They had six ploughs with them and they started cultivating the land. Mansaram and his sons protested and asked them not to plough their land and also asserted that they would not allow them to plough the land. This annoyed the appellants and others and Sadananda who has since been acquitted, gave an order for assaulting Mansaram and his sons. Abhoy, Mansaram and Jagat were assaulted by some of the accused persons with tangis; spears, axes and lathis and they fell down on the khet with bleeding injuries on their persons. Paresh and Debu also came up and opposed the assailants. They too were assaulted by them with the weapons as a result of which they also fell down there with bleeding injuries.

After this the appellants and others fled away. Abhoy, Mansaram and Jagat died soon after on the land. Rani Mahatani, the daughter of Abhoy saw the occurrence from the other ail and she immediately reported the incident to Dibakar, her father's cousin at his house. She then came back to the spot and gradually other persons of the family also came. Paresh was unable to speak but Debu told him of the assault on him and others by naming the assailants. Dibakar went to Hura police station and lodged a F. I. R. before an A. S. I. of Police. This Police Officer came to the spot and made arrangement for removing the dead bodies to the Purulia Morgue for post-mortem examination.

Investigation was started and some seizures were made. Witnesses were examined and some arrests were made that very night. Gradually the police arrested the other persons on the basis of first information report and after completion of investigation submitted chargesheet against 39 persons for various charges for murder and also for rioting armed with deadly weapons. The learned Judge framed a fresh charge under Section 302/149 I. P. C. and also under Section 304/149 I. P. C. Nine persons who were appellants, were convicted while the remaining 30 were acquitted by the learned Sessions Judge.

3. The defence is a plea of innocence. They pleaded that Shivapada Senapati and his brothers were in possession of the lands within Burir-bandh-namo Khet and had already ploughed the lands and rendered them fit for transplantation of paddy seedlings prior to the date of occurrence and on the date of occurrence they went to the land with 8 ploughs and several kamins for the purpose of transplantation. While they were getting the lands ploughed, Mansaram along with his sons and brothers and others, 15/16 in number, came to the land and attacked the ploughmen and others. Shivapada opposed them and he was assaulted by Mansaram with lathi on his head. Kangal and Basudeb also sustained injuries. But they were ultimately implicated in the case over earlier grudge and litigation and over obstruction in their attempt to take forcible possession of the land.

4. The learned Judge found that the prosecution failed to prove that the disputed land was settled to Mansaram and his sons in tenancy right or that he was in actual possession of the land. Regarding title the learned Judge held as follows: —

"In view of all these circumstances and the absence of any cogent, oral and documentary evidence of the landlords' sherista I find that the story of creation or existence of a tenancy comprising the Bara-khet and other adjoining khets out of the Burir-bandh-namo khet in the names of the sons and a son's wife of Mansaram Mahato has not been proved." Regarding possession the learned Judge found:

"I find that the disputed land comprising the Bara-khet and the khets adjacent thereto were in possession of accused Shibapada Senapati, accused Saktipada Senapati and Khendulal Senapati as appertaining to the Jama held by them under the Panchakote Raj Estate at the time of the occurrence, and not by Mansaram Mahato and his sons as alleged by the prosecution."

5. The learned Judge however found on the evidence on record and on the circumstances that the appellants had no right of private defence as there was no reasonable apprehension or danger to the body of any member of the party of accused Shibapada or to the disputed property.

6. So far as the first two findings regarding title and possession of the land are concerned, the learned Judge has dealt with the evidence both oral and documentary and his conclusion seems to be reasonable and we find no reason to differ from that view. (The learned Judge after discussing the evidence proceeded.)

The evidence therefore is in favour of the learned Judge's finding that not only the Senapaties had title to the land but

they were also in possession of the land on the relevant date and that they actually came on the land with six ploughs for cultivating it.

8. Having made this finding regarding title and possession the learned Judge has held that they had no right of private defence as there was no reasonable apprehension of danger to the body of any member of the party or the accused Shibapada or to the disputed property. That is the land of the Barokhet which was being ploughed that morning. Mr. S. S. Mukherjee, learned Advocate for the appellants has submitted that this view of the learned Judge is not correct and that it is in conflict with the earlier finding of title and possession in favour of the appellants. Mr. Mukherjee has argued that if the appellants had title and were in possession and were ploughing the land with six ploughs in the morning of the date of incident and if Mansaram and his sons and other relations came on the land and put obstructions to their ploughing, they had the right to throw them out and any force used in such circumstances would be in exercise of the right of private defence. There is some force in the contention raised by Mr. Mukherjee. On the finding of both title and possession in favour of the appellants and also of the admitted prosecution case that Mansaram and his men were challenging their right to plough and putting obstruction to their ploughing, there is no gainsaying the fact that the owner in possession of the land has a right to remove the obstruction by force from the land. They had undoubtedly a right of private defence of property to throw them out. They had besides the right of private defence of the person as well if in course of throwing them out they had any reasonable apprehension of bodily injury. The question that arises here is, in our view whether the right of private defence which the appellants had, was to the extent of inflicting such injury as they have done in the present case leading to death of a number of persons.

9. The prosecution case is that the appellants with others came upon the land with six ploughs and started ploughing. Mansaram and his sons and others protested and attempted to obstruct and thereupon the appellants and their men who were armed with tangis, spears, lathis and other deadly weapons assaulted them resulting in the death of three men on the spot—and this (one?) the same night and grievous hurt to another. Mr. Mukherjee learned Advocate for the appellants submitted that the appellants were in possession of the land from before. They had cultivated the land and on that date they came for final ploughing before actual sowing. They had a

right to the property and were in possession of the same. There was besides attack from the side of Mansaram resulting in injury to Sadananda and two others and therefore the appellants who had the right of private defence were in apprehension of not only being thrown out of possession but of being themselves injured at their hands.

They had therefore the right to attack Mansaram and his men for saving their lives and property. They had reasonable apprehension of death in view of the fact that Mansaram was accompanied by 10/11 persons and had earlier attacked them. Shibpara was examined at the Sadar hospital Purulia on August 14, 1954. The doctor who examined him found one lacerated injury $1'' \times \frac{1}{2}''$ x scalp deep about $2''$ of the right side of the head about $2''$ left of frontal eminence. The injury might be caused by some hard and blunt substance such as lathi. There is no evidence that anybody else from the appellants' side was examined by any doctor and there is no specific evidence about the nature of such injury.

The injury of Shivapada is not therefore of such a nature as might give rise to a reasonable apprehension that the lives of the appellants would be at a stake unless they attacked Mansaram and his party and inflicted such injury resulting in the death of so many persons. Section 100, Indian Penal Code provides the circumstances when the right of private defence of the body extends to the voluntary causing of death. This section provides for a right of private defence to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is such as may reasonably cause the apprehension that death will otherwise be the consequence of such assault.

There is sufficient evidence to show that the appellants' party consisted of more than nine persons. According to the prosecution it was 40 persons and the evidence has shown that though they came with ploughs, they came armed with deadly weapons including tangis, spears, axes, lathis etc. The injury on the head of Shivapada was of a minor nature and on the evidence it is difficult to hold that even if Shivapada was assaulted by Mansaram it was to such an extent as would reasonably cause an apprehension in the minds of the appellants and others that unless they inflict blows they would themselves be killed. The trouble was over possession of land and according to the defence they were in possession of the land. The prosecution has adduced evidence to show that some of them

were shouting that the whole family of Mansaram would be finished. As a matter of fact the dead persons include Mansaram, his three sons and his brother. It is true that this right of private defence cannot be weighed in a golden scale in times of excitement but even so, the facts disclose that the situation was not such as would justify making murderous assault on so many persons as a result of which three died on the spot and one died in the hospital same night while fifth had at least grievous hurt. The evidence and circumstances clearly show that the appellants' party wanted to make exhibition of force and P. W. 3 stated in his evidence that one of them was shouting that the whole family of Mansaram would be exterminated. On the evidence therefore we hold that even though the appellants had the right of private defence, they had exceeded it and there could not have been any reasonable apprehension in their minds that such murderous assault was necessary either to save their property or to save themselves.

10. The appellants have been convicted by the learned Sessions Judge under S. 302 read with S. 149 I. P. C. We have already found that the appellants had title and possession in the property and that they had right of private defence. It is true that they went to the spot armed although ostensibly for ploughing, but even so that assembly of the appellants cannot be said to be an unlawful assembly and therefore the conviction under S. 302 read with S. 149 I. P. C. is bad in law.

11. The learned Judge framed charge both under Sec. 302/34 and also under Section 304/149 I. P. C. In view of our finding that the appellants had the right of private defence but they exceeded it the offence committed would be one under S. 304 I. P. C. (After discussing the evidence his Lordship proceeded).

The injuries were of very severe nature and the strokes were all on vital parts and according to the doctor, could be caused by sharp-cutting weapons like tangis, spear, axe and also lathi. We have already noticed that though the appellants had the right of private defence they had exceeded it and the injuries inflicted were not only on five persons ultimately resulting in the death of all but also were on the vulnerable regions and applied with great force. It is true that they had right of private defence and their assembly was not unlawful. So that conviction under S. 302/149 I. P. C. is not legal. In view also of the finding that they had right of private defence the offence committed would not be one under Sec. 302 I. P. C. but would be under S. 304 I. P. C., that is, for culpable homicide not amounting to murder. The charge

was under S. 304/149 I. P. C. also, but then there is no bar against conviction under S. 304/34 I. P. C. even though no charge on that section was framed provided there is common intention. Common intention has to be gathered from the facts and circumstances and in the present case it is clear that they came upon the land for ploughing but they came heavily armed and when protest was made from the side of Mansaram, they started assaulting and inflicting grievous injuries on so many persons. All of them were armed with tangis, spears, axes, tabla and lathis and the doctor's evidence discloses that there were such injuries as could be inflicted by these weapons. They came together upon the land, inflicted injuries and while the people were lying in the land they left together. This is the evidence of the prosecution witnesses, particularly the evidence of P. Ws. 2 to 4 and they are eye witnesses of the occurrence. Common intention, in our view, is apparent from the fact that they came together and they left together and in the meantime inflicted injuries on so many persons with various weapons which they carried. Although there is a difference in common object and common intention they both deal with combination of persons which became punishable as sharers in one offence and the charge under Section 149 I. P. C. is no impediment to a conviction by the application of S. 34, if the evidence discloses the commission of the offence in furtherance of common intention of all. The only question that may be considered in this connection is whether any prejudice is likely to be caused to the appellants for the absence of a charge under S. 304 read with S. 34 I. P. C. There were already charges under Sec. 302 read with S. 34 I. P. C. against the appellants for murder of the different persons and they were therefore aware of the charge and evidence was adduced and the question of prejudice does not arise in the present case. The appellants had notice that they were being tried as sharers in the offence of murder under S. 34 and also that their liability was collective and vicarious and not individual. On the evidence therefore the inference of common intention can be drawn and the appellants are liable to be convicted for the offence of culpable homicide, read with S. 34 I. P. C. We have already held that the appellants have the right of private defence and therefore the appellants must be held guilty under S. 304 Part I read with S. 34 I. P. C. We have already discussed the nature of the injuries and of the shouts to exterminate the whole family and obviously the injuries were inflicted with intention to causing death and death has caused to three on the spot, to one in course of the same night and fifth man had at least grievous hurt.

12. Mr. Mukherjee has urged that the learned Judge framed a charge under Sec. 302/34 I. P. C. and acquitted the appellants of that charge. There was no appeal against that order of acquittal and as such this Court sitting in appeal should not convict them for murder read with S. 34. There is no doubt that the learned Judge acquitted them of the charge of murder under S. 302/34 I. P. C. and on the principle of *autrefois acquit* as dealt with in S. 403 of the Cr. P. C. they cannot be convicted under S. 302/34 I. P. C. We have however already found that in view of the fact that they had a right of private defence they are not found guilty under S. 302 I. P. C. but their conviction under S. 304 I. P. C. read with S. 34 is not hit by earlier acquittal under S. 302/34 I. P. C. and is perfectly legal and proper in this case.

13. Now coming to the evidence we find that the learned Judge dealt with the evidence against each of the appellants in some details. (After discussing evidence the learned Judge proceeded.)

14. In the result therefore we find all the appellants guilty under S. 304 Part I read with S. 34 I. P. C. On the question of sentence these appellants are all agriculturists and they have natural attachment for their land. They had their title and possession in the land and they came in the height of cultivation season with their ploughs also and there was earlier trouble over their possession. Undoubtedly there was obstruction from the side of Mansaram and his relations and apparently they lost their heads over obstruction to their possession at that time of the year. They are not really criminals by nature but they lost their balance. We are aware of the agriculturist's love for land and we feel that in a case like this they should be leniently dealt with, notwithstanding the fact that several persons lost their lives. We, therefore, sentence each of them to R. I. for 10 years.

15. We have already found that there was no unlawful assembly and therefore the conviction under Ss. 147 and 148 I. P. C. cannot stand. Their conviction under Ss. 147 and 148 I. P. C. are set aside and they are acquitted of the charge. This appeal therefore succeeds in part. The conviction under Ss. 147 and 148 I. P. C. is set aside and they are acquitted of the charge. The conviction of the nine appellants under S. 302/149 I. P. C. is also set aside but they are instead convicted under S. 304, Part I read with S. 34 I. P. C. and they are sentenced to R. I. for 10 years each. The appeal is disposed of accordingly.

16. S. K. CHAKRAVARTI, J.: I agree. BDB/D.V.C. Appeal partly allowed.

AIR 1969 CALCUTTA 32 (V 56 C 7)

A. K. MUKHERJEE AND S. K. MUKHERJEE, JJ.

Rank Film Distributors of India Ltd., Appellant v. The Registrar of Companies, West Bengal and another, Respondents.

Appeal from Original Order No. 14 of 1967, D/- 21-9-1967.

Companies Act (1956), S. 17(3) and (4) — Alteration in memorandum — Change of place of registered office from one State to another — Confirmation by Court — Loss of revenue to State — Whether relevant consideration. AIR 1957 Orissa 232 and AIR 1961 Orissa 62 and A. H. O. No. 1 of 1957 (Orissa), Dissent. from.

The company passed a special resolution that subject to the sanction of the High Court at Calcutta being obtained, the registered office of the company at present situate in the State of West Bengal be removed to the State of Maharashtra and the relevant clause in the Memorandum of Association be altered accordingly. In an application made to the High Court for confirmation the following grounds were stated:

(i) The head office of the company was situate in Bombay and the transfer of registered office from Calcutta to Bombay would enable the company to carry on its business of distribution of films more economically and more efficiently from the administrative point of view. (ii) It would assist the company to compete in its business with other foreign film companies most of which had their registered offices in Bombay. (iii) There was better scope at Bombay for expansion of the company's business as it was easier there to come into contact with foreign visitors in the film industry who were interested in the distribution of their products and such personal contact would essentially promote the interests of the company. (iv) It was in the interest of the shareholders of the company that the registered office of the company be removed to Bombay. The Court refused to accede to the prayer of the company on the ground that the application was lacking in particulars in support of its case that the transfer of the registered office would be beneficial to the company and its shareholders and that a bare averment putting in relevant provisions of statute was not sufficient.

Held that the application did not merely repeat the provisions of the statute; reasons had been given in sufficient detail as to why in the opinion of the shareholders, which was expressed in the shape of special resolutions, the transfer of the registered office would enure to the benefit of the company. It was true that no

separate reasons had been given as to why the transfer of the registered office would be in the interest of the shareholders. But if the transfer was in the interest of the Company, it was ipso facto also in the interest of the shareholders. It was not necessary that each and every reason advanced for transfer of the registered office had to be justified by evidence. In the nature of things, the evidence which the company would be required to adduce would be of its prospective business operations and future conduct of its affairs in relation to the present. The evidence would be, therefore, necessarily vague and problematic and might well verge on speculation. When the Company, its shareholders and directors had in exercise of their judgment, after mature deliberation decided on the course proposed in the special resolutions the evidence that could be given was of little assistance to the Court. (Paras 4, 7 and 8)

Section 17(3)(a) enjoins that before confirming the alteration, the court must be satisfied that sufficient notice has been given to every person or a class of person whose interests will, in the opinion of the Court, be affected by the alteration. It is true that although sub-section (4) specifically requires that notice of the petition must be served on the Registrar, no specific provision has been made for notice to the State. But it can hardly be disputed that the language of S. 17 is sufficiently wide to enable the court to direct notice to be served on the State if the Court is of opinion that the interests of the State will be affected by the order to be made in the application.

(Para 13)

Under the statute, it is for the members of the company and not for the State to decide whether the registered office of the company should be transferred from one State to another in the interest of the company for the reasons specified in S. 17. It is for the court to confirm or not to confirm the alteration. To permit the State to contend that the proposed transfer of the registered office will not enable the company to carry on its business more efficiently or economically, contrary to the opinion of the shareholders expressed in the special resolutions, will be to enable the State to have a voice in an aspect of the management of affairs of the company which is not warranted by statute. The transfer of a registered office by itself does not affect, or appreciably affect, the scope of employment of the people of the State. It was therefore useless to refuse to confirm the alteration on the ground of loss of prospect of employment in the State. In any event, taking a broader perspective, the loss of employment in one State would be balanced by employment in another. After all, the country was one

and indivisible. The contention that the revenue of the State in sales tax or the share of the State in the income-tax would be adversely affected was also not sound. In this view of the matter the consideration that by transfer of the registered office, the economy and revenue of the State would suffer, appeared to be unreal or at the most, speculative, and was, therefore, not a relevant consideration in the present application. In any event, the loss of revenue in one State would be accompanied by increase in revenue in the other. In the administration of justice, the interests of a particular State ought not to be thought of in a sectional manner and what has to be considered, is the interest of the country as a whole. (1967) 71 Cal WN 340, Rel. on; AIR 1957 Orissa 232 and AIR 1961 Orissa 62 & A. H. O. No. 1 of 1957 (Orissa), Dissent. from. (Paras 14, 15, 16, 17, 18 & 22) Cases Referred: Chronological Paras (1967) 71 Cal WN 340=1967-1 Com LJ 200, In re Mackinnon Mackenzie & Co. Ltd. 12 (1965) AIR 1965 Cal 16 (V 52), In re Standard General Assurance Co. Ltd. 12 (1961) AIR 1961 Cal 666 (V 48) =65 Cal WN 99, Mahaluxmi Bank Ltd. v. Registrar of Companies, West Bengal 25 (1961) AIR 1961 Orissa 62 (V 48)= (1962) 32 Com Cas 497, In re Orissa Chemicals & Distilleries, Private Ltd. 19 (1957) AIR 1957 Orissa 232 (V 44)=ILR (1956) Cut 697, Orient Paper Mills Ltd. v. State 19 (1957) A. H. O. No. 1 of 1957 (Orissa), Bonai Industrial Co. Ltd. v. State of Orissa 19 (1951) 1951-1 All ER 881=1951 AC 625, Ex Parte Westburn Sugar Refineries Ltd. 9, 24 (1908) 1908-2 Ch 287=77 LJ Ch 629, In re Jewish Colonial Trust Ltd. 9 (1907) 1907 AC 229=76 LJ Ch 458, Poole v. National Bank of China Ltd. 24

S. K. MUKHERJEA, J.: This is an appeal against an order by which the learned Judge dismissed an application under S. 17 of the Companies Act for confirmation of alteration of the provisions of the Memorandum of Association of a Company by special resolutions so as to transfer the place of its registered office from one State to another. The registered office of the company is situate at Calcutta. One of the main objects of the company is to carry on the business of distributors of films. By those special resolutions it was resolved that subject to the sanction of the High Court at Calcutta being obtained, the registered office of the company at present situate in the State of West Bengal be removed to the

State of Maharashtra and the relevant clause in the Memorandum of Association be altered accordingly.

2. It is stated in the petition that in arriving at the decision to transfer its registered office from Calcutta to Bombay, the facts taken into consideration were:

(i) The Head Office of the company is situate in Bombay, registered office of the company is situate in Calcutta and it is essential that this anomaly should be removed by transferring the registered office of the company from Calcutta to Bombay to enable the company to carry on its business more economically and more efficiently from administrative point of view.

(ii) The registered offices of most of the foreign film companies are situate in Bombay and, therefore, it is considered essential that the company's registered office should also be situate at Bombay. It will assist the company to compete in its business with other foreign film companies if the registered office of the company is situate there.

(iii) There is better scope at Bombay for expansion of the company's business as it is easier there to come into contact with foreign visitors in the film industry who are interested in the distribution of their products and such personal contact will essentially promote the interests of the company.

(iv) It is in the interest of the shareholders of the company that the registered office of the company be removed to Bombay.

3. Notice of the application was served on the Registrar of Joint Stock Companies and as directed by the learned judge, also on the State of West Bengal. No affidavit was filed by the Registrar or by the State. The application was opposed only by the State on the ground that sufficient cause has not been shown as to why the registered office should be transferred to Maharashtra.

4. It appears that the learned Judge refused to accede to the prayer of the company because, in his opinion, the petition was lacking in sufficient particulars in support of its case that the transfer of the registered office will be beneficial to the company and its shareholders. The learned Judge observed that a bare averment putting in the relevant provisions of the statute is not enough. We respectfully agree. The petition however does not merely repeat the provisions of the statute. In paragraph 8 of the petition reasons have been given in sufficient detail as to why in the opinion of the shareholders which is expressed in the shape of special resolutions, the transfer of the registered office will enure to the benefit of the company. The reasons appear to

be cogent and have the merit of sound commercial sense to recommend them. The learned Judge found that material particulars are lacking because it is not indicated what has happened since 1962 when the Head Office of the Company was removed to Bombay by reason of which the decision to transfer the registered office to Bombay has been taken; because the petition does not disclose why it is easier to make contacts with foreign visitors in the film industry if the registered office is transferred to Bombay when the purpose may well be served by the Head Office; and because the petition does not indicate why it will be in the interest of the shareholders to transfer the registered office to Bombay.

5. The Head Office of the company was transferred to Bombay in 1962. That the shareholders did not decide to transfer the registered office to Bombay at once or soon thereafter does not, in our opinion, call for an explanation. The shareholders may decide early or late. The test to be applied is whether at the time when the resolutions are passed, the shareholders have, by domestic deliberation, for any of the reasons specified in S. 17, decided in favour of the transfer.

6. No doubt the Company has not indicated why trade contacts cannot be made through the Head Office at Bombay. Indeed it is not possible to contend that they cannot be. The case is, however, one of convenience. For the purpose of business negotiations it will be clearly more convenient to have the registered office at Bombay which is the hub of film industry in India, especially when the Head Office is already there. If that is so, we do not see why the Court, in exercise of its powers under S. 17 should make the decision of the shareholders nugatory by refusing to confirm the alteration.

7. It is true that no separate reasons have been given as to why the transfer of the registered office will be in the interest of the shareholders. If the transfer is in the interest of the Company, it is ipso facto also in the interest of the shareholders.

8. We do not agree that each and every reason advanced for transfer of the registered office has to be justified by evidence. In the nature of things, the evidence which the company will be required to adduce will be of its prospective business operations and future conduct of its affairs in relation to the present. The evidence will be, therefore, necessarily vague and problematic and may well verge on speculation. And yet, the Company, its shareholders and directors may bona fide in exercise of their judgment, after mature deliberation have decided

on the course proposed in the special resolutions. Nevertheless, the evidence that can be given is of little assistance to the Court.

9. In *Re Jewish Colonial Trust Ltd.*, (1908) 2 Ch 287 it was held that the principles which have been laid down for the guidance of the Court in dealing with applications for confirmation of reduction of capital apply to applications for confirmation of alteration of the Memorandum of Association. In *Ex Parte Westburn Sugar Refineries Ltd.*, (1951) 1 All ER 881 in an application for sanction of reduction of capital the company stated in the petition that the capital to be returned was in excess of its needs but did not state by how much it was surplus. The Company was threatened with nationalisation. The first court dismissed the application because it was against public policy to aid a company threatened with nationalisation to part with its assets and also on the ground that the company had failed to show by how much its capital was surplus to its requirements. On appeal, the House of Lords, in reversing the order of dismissal, held that the possibility that the industry in which the company was engaged might be nationalised as the result of future legislation was not a ground on which the Court should refuse to confirm the reduction.

10. As for the other ground, Lord Radcliffe said:

"I pass, to the second, and, indeed, the main reason which weighed with the learned Judge. In his view it was essential for the appellant company, which showed by its petition that the ground of the proposed reduction was that the share capital to be returned was in excess of its wants, to demonstrate to the court by how much its capital was in fact, surplus, and, since the evidence presented to the court was deficient in this respect, a material fact had not been made out..... The conclusion itself is based on a misunderstanding. I cannot find any good reason why the court should be concerned to know what is the extent by which the company's capital is surplus to its requirements. If by that phrase, itself susceptible of ambiguity, is meant the extent by which the whole of the company's assets, at the best contemporary valuation that can be placed on them, exceeds what is required for the future conduct of its business, the precise information on this would do nothing to aid the task of the court, for it would throw no light on the sole point which is here in question, viz., how much of the paid up share capital is to be returned as surplus? Nor do I think that evidence of this kind is usually required in cases of this sort. In truth this, which is the real question, answers itself by the company's own resolution how much of the paid up share capital of

the company can dispense with in future is a domestic matter which the shareholders and their managers must decide among themselves. If the amount which they have decided on, works no injustice to creditors or to shareholders I see no purpose which can be served by the court's insisting on a precise figure of the company's wants or the striking of an exact balance between that figure and the total available resource in hand."

11. In our opinion, the principles expressed in the judgment of Lord Radcliffe apply with equal force to an application for confirmation of alteration of Memorandum of Association.

12. The learned trial Judge directed notice of the application to be served on the State. Before us, the State opposed confirmation of the alteration on the ground that the transfer of the registered office of the company will affect the general economy of the State and in particular, its revenue. Latterly, a great deal has been said with regard to the right of the State to appear in an application under Section 17 of the Companies Act and the grounds on which the State may oppose the application. In *Re Mackinnon Mackenzie and Co. Ltd.*, (1967) 71 Cal WN 340, A. N. Ray J. held that the State cannot as a matter of right be heard in an application under S. 17. In several decisions of the Orissa High Court to which we shall presently advert it was held that the prospect of loss of revenue to the State is a material consideration. A. N. Ray J. was of opinion that no hard and fast rule can be laid down that under no circumstances it is open to the State to contend in these applications that there may be loss of revenue. In *Re Standard General Assurance Co. Ltd.*, AIR 1965 Cal 16, B. C. Mitra, J. expressed the view that if the company has an existing liability to the State no doubt the State becomes the creditor of the company and therefore would be entitled to oppose the alteration, if its interest as a creditor is likely to be affected by the alteration, but the statute does not confer upon the State as a prospective creditor, the right to oppose the proposed alterations.

13. Section 17(3)(a) of the Companies Act enjoins that before confirming the alteration, the court must be satisfied that sufficient notice has been given to every holder of the debentures of the company and to every other person or a class of persons whose interests will, in the opinion of the Court, be affected by the alteration. It is, however, to be noticed that although sub-section (4) specifically requires that notice of the petition must be served on the Registrar, no specific provision has been made for notice to the State. If it were the intention of the legislature to serve notice on the State, it is difficult to see why no specific pro-

vision was made in that behalf. Be that as it may, it can hardly be disputed that the language of S. 17(3)(a) is sufficiently wide to enable the Court to direct notice to be served on the State if the Court is of opinion that the interests of the State will be affected by the order to be made in the application.

14. If notice is served on the State under S. 17(3), the question arises whether the State can object to the transfer of the registered office on the ground that the reasons which have prompted the shareholders to pass the resolution are not valid or that those reasons have not been substantiated by the materials disclosed in the petition. In the absence of statutory provisions, it is not for the State to exercise control over the conduct of affairs of a company. Under the statute, it is for the members of the company and not for the State to decide whether the registered office of the company should be transferred from one State to another in the interest of the company for the reasons specified in Section 17. The shareholders have expressed their decision by special resolutions in favour of the transfer. It is for the court to confirm or not to confirm the alteration. If the State has no voice under the statute in the conduct and management of the company's affairs, it is difficult to see how the State can contend that the reasons which have impelled the shareholders after domestic deliberation to decide on transfer of the registered office, are not tenable. In our opinion, the State has no such right. To permit the State to contend that the proposed transfer of the registered office will not enable the company to carry on its business more efficiently or economically, contrary to the opinion of the shareholders expressed in the special resolutions, will be to enable the State to have a voice in an aspect of the management of affairs of the company which is not warranted by statute.

15. It was then contended that the economy of the State will be adversely affected if the registered office is shifted elsewhere. The State is benefited by the opportunities of employment, a company affords. In most cases, the registered office employs a comparatively small number of people. The bulk of a Company's employees are engaged in industrial undertakings, in trade or in general administration. If a Company desires to transfer its business activities from one State to another there is nothing in law to prevent it from doing so. If the Court refuses to sanction the transfer of the registered office by dismissing the application for confirmation of the alteration, the Company may yet leave the husk of a registered office to function in the State and transfer its entire busi-

ness activities elsewhere. There are many foreign companies which have their registered offices abroad but whose business activities are entirely confined to India. It will be wrong, in our view, to equate the location of the registered office of a company with the field of its business operations. The transfer of a registered office by itself does not affect, or appreciably affect, the scope of employment of the people of the State. In the present case, the Head Office of the Company has already been shifted to Bombay. The company is free to engage or not to engage in business in Bengal. It is therefore useless to refuse to confirm the alteration on the ground of loss of prospect of employment in the State. In any event, taking a broader perspective, the loss of employment in one State will be balanced by employment in another. After all, the country is one and indivisible.

16. On behalf of the State it was urged that the revenue of the State in income-tax and sales tax is likely to suffer. In our opinion, this is a misconception. In the scheme of the State Sales Tax Acts, sales tax is payable to a State on sale of goods which are within that State; under the Central Sales Tax Act, it is payable to the State from where the movement of goods in the course of inter-State trade and commerce commences. Sales tax payable on the sale of a company's products or on goods purchased by the company does not depend on where the registered office of the company is situated or where the contract of sale is made. Transfer of the registered office of a company is, therefore, irrelevant for the purpose of Sales Tax realised by the State.

17. As for income-tax, the share of a State out of the proceeds of income-tax does not appear to vary with the income-tax realised in the State. Article 270(1) of the Constitution provides that taxes on income other than agricultural income shall be levied and collected by the Government of India and distributed between the Union and the States in the manner provided in Cl. 2. Cl. 2 provides that such percentage, as may be prescribed of the net proceeds in any financial year of any such tax except in so far as those proceeds represent proceeds attributable to the Union Territories or taxes payable in respect of Union emoluments shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which the tax is leviable in that year, and shall be distributed among those States in such manner and from such time as may be prescribed. The proceeds of income tax are distributed among the States under the provisions of the relevant Constitution (Distribution of Revenue) Orders by which a fixed percentage is allotted to a State. These orders are pro-

mulgated by the President from time to time on the basis of the recommendations of Finance Commissions. No material has been placed before us from which we can conclude that the allocation of the share of income tax to a State varies with the collection of income tax in the State from year to year. We cannot proceed on the assumption, for which there is no basis, that the percentage increases or decreases with the increase or decrease of the tax realised in the State. Moreover, there is nothing in the Income-tax Act under which a company has to be assessed in the State where its registered office is situate. The registered office of a company may or may not be its principal place of business. It cannot therefore be held that the transfer of the registered office of a company will adversely affect the share of a State in the proceeds of income-tax.

18. In the view we have taken of the matter, the consideration that by transfer of the registered office, the economy and revenue of the State will suffer, appears to be unreal or at the most, speculative, and is, therefore, in our opinion, not a relevant consideration in the present application. In any event, the loss of revenue in one State will be accompanied by increase in revenue in the other. We agree with the views expressed by A. N. Ray, J. that in the administration of justice, the interests of a particular State ought not to be thought of in a sectional manner and what has to be considered, is the interest of the country as a whole. Incidentally if notice is to be given to the State where the registered office of the company is situate on the ground that its economy and revenue might suffer by transfer of the registered office, there is no reason why notice should not be given to the State where the registered office of the company is to be transferred. If the area of business operations of a company were to depend on the location of its registered office, the State to which the registered office is sought to be transferred, might very well contend that there is enough of that particular type of business in which the company is engaged and the transfer will not be in the interest of the State. The Union of India may also like to have a say in the matter. It may contend that in the interest of a just and proper economic development of different regions which is its declared policy, the transfer is or is not desirable. In that event, an application under S. 17 for confirmation of the transfer of the registered office from one State to another will bring the different States and the Centre into the arena with rival economic contentions. We do not think, that is a situation contemplated by S. 17 of the Companies Act.

19. In *Orient Paper Mills Ltd. v. State*, AIR 1957 Orissa 232 it was held by the Orissa High Court that where by a change of registered office of a company situate within a certain State, that State would suffer a substantial reduction of income from income-tax and sales tax, the Court would take that fact into account and would refuse to confirm the resolution seeking to transfer the registered office of the company. The decision in *Orient Paper Mills* was approved by a Division Bench of the Orissa High Court in *Bonai Industrial Co. Ltd. v. State of Orissa*, A. H. O. No. 1 of 1957 (Orissa) and followed in *Re Orissa Chemicals & Distilleries Private Ltd.*, AIR 1962 Orissa 62.

20. In the *Orient Paper Mills* case the learned Judge accepted the contention on behalf of the State that the State of Orissa was likely to lose a substantial sum in revenue if the registered office was transferred to Calcutta. The contention appears to have been founded on the assumption that a portion of income-tax realised by the Central Government is paid to the respective States in proportion to the tax realised in the State concerned. Under the Finance Distribution Order then in force, every State was entitled to a fixed percentage of the proceeds of income-tax which did not vary with the income-tax collected in the State. Moreover, there was nothing in the Income-tax Act of 1922 under which a company was to be assessed at the place where its registered office was situate. A company was assessable at its principal place of business, which might or might not have been its registered office.

21. The other contention which was raised successfully on behalf of the State was that if contracts of sale were made by the registered office which was proposed to be transferred to Calcutta and contracts of sale were entered into at Calcutta the liability to pay sales tax might arise at Calcutta and the State of West Bengal might realise the sales tax. Under the Sales Tax laws then in force, sales tax was not necessarily payable to the State where the contract of sale was made or where the registered office of the company was situate. Reliance was placed on a passage in Halsbury's Laws of England, 3rd Edition Vol. 6 at page 113 where it is said:

"The residence of a company is of great importance in revenue law, and the place of incorporation is not conclusive on this question. In general, residence depends upon the place where the central management and control of the company is located. It follows that if such central control is divided, the company may have more than one residence. The locality of the shares of a company is that of the register of shares. The

head office of the company is not however necessarily the registered office of the company, but is the place where the substantial business of the company is carried on and its negotiations conducted."

The passage in our opinion, is no authority for the proposition that a company is necessarily assessable at the place where its registered office is situate. As we have already said, there is nothing in the Income-tax Act of 1922 or of 1961 under which a company is to be assessed at the place of its registered office.

22. In these circumstances, we are unable to agree that the transfer of the registered office of the company by itself, affects the revenue of the State or even if it does, the prospect of loss of revenue is a relevant factor to be taken into consideration, in the facts and circumstances of the present case.

23. It is only fair to point out that the company in its petition has stated that the removal of the registered office will not involve retrenchment or dismissal of any employee of the company nor will it cause any loss of revenue to the State of West Bengal.

24. It has been argued that as an application for confirmation of alterations in a Memorandum of Association is in pari materia with an application for confirmation of reduction of share capital, in making an order under S. 17, the interests of the public have to be taken into consideration. The State represents the public and therefore the State is entitled to be heard and the interests of the State have to be safeguarded. In this connection, reliance has been placed on the decision in *Poole v. National Bank of China Ltd.*, 1907 AC 229 where an application for confirmation of reduction of share capital fell to be considered by the House of Lords. Lord Macnaghten said:

"In the present case, creditors are not concerned at all. The reduction does not involve diminution of any liabilities in respect of unpaid capital or the payment to any shareholder of any paid-up capital. The only questions therefore to be considered are these: (i) Ought the court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company and (ii) is the reduction fair and equitable as between the different classes of shareholders?"

On the strength of these observations it has been contended that in an application for confirmation of the alterations in a Memorandum, the interests of the public have to be taken into consideration. Lord Macnaghten however made it clear that he meant by interests of the

public when he said that the interests which have to be protected are of those members of the public who might be induced to take shares in the company. There is nothing in the judgment from which it appears that his Lordship intended that the revenue interests of the State or the economic interests of the State have to be considered in sanctioning a reduction of share capital. In 1951-1 All ER 881 Lord Radcliffe said:

"What is in question is a reduction of share capital by repaying some paid-up share capital. If transaction is itself competent, the court should only refuse its confirmation if what is proposed to be done is somehow unfair or inequitable and what is unfair and inequitable cannot well extend beyond consideration of the interests of creditors, shareholders and the general public, by which term is, I think, meant persons who may in the future have dealing with the company and may be minded to invest in its securities."

25. In *Re Mahaluxmi Bank Ltd.*, AIR 1961 Cal 666 a Division Bench of this Court expressed the view that the public and the shareholders individually and collectively are protected by the necessary publicity of the proceedings and by the discretion which is entrusted to the court.

26. In (1967) 71 Cal WN 340, A. N. Ray J. understood those observations of Lord Macnaghten in the sense in which we have understood them and we respectfully agree with the views expressed by the learned Judge on that aspect of the matter. We, therefore, hold that if the interest of the public has to be taken into consideration in an application under S. 17, the interest contemplated is not revenue interest or the interest of the general economy of the State.

27. In the view we have taken, the appeal succeeds. The order of the learned Judge is set aside. The alteration of the Memorandum of Association sought to be effected by the special resolutions set out in para 7 of the petition and passed at the extraordinary general meeting of the company held on the 8th day of June 1966 is hereby confirmed in terms of prayer (1) of the petition. The appellant will pay the costs of the Registrar of Joint Stock Companies which we assess at 30 Gold Mohurs. Certified for two counsel so far as the appellant is concerned. Save as aforesaid there will be no order as to costs.

28. A. K. MUKHERJEA, J.: I agree.
JHS/D.V.C. Appeal allowed.

AIR 1969 CALCUTTA 39 (V 56 C 8)
BIJAYESH MUKHERJI, J.

Brooke Bond India (Private) Ltd., Petitioner v. Union of India and another, Opposite Parties.

Civil Revn. Case No. 3610 of 1966, D/- 8-7-1968.

Railways Act (1890) (as amended in 1961), Ss. 78-B and 140 — Service of notice of claims for refund on Refunds Officer is legal.

Refunds Officer is competent to receive a notice of claim against the Railways. It is true that according to Ss. 78-B and 140 a notice of claim for refunds must be served only on the General Manager or the Chief Commercial Supdt. But when the highest authority in railway administration, namely the Ministry of Railways, issues and makes available to the public a pamphlet announcing therein that the Refunds Officer is one who may receive notice of claims for refund, such notice served upon the Refunds Officer is not bad at law. Such a public announcement by the supreme head of railway administration, namely, the Ministry of Railways, amounts to recognition of service of notice of claim upon the Refunds Officer qua agent of the statutory authority as in order and there is no necessity of such service upon the statutory authority, namely, the General Manager or the Chief Commercial Superintendent, when it is served upon the Refunds Officer, the proclaimed ad hoc agent of either. (Para 5)

The announcement, of course, does not amount to waiver of the right of the General Manager or the Chief Commercial Supdt. to receive notice. It cannot be said that there is any conflict between the provisions of Ss. 78B and 140 on the one hand and hence the yielding of the non-statutory provisions does not arise. (Paras 5 & 9)

Even though there is no authorisation or delegation by the General Manager or the Chief Commercial Supdt. of their right to receive notice, such authorisation by Ministry of Railways, only satisfies the requirements of the statutory provisions and the notice to an agent is notice to the principal. Case law discussed. (Para 10)

Cases Referred: Chronological Paras

- (1967) AIR 1967 Cal 47 (V 54), Union of India v. Alliance Assurance Co. Ltd. 14
- (1965) 69 Cal WN 614, Mohanlal Shri-lal Mohatta v. Union of India 13
- (1965) 69 Cal WN 692, Jiban Ram Agarwalla v. Union of India 13

- (1964) 68 Cal WN 814=1964 Cal LJ 56, Commissioners for the Port of Calcutta v. Abdul Rahim Oosman & Co. 2
- (1962) AIR 1962 SC 1879 (V 49)= (1963) 2 SCR 832, Jethmull Bhojral v. Darjeeling Himalayan Rly. Co. Ltd. 14
- (1962) AIR 1962 Cal 42 (V 49)=65 Cal WN 876, Niranjan Lall Agarwalla v. Union of India 13
- (1959) AIR 1959 Cal 215 (V 46)=63 Cal WN 581, Gajanan Dhanuka v. Union of India 5
- (1957) AIR 1957 Cal 17 (V 44)=60 Cal WN 985, South Indian Co-operative Stores Ltd v. Union of India 5
- (1957) 61 Cal WN 433=ILR (1957) 3 Cal 426, Radhamadhab Kundu v. Union of India 13
- (1955) AIR 1955 Cal 448 (V 42)=59 Cal WN 278, Union of India v. Gujarat Tobacco Co. 13
- (1952) AIR 1952 Cal 35 (V 39)=56 Cal WN 83 (FB), Bansi v. Governor-General in Council 5
- (1952) AIR 1952 Cal 341 (V 39), Surendra Nath v. Governor-General in Council 13
- (1945) AIR 1945 Cal 412 (V 32)=49 Cal WN 240, Srishtidhar Mondal v. Governor-General in Council 13
- (1937) AIR 1937 PC 306 (V 24)=41 Cal WN 1317, Commissioners for the Port of Calcutta v. Corporation of Calcutta 2

Bhupal Chandra Ray Choudhury and Dilip Kumar Roy Chowdhury, for Petitioner; Ajoy Kumar Basu, for Opposite Party No. 1; Bijan Behari Mitter, for Opposite Party No. 2.

ORDER: This is a rule under S. 25 of the Provincial Small Cause Courts Act, obtained by M/s. Brooke Bond India (Private) Ltd., whose suit raised on July 7, 1965, for recovery of Rs. 203.95 on account of excess freight realized on May 8, 1962, by the Commissioners for the Port of Calcutta and the South Eastern Railway, for a certain consignment from KP docks to Ghatkesar via Nagpur, a distance of 1736 kilometres, fails before a learned Judge of the small causes court at Alipore. It fails, not on merits of the claim, but on the sole ground that the notice under S. 77 of the Railways Act, 9 of 1890, was served on the Refunds Officer of the South Eastern Railway, not on the General Manager. On merits the learned Judge indeed finds as a fact that "excess freight of Rs. 203.95 was realized by the defendants due to their miscalculation and negligence."

2. The Commissioners for the Port of Calcutta, who do not enter appearance in the court below and against whom the learned Judge dismisses the suit ex parte, may be eliminated here and now.

Mr. Roy Chowdhury, appearing for the petitioner, does not press the rule against them. He does not, presumably because the suit was instituted on July 7, 1965, long, long after the expiration of three months from May 8, 1962, when the cause of action for the suit arose, for which the Commissioners for the Port of Calcutta are completely protected from such suit by virtue of Section 142 of the Calcutta Port Act, 3 of 1890. Indeed in terms thereof, no suit shall be brought after the expiration of three months from the day on which the cause of action arose. So, the suit against the Port Commissioners appears to be clearly barred in limine. See *Commissioners for the Port of Calcutta v. Corporation of Calcutta*, 41 Cal WN 1317=(AIR 1937 PC 306) and *Commissioners for the Port of Calcutta v. Abdul Rahim Oosman & Co.*, (1964) 68 Cal WN 814=1964 Cal LJ 56.

3. The section to go by, in the context of this litigation, rested on a booking dated May 8, 1962, is not S. 77, which the learned Judge and the parties go by in the court below, but S. 78B, as Mr. Basu, appearing for the opposite party Railway submits, and rightly in my judgment. Section 78B is a new section inserted by the Railways (Amendment) Act, 1961. It replaces the old S. 77. But that does not matter. What matters is the requisite written notice of claim to a refund of an overcharge to the railway administration. Such written notice is very much here, but to the Refunds Officer, not to the Railway administration which, in terms of S. 140, read with Section 2(6), means the Manager, that is, the General Manager, or the Chief Commercial Superintendent. The Refunds Officer is neither. And the seed of the controversy lies here. The Judge holds — and Mr. Basu supports him — that a notice as this is bad at law and must lead to the dismissal of the suit. Mr. Roy Chowdhury refers to a pamphlet of 1958, captioned: *Principal Rules and Procedure for the Preferment and Disposal of Claims on Railways*, published under the authority of the Ministry of Railways, and priced at 15 paise, at page 14 of which occurs Appendix B, the heading of which is:

'Designation and Address of Officers who may receive notice of claims for compensation or refund within their respective jurisdictions.'

and page 15 of which under Appendix B bears inter alia:

South Eastern Railway.

1. The General Manager,

South Eastern Railway, Calcutta.

2. The Chief Commercial Superintendent (Claims), 1 Royal Exchange Place, Calcutta-1.

3. The Refunds Officer, 23 Canning Street, Calcutta.

4. All Claims and Traffic Inspectors and Station Masters enumerated in Appendix D for claims below Rs. 50 per consignment arising after granting open delivery.

That being so, Mr. Roy Chowdhury concludes, here is clear proof of the Refunds Officer being authorized to receive notice of claim for refund, and the petitioner's notice cannot go down as bad at law.

4. Such then is the lie of the controversy which Mr. Basu wants to be resolved in his favour by very various contentions noticed and answered, one by one, in the following lines.

5. First: go strictly by Sections 78B and 140 and hold that a notice of claim to an officer other than the Manager or the Chief Commercial Superintendent (as here) falls short of the requisite notice the statute contemplates. Without more, certainly I may hold so. But there is a lot more here. The very publication referred to above, issued under the high authority of the Ministry of Railways and made available to the public at 15 paise each, announces to all concerned in unmistakable terms that the Refunds Officer is one who may receive notice of claims for refund. When the highest authority in the railway administration, namely, the Ministry of Railways, makes such a public announcement "for the guidance of the public", as Rule 2 thereof, at page 1, says, to go strictly by Ss. 78B and 140 will be to make a fetish of them both. The sanctity attached to these provisions is not denied. What is denied is that when the highest authority in the railway administration makes a public announcement that a notice of claim to the Refunds Officer is too good, the court is not at liberty to depart from their rigour. In the circumstances, such a one is held out as the agent of the Manager or the Chief Commercial Superintendent. That is the way I go, not the way of waiver Mr. Roy Chowdhury likes me to go, quoting *South Indian Co-operative Stores Ltd v. Union of India*, 60 Cal WN 985=(AIR 1957 Cal 17) and *Gajanan Dhanuka v. Union of India*, 63 Cal WN 581=(AIR 1959 Cal 215) to cite but two authorities, out of so many, which cluster round the subject. The way of waiver I do not go, because of the decision of a Full Bench of this Court in *Bansi v. Governor-General in Council*, 56 Cal WN 83 = (AIR 1952 Cal 35): "Such waiver must be made in the suit for refund or compensation and cannot be prior thereto." Still what can such public announcement by the supreme head of the railway administration, namely the Ministry of Railways, amount to, but recognition of service of notice of claim upon the Refunds Officer qua agent of the statutory authority as in

order and of no necessity of such service upon the statutory authority, namely, the General Manager or the Chief Commercial Superintendent, when it is served upon the Refunds Officer, the proclaimed ad hoc agent of either. So, this contention fails.

6. Second: if Ss. 78B and 140 be made so elastic as to include even the Refunds Officer as one competent to receive notice of claim, how low will you go and where will you stop? Will a notice to a station-master or even a peon do? Where then will you draw the line? The answer to such a contention is threefold. One, far from making Ss. 78B and 140 elastic, I keep them intact. All I say is: the Refunds Officer is authorized to receive a notice of claim, and that too by the highest authority in the railway administration, for whose benefit the Sections are in the statute book. And it is always open to them to nominate a person as their agent to receive the notice. Law says to the railway administration: 'I give you this protection: that you will have a prior notice of claim.' The railway administration says: 'We have nominated a certain person (here the Refunds Officer) to receive such notice on our behalf. Notice to him, our agent, is notice to us, the principal.' Will the court say then: 'No; you yourselves must receive the notice, not your agent'. A clear *reductio ad absurdum*. Two, I shall go as low as you go in your pamphlet or in any other authorization. Station-Masters? Yes; I shall go as low as that, but within the limits of their authority; (i) specified ones in Appendix D, (ii) claims below Rs. 50, and (iii) such claims arising after open delivery; just the limits prescribed by the Ministry of Railways (Paragraph 3 ante). Peons? That looks like an argument of despair. I reserve my comments until the Ministry of Railways has authorized them to receive notices of claims. Three, the line to be drawn is the very line on the other side of which the Ministry of Railways, the General Manager or the Chief Commercial Superintendent will not travel in authorizing notices of claims to be received. Thus, the second contention fails too.

7. Third: Rule 5 of the Principal Rules and Procedure, embodied in the pamphlet, reiterates that a notice required to be served on the railway administration must be served on the General Manager of the railway concerned, and not on any other person. So, the petitioner did serve the notice of claim on the Refunds Officer at its peril. But the very next paragraph of rule 5 makes it clear that, touching a notice under Section 77, "the Railway Administrations will not normally take a plea of defective notice even if the notice is served on a subordinate authority who

normally deals with such compensation claims under the local procedure in force on each Railway Administration, such as the Chief Commercial Superintendent, provided such notice is within the time limits prescribed". So, the rule itself is the answer. The mention of the Chief Commercial Superintendent is illustrative, not exhaustive. The Refunds Officer, as the very designation implies, deals with claims for such refunds. On top of that, such a one is specifically authorized to receive notice of claims for refund. So it is not a defective notice even. Rule 5 and Appendix B stand together. Not that they run against one another.

8. Fourth: Rule 8 and Appendix A do no more than indicate the location of various claims offices to assist the convenience of the public. They do. But I am going by rule 9 and Appendix B which list the officers competent to receive notices of claims for refunds.

9. Fifth: Rule 13 prescribes: intended only for the guidance of the public and without any statutory authority, the rules in the pamphlet must yield, in case of conflict, in favour of the Railways Act or any statutory instrument. Who has ever denied that? But no conflict is there. What is there instead is a complete harmony. Sections 78-B and 140 no doubt prescribe service of notice of claim upon the Manager or the Chief Commercial Superintendent. The non-statutory rules (rule 9 read with Appendix B) prescribe that, amongst other things, service of notice of claims upon the Refunds Officer will suffice, making such officer the ad hoc agent of the Manager, the Chief Commercial Superintendent and indeed the railway administration, and satisfying thereby the requirement of Sections 78 B and 140. Notice to an agent is notice to the principal. That is all. To get an agent, no statutory rule is needed. Even a word of mouth is enough. And here enough is enough: a solemn publication under the high authority of the Ministry of Railways.

10. Sixth: what is required is delegation or authorization by the General Manager or the Chief Commercial Superintendent but what you find here is such delegation by the Ministry of Railways. Is the Union of India, the opposite party before me, then disowning its Ministry? I hope not. Otherwise the Union of India or its railway ministry will have put upon it the slur of laying a trap for the unwary public with a view to defeating their legitimate claims. I shall not allow a stigma as this to be put upon either, unless I am compelled to do so, upon overwhelming evidence. There is nothing like that here. At all events, such authorization stands, all concerned

having acquiesced in it, as indeed they were bound to.

11. Seventh: at page 22 of the pamphlet, a specimen of a notice of claim is given. A sample letter as this is to the address of the Chief Commercial Superintendent. Why write then to the Refunds Officer? The same answer: that, by Appendix B, the Ministry of Railways directs that the Refunds Officer, as also the General Manager, the Chief Commercial Superintendent and others, shall be competent to receive notices of claims. Hence, the notice of claim in the case in hand has been addressed so.

12. This exhausts all I have been addressed by Mr. Basu on the Principal Rules and Procedure for the Preferment and Disposal of Claims on Railways, as the heading of the pamphlet is. And it has not been possible for me to accept any one of his contentions.

13. The authorities Mr. Basu cites are no doubt there. But they are not the only authorities. Indeed, there are authorities both ways. Surendra Nath v. Governor-General in Council, AIR 1952 Cal 341, holds that the sending of a claim to the Chief Transportation Manager is not sufficient compliance with the then Section 77: almost just the opposite of what has been held in that well-known case, Srishtidhar Mondal v. Governor-General in Council, AIR 1945 Cal 412: 49 Cal WN 240, approved, for example, in Union of India v. Gujarat Tobacco Co., 59 Cal WN 278 = (AIR 1955 Cal 448), Mr. Roy Chowdhury refers me to, and dissented from in other cases too. In Radhamadhab Kundu v. Union of India, (1957) 61 Cal WN 433, it is held that the requirements of the then Section 77 are satisfied if the claim is preferred in writing to the duly authorized agent of the Manager, that is, the General Manager (the Chief Commercial Manager in that case). There the General Manager issued a public notification conferring such authority. Here the superior authority of the General Manager, namely, the Ministry of Railways, has issued the public notification. Is the difference much? Not very. In Niranjan Lal Agarwalla v. Union of India, 65 Cal WN 876 = (AIR 1962 Cal 42), the notice under Section 77 goes down, because there is nothing to show that the Chief Commercial Manager was held out, expressly or by implication, as the officer authorized to receive the notice. In the case on hand, the Refunds Officer was expressly held out so. Mohanlal Shrilal Mohatta v. Union of India, (1965) 69 Cal WN 614 does no doubt favour Mr. Basu's point of view. But, apart from the fact that there are authorities the other way round, what is found in the case on hand, on the basis of the pamphlet, is not modification of

the statute, as Chatterjee, J. finds in Mohatta's case, but a clear holding out of an ad hoc agent to receive the requisite notice, satisfying thereby the requirements thereof (Sections 78B and 140), in so far as the Refunds Officer is authorized to receive such notices. The last case cited by Mr. Basu is Jiban Ram Agarwalla v. Union of India, (1965) 69 Cal WN 692, which strikes down a notice dated August 20, 1953, (long before the 1961 Amendment), under Section 77 to the Chief Commercial Superintendent who, however, was not held out by the Railway administration as authorized to receive such notices of claims, in the manner in which the Refunds Officer has been held out in the case in hand.

14. Thus, most of the authorities, Mr. Basu refers me to, cannot alter the conclusion I have come to, on the Refunds Officer having been held out by the railway administration as the duly authorized person to receive notices of claims for refunds. The more so, as the intention behind Section 78B (formerly Section 77) is only to afford protection to the railway administration against fraud and not to provide means for depriving the consignors of their legitimate claims: Jethmull Bhojraj v. Darjeeling Himalayan Rly. Co. Ltd., AIR 1962 SC 1879. Such provision must, therefore, be construed liberally. Having construed it so, G. K. Mitter, J. (as his Lordship then was) held a notice in 1953 to the Chief Commercial Superintendent, an officer standing very high in the hierarchy of officials in the administration, to be good notice at law, though his Lordship's observation is in the nature of an obiter dictum, as is apparent from the concluding portion of his judgment: Union of India v. Alliance Assurance Co. Ltd., AIR 1967 Cal 47. The case before me appears to be so much the stronger, because of the Refunds Officer having been openly held out as the authorized person to receive the notice of claim, no less because of the railway administration having inquired into the claim in suit, presumably on the basis of the notice of claim to such a one just as the Union of India avers in paragraph 5 of its written statement:

"The defendant, however, states that enquiries regarding the suit consignment are still in progress"

certainly not enquiries suo motu.

15. Having regard to the foregoing considerations, I find that the learned judge has acted, with illegality, in holding the service of notice upon the Refunds Officer to be bad at law.

16. On the finding by the learned judge that an excess freight of Rs. 203.95 has, in fact, been realized, a remit is prayed for, on behalf of the Union of India, so that it may be shown that, far from an excess freight, there has really,

been a short levy. A prayer as this is rested on the affidavit in opposition (filed here), which, again, is rested on the official publication known as the Goods Tariff. It appears to be worthy of note that the Union of India contested the suit, but led no evidence at the trial, save the notice under Section 80 of the Procedure Code (exhibit A). Worse, not even the original railway receipt, the credit note, and various other important documents called for by the petitioner on November 26, 1965, from the defendants, were produced. The Port Commissioners' letter of March 18, 1966, exhibit 4, admits erroneous realization of freight and in excess too. The oral evidence on behalf of the petitioner is there as well. In the face of all this, to direct a remit is to pamper a litigant much too much, the more so, as the explanation for having not led evidence at the trial as set out in paragraph 7 of the affidavit in opposition (that they were not ready with materials and documents), explains little save amazing negligence and incompetence. The Union of India entered appearance on August 13, 1965 and the suit was heard in April and May 1966. The remand prayed for appears, therefore, to be out of the question. The finding of fact come to by the learned judge must stand.

17. In the result, the rule succeeds so and is made absolute with costs against the opposite party Union of India only. Hearing fee—5 gold mohurs. The petitioner's suit in the Court below be decreed on contest with costs against the said opposite party Union of India only. The rule do stand discharged without costs against the other opposite party.

BNP/D.V.C. Rule made absolute.

AIR 1969 CALCUTTA 43 (V 56 C 9)

P. B. MUKHARJI, J.

Aktiebolaget Jonkoping Vulcan, Appellant v. V. S. V. Palanichamy Nadar and others, Respondents.

A. F. O. O. No. 232 of 1966, D/- 6-6-1968.

(A) Trade and Merchandise Marks Act (1958), S. 46(1) — "Person aggrieved" — Company 'A' being in the trade with a trade mark identical with the registered one of Company 'B' — 'B' threatening 'A' with legal consequences if the latter does not desist using the registered mark — 'A's application for registering the trade mark in its name being opposed by 'B' — 'A', held, a "person aggrieved" within the meaning of S. 46(1) — 'A' could therefore seek to cancel the trade mark registered in the name of 'B'. (1894) 11 RPC 77 and (1894) 11 RPC 4 and (1889) 6 RPC

GL/HL/C860/68

493 and (1943) 60 RPC 147 and (1891) 8 RPC 137 and (1884) 26 Ch D 48, Rel. on. (Paras 6 to 8)

(B) Trade and Merchandise Marks Act (1958), Ss. 46(3) and 12(3) — Scope and applicability — "Special circumstances" meaning.

For S. 46(3) to apply, the actual non-user of the trade mark must be shown to have been due to the special circumstances of the trade and secondly that non-use must be not due to any intention to abandon or not to use the trade mark in relation to the goods to which application relates. (Para 11)

The expression "special circumstances in the trade" has been held to mean not any special circumstances merely attendant on or attached to any particular individual business. It must be a kind of special circumstances for all the trade in those particular goods. The non-use must be due to certain external forces such as the war or prohibitive tariff and not due to any voluntary act or omission on the part of the trader. This plea of "special circumstances" as the cause of the non-user is really a defence in the nature of frustration in a contract. Special circumstances like frustration should not be induced by the proprietor himself nor can it be individual or personal. It must always be circumstances beyond his control and for which he is not responsible in any way. Again, such "special circumstances" must be the direct cause of the non-use. If the non-use is due to other causes apart from special circumstances then the special circumstances cannot be availed to overcome the handicap of non-use of the statutory period of five years. The user or non-user in territories outside India cannot bring the case within S. 46(3) of the Act.

(Paras 12, 14 & 19)

A Madras Match Company was in the trade since 1951-52 using the trade mark identical with the one registered of which the owner was a Swedish Match Company. The Swedish Company failed to prove that its trade mark had been in use in India at least since about the time when it was registered in the year 1944. However, it pleaded that its non-use was due to 'special circumstances', in that the import of foreign matches was almost totally prohibited even since a few years before it was registered. Considering the facts that the Swedish Company's registration of the mark in 1944 was with full knowledge of uselessness of such registration in view of the total prohibition, that the Company had not proved by overt acts any intention to use the mark by publicity, advertisement or at least user in Consulates of Sweden operating in India and that there was in fact no such total prohibition as alleged, it was held that the Swedish Company could

not avail of the provision under S. 46(3) and that its registration was liable to be cancelled on an application by the Madras Match Company. But taking into consideration the subsequent event, viz., the concurrent registration of the trade mark used by the Madras Match Company, the court confirmed such concurrent registration imposing certain conditions on the use of trade mark by the parties. (1898) 2 Ch D 432 and (1921) 38 RPC 155, Foll.; (1944) 61 RPC 31 and (1932) 49 RPC 621, Rel. on; (1949) 66 RPC 71 and (1950) 67 RPC 95 and (1946) 63 RPC 161 and (1884) 26 Ch D 398, Dist. (Paras 6, 14, 18, 19, 26, 29, 31, 39, 41, 47 & 53)

(C) Trade and Merchandise Marks Act (1958), Preamble, Ss. 46, 1(2), 2(v) and "International Convention for the protection of Industrial property" revised in Lisbon in 1958, Art. 6 — "Use" is use within India.

Use abroad and advertisement abroad outside the place where the mark is registered are not material. On principles as also on the interpretation of the statute, it must be held that the trade mark law is not extra-territorial and, therefore, use abroad in foreign countries under foreign registration cannot be used within the meaning of the Indian Trade and Merchandise Marks Act. The preamble to the Act says that it is for registration and better protection of trade marks and for prevention of the use of fraudulent marks on merchandise. The preamble and S. 1(2) state that the Act extends to the whole of India. The definition of a trade mark in S. 2(v) speaking of use in relation to goods must be understood as use within the territory of India and not use abroad. Further, under Art. 6 of the 'International Convention for the protection of Industrial property', each of the national trade mark is to be considered as independent. (1955) 72 RPC 191 and (1913) 2 Ch D 291 and (1898) 2 Ch D 432 and (1951) 68 RPC 103, Rel. on. (Paras 20 & 27)

(D) Trade and Merchandise Marks Act (1958), Ss. 46(1)(e) and 46(3) — Burden of proof.

When in proceedings under S. 46(1)(e) non-use for the statutory period of five years is admitted as a fact then the defence that the non-use is due to special circumstances under S. 46(3) of the Trade and Merchandise Marks Act, 1958 must be proved by the party taking the defence. The onus of proving it is upon that party taking the defence of "special circumstances". (1932) 49 RPC 621, Rel. on. (Para 40)

(E) Trade and Merchandise Marks Act (1958), S. 46 — Rectification — Question is not so much between the applicant and the respondent as between the public and the respondent — Court or the Registrar

therefore, has full discretion in granting or refusing the relief. (1950) 68 RPC 168, Rel. on. (Para 46)

(F) Trade and Merchandise Marks Act (1958), Ss. 46, 56(3) and 109(6) — High Court has as much power as the Registrar in proceedings under S. 46 to impose appropriate limitations, conditions and directions. (Para 52)

Cases Referred: Chronological Paras
(1955) 72 RPC 191, In the matter of Ford-Werke AG's Application for a Trade Mark 21
(1951) 68 RPC 103=1951 WN 195, De Cordova v. Vick Chemical Co. 23
(1950) 67 RPC 95, Lomette Case; Gardinal Chemical Co.'s Application 42, 45

(1950) 68 RPC 168, In re Noblitt Spark's Industry's Application 46

(1949) 66 RPC 71=1949 Ch 208, Aktieblaget Manus v. R. J. Fullwood & Bland Ltd. 13

(1946) 63 RPC 161, Black Flag case, In the matter of David Thom & Co. Ltd. 44, 45

(1944) 61 RPC 31, In the matter of Application of John Taylor Peddie 17

(1943) 60 RPC 147, In re Marshall's Application 7

(1932) 49 RPC 621, In the matter of Columbia Gramophone Co. Ltd. 40

(1927) 44 RPC 27=1927 AC 406, In re Reddaway & Co's Application 23

(1927) 44 RPC 405, Impex Electrical, Ltd. v. Wein Bawn 23

(1925) 42 RPC 397=1925 Ch 693, In re Reddaway & Co's Application 23

(1921) 38 RPC 155, In the matter of a Trade Mark of James Crean & Sons Ltd. 34, 41

(1913) 1913-2 Ch D 291=108 LT 966, In re Neuchatel Asphalte Co's Trade Mark case 22, 26

(1898) 1898-2 Ch D 432, In re Batt & Co's Trade Mark 22, 24

(1894) 11 RPC 4, In re Powell's Trade Marks 7

(1894) 11 RPC 77=63 LJ Ch 264, In re Talbot's Trade Mark 7

(1891) 1891-2 Ch 186=8 RPC 137, In re Apollinaris Co's Trade Marks 7

(1889) 6 RPC 493, In re Batt's Trade Mark 7

(1884) 26 Ch D 48=53 LJ Ch 578, In re Rivere's Trade Mark 7

(1884) 26 Ch D 398, Mouson & Co. v. Boehm 15

B. Sen and Tapas Banerjee, for Appellant; D. K. De and D. P. Mukherji, for Respondents.

JUDGMENT: This is an appeal under S. 109(2) of the Trade and Merchandise Marks Act, 1958 from the decision of the Deputy Registrar of Trade Marks dated the 22nd June, 1966, allowing the application for rectification made by the

respondent and expunging the appellant's trade mark No. 93017 in the Trade Marks Register.

2. The appellant is a Swedish Match Company of the name of Aktiebolaget Jonkoping Vulcan having its office in Sweden. The respondents are Gnanam Match Works of Sivakasi, Madras along with the Registrar and Deputy Registrar of Trade Marks. For the sake of brevity I shall call the appellant as 'the Swedish Match Company' and the other respondent as 'the Madras Match Company.'

3. The dispute is with regard to the use of a trade mark in respect of matches and match boxes. The impugned registration is that of the Swedish Match Co. It is a label containing the device of three stars in a row with the words "Three Stars" on the top of the device of three stars. The registration was dated 24th February 1944 and has since been renewed. The mark of the Madras Match Company is also a "Three stars" label which has been in actual use since 1951 in respect of safety matches.

4. The present proceedings arose out of an application filed on the 5th September 1963 by the Madras Match Company for rectification of the register by expunging therefrom the entry relating to trade mark No. 93017 registered in Class 34 originally in the name of Jonkoping Och Vulcans Tandstickfabriksaktiebolag now changed into the appellant's name. In that application the respondent Madras Match Company claimed that they had been extensively using this trade mark of Three Stars on safety matches ever since 1951. The Madras Match Company also made an application for registration of their trade mark on the 4th June 1963. The close similarity between these two trade marks is now the centre of dispute. The Swedish Match Company served the Madras Match Company with a notice dated the 8th August 1963 calling upon them to desist from using their 'Three Stars' label mark which was described as a colourable imitation of the Swedish Match Co's registered trade mark.

5. In these proceedings the Madras Match Company are seeking the cancellation of the registration of this trade mark of the Swedish Match Company on the ground, based on S. 46(1)(b) of the Trade and Merchandise Marks Act, 1958, that there had been no bona fide use of the registered trade mark by the Swedish Match Company for the statutory period of a continuous stretch of five or more years upto one month before the date of the application for rectification. On behalf of the registered proprietors of the trade mark, namely the Swedish Match Company, two points have been urged. The first is that the Madras Match Com-

pany is not a "person aggrieved" who can competently maintain an application for cancellation of the appellant's registered trade mark. The second is that the non-use of the registered trade mark of the Swedish Match Company during the material period was due to special circumstances in the trade. Those special circumstances are alleged to be import restrictions of foreign matches amounting to total prohibition, and not due to any intention on the part of the Swedish Match Company to abandon its trade mark. The defence of the Swedish Match Company is really based on the provisions of S. 46(3) of the Trade and Merchandise Marks Act, 1958.

6. I shall briefly dispose of the first point, namely the contention that the Madras Match Company is not a "person aggrieved" within the meaning of Section 46(1) of the statute. The facts relevant for this purpose are briefly as follows:— The Madras Match Company has been in the trade with this trade mark of "Three Stars" on their matches identical with the registered trade mark since the year 1951-52. The second fact is that the Swedish Match Company has served the Madras Match Company with a notice in 1963 threatening them with legal consequences, if they did not stop using their trade mark. The third fact is that the application for registration of the trade mark filed by the Madras Match Company had actually been opposed by the registered proprietor, viz., the Swedish Match Company.

7. I am satisfied on these facts that the respondent Madras Match Company is a "person aggrieved" within the meaning of Section 46 of the Trade and Merchandise Marks Act, 1958. In support of this conclusion I rely on the principle laid down in *re Powell's Trade Marks*, (1894) 11 RPC 4 and *In re Talbot's Trade Mark*, (1894) 11 RPC 77 that any person whose legal rights are limited by the existence of the entry on the register so that he could not lawfully do that which but for the existence of the mark upon the register, he could lawfully do. Indeed, it has been held in *In re Batt's Trade Mark Case*, (1889) 6 RPC 493 and *In Marshall's application* in (1843) 60 RPC 147 specially at page 151 that an applicant for registration whose trade mark has been refused by reason of prior registration by the respondent of the same or similar or identical mark for the same goods or description of the goods or whose application for registration is opposed on the basis of prior registration of the same or similar mark by the respondent, has been regarded as a "person aggrieved". See also *In re Appollinaris Co's Trade Marks*, (1891) 2 Ch 186 corresponding to 8 RPC 137 and *In re Rivire's Trade Marks*, (1884) 26 Ch D 48. On the facts stated

above, I am therefore convinced that the Madras Match Company satisfies the tests laid down by these authorities to come within the meaning of the expression "any person aggrieved" in Section 46 of the Trade and Merchandise Marks Act, 1958.

8. I therefore uphold the decision of the Registrar on this point and hold that the Madras Match Company is a "person aggrieved" and can maintain this application for cancellation of the registration of the mark of the Swedish Match Company.

9. The main point for determination in this appeal is the defence of the Swedish Match Company under Section 46(3) of the statute pleading "special circumstances" in the trade as the cause of the non-use of the registered trade mark belonging to the Swedish Match Company.

10. According to the traditions of trade mark appeals in this Court, here also a massive number of trade mark decisions and authorities have been cited from the Bar on this point. I shall notice a few of these decisions.

11. Before I do so it will be appropriate to quote the relevant language of Section 46(3) of the Trade and Merchandise Marks Act, 1958 which inter alia uses these words:

"Any non-use of a trade mark which is shown to have been due to special circumstances in the trade and not to any intention to abandon or not to use the trade mark in relation to the goods to which the application relates".

On an interpretation of the above language of Section 46(3) of the statute certain points are abundantly clear. The actual non-use of the trade mark must be shown to have been due to the special circumstances of the trade. Secondly, that non-use must be not due to any intention to abandon or not to use the trade mark in relation to the goods to which the application relates. Bearing these express words in Section 46(3) of the statute it will be useful to look at the authorities, mostly English, which have been cited from the Bar on this point.

12. The expression "special circumstances in the trade" has been held to mean not any special circumstances merely attendant on or attached to any particular individual business. It must be a kind of special circumstance for all the trade in those particular goods.

13. On behalf of the appellant, Mr. Sen relied on two main decisions. The first case is *Aktiebolaget Manus v. R. J. Fullwood & Bland Ltd.*, reported in (1949) 66 RPC 71. This was a dispute with regard to the trade mark of the milking machine of Sweden. Its essential feature was the word "Manus." One of the contentions in that case was that war restrictions provided the special circumstances in the trade. It was held that the

war restrictions did constitute "special circumstances in the trade" within the meaning of S. 26(3), British Trade Mark Act 1958. At p. 79 of the Report, Evershed L. J. made the following observations relating to 'special circumstances in the trade' in these terms:

"But even if the word be extended so as to comprise also English manufacturers, I am unable to accept the defendant's arguments: for though the phrase in question may or may not be apt to cover the case of a calamity suffered exclusively by a particular trader — e.g. if his factory were destroyed by fire or bombs — it is not in my view necessary that the 'special circumstances' should be such as to afflict all traders equally or indeed to afflict all of them at all. It is important to my mind to note that the relevant phrase is used in contrast to that which immediately follows — 'and not any intention not to use or to abandon the trade mark.' In that context, it seems to me (without attempting any precise definition) that the words must be taken to refer to circumstances which are "special" in the sense of being peculiar or abnormal and which are experienced by persons engaged in a particular trade as a result of the working of some external forces as distinct from the voluntary acts of any individual trader. According to such a test, no less than (in my view) the ordinary and commonsense meaning of the words the impact of war conditions making impracticable the ordinary usages of international trade would amount to 'special circumstances' in the trade; and if the non-user of his marks by a particular trader was in fact due to the effect upon his business of those conditions, then he would in my view be within the protection of sub-section (3).

The case was put by Somervell L. J., in the course of the argument of the imposition of prohibitive tariffs practically effective to keep out of England altogether machines manufactured abroad. It is clear that such a tariff would strike hardest at those manufacturers who had no means of manufacturing in England and would, as it would be intended to do, immensely benefit English manufacturers; and whether or not the words "the trade" be given their widest significance, the effect of such a tariff would in my judgment amount to 'special circumstances in the trade'."

14. Now, this exposition of 'special circumstances in the trade' as being the cause of the non-use of the trade mark emphasises the aspect that the non-use is due to certain external forces such as the war or prohibitive tariff and not due to any voluntary act or omission on the part of the trader. This case was a war time case. Evershed L. J. at p. 74 points out that the dispute owes its origin to the

1969

A. J. Vulcan v. V. S. V. Palanichamy (P. B. Mukharji J.)

war and the severance that the war imposed for its duration of the relationship with the parties in the litigation. It was as a result of that severance that the dispute arose when one of the parties proceeded to manufacture milking machines and claimed the right to continue the use of the name "Manus" to machines of their own manufacture altogether independently of the registered traders and their business. But this case was a case where there was a prior and previous use which was interrupted by the war which was regarded as a special circumstance as being the cause of the non-use. That point distinguishes the present appeal before me for there was no use whatever of the trade mark of Swedish Match Co. at any relevant time in India for the Indian market although it was registered with the Indian Registrar of Trade Marks.

15. The other case on which reliance was placed on behalf of the appellant was *Mouson & Co. v. Boehm*, reported in (1884) 26 Ch D 398. This authority lays down certain very important and significant principles. In the first place, it lays down the principle that mere discontinuance of user for lack of demand, even coupled with non-registration and non-assertion of the right, is not enough and it is necessary that there must be evidence of a distinct intention to abandon. In other words, the two principles are: first, mere non-user is not enough; and secondly, a distinct intention to abandon must be shown. Therefore, if the requisite period of non-user for 5 years under the Statute co-exists with an intention to abandon the use of the mark, then the mark can be struck off. This was not a war time case or even a case of prohibitive tariff. It was a case of fall or decline in the trade in the ordinary economic process of a number of years. Chitty J. at p. 405 said: "Now on the question of abandonment, it appears to me that intention to abandon must be shown." But he lays down also the principle at the same page, viz.: "In substance therefore the question of abandonment is one of intention to be inferred from the facts of the particular case." The learned Judge was satisfied in the facts of that particular case that this intention had not been proved. Chitty J. found the following facts there, viz. (1) retention of the mark; (2) the owner did not break up the moulds; (3) he did not even erase the trade marks from his books; (4) there were persons in the market who got the goods from him who were endeavouring to effect sales; and (5) he did not give up the business to which the trade mark belonged. See the observations of Chitty J. on these specific points of facts at p. 405 of the Report. Finally, at page 406 Chitty J. actually found as follows:

"Here it appears to me that there was no absolute non-user for any sufficient time, taken in connection with all the circumstances, to show an intention to abandon. A man who has a trade mark may properly have regard to the state of the market and the demand for the goods; it would be absurd to suppose he lost his trade mark by not putting more goods on the market when it was glutted. There was some user and the result therefore is that he has not abandoned his trade mark."

16. *Mouson's* case is important because in the first place, it lays down that mere non-user which can be explained by many causes is not enough but it has got to be supported by an intention to abandon the trade-mark or its use before the registered trade-mark is cancelled. Secondly, it lays down the type and nature of evidence from which the intention has to be inferred one way or the other. Here again the fact is that the evidence in the present appeal before me does not show any user whatever and that is the finding of the Registrar of Trade Marks.

17. At this stage I must notice one other case in the Matter of application of John Taylor Peddie, reported in (1944) 61 RPC 31. One of the points decided there was that the adoption and use by trader of a mark may be despite his knowledge of a similar mark already in the Register and that a short period of concurrent use in combination with other special and exceptional circumstances may enable a trade mark to be registered despite the presence in the Register of a closely resembling mark. That case also decided that a bona fide intention on the part of an applicant to use, when circumstances permit, a mark temporarily debarred from use because of prevailing difficulties and uncertainties in trade is sufficient, apart from other circumstances, to justify an application for registration. This however is a decision of Dr. Lindley, the Comptroller General sitting as a Registrar of Trade Marks. This was a war time case relating to the period 1941-42. The course adopted in Peddie's application is relevant having regard to the order that I propose to make at the end of this judgment.

18. For the appellants *Swedish Match Company* the facts definitely are against their contention. I shall briefly summarise the facts. The first fact is that they chose a time to register their trade mark in India when according to their own affidavit, namely paragraph 5 of the affidavit of Anil Chandra Daphtary affirmed on the 6th October 1964, the severe import restrictions amounted practically to prohibition even from 1942. The registration, therefore, by the *Swedish Match Company* of their trade mark in India

on the 24th February 1944 was at a time when there was almost total prohibition on imports of foreign matches. To quote the language of Anil Chandra Daphtary this is what he says:

"To my knowledge, the import of matches into India from the year 1942 has been subject to severe import restrictions amounting practically to prohibition."

To the same effect is the affidavit of Mr. Walter Emanuel Thulin, the Managing Director of the appellant when he says in paragraph 11 of his affidavit affirmed on the 3rd September, 1964, "I state that, on account of Government's policy regarding the import of matches of foreign manufacture, the matches of Jonkoping under their Registered Three Stars label could not be sold in India during the relevant period". The second fact is that the Indian market was completely closed for all practical purposes against any use by the appellant company of its foreign matches in the Indian market. Registration therefore, of the Swedish Match Co's mark on the 24th February 1944, knowing that there was a virtual prohibition of importation of all foreign matches was unfortunate in its effect on its probable use. The only excuse, not proved, might have been that the appellant thought that those restrictions in 1944 were temporary. But such a thought is also without substance because according to its own affidavit quoted above it had already gone on for more than two years. It was still possible I suppose for the appellant to think that when the war would be over, for at the time when the registration took place the last Second World War was on, there would be relaxation with regard to these imports. However, reasonable that thought may be it can only be a matter for speculation. The third fact is that throughout these long number of years, until today 1968, a period of about 24 years this mark has been a dead mark. It was an abortive registration. Except that it appears on the Indian Trade Mark register and has been renewed from time to time during these years, this mark has never been in use in the Indian market in respect of the matches of the Swedish Match Company for which it was registered. There is no association in the mind of the Indian public that this mark of the appellant Swedish Match Company is a mark associated with it.

19. If it wanted to show its intention not to abandon the mark, it could at least have issued some publicity or advertisement from time to time but there has been no publicity and no advertisement during these 24 years. There is no proof or no instance of any sale or use of the appellant's matches with this trade mark, not even use in the embassies and

consulates of Sweden operating in India. There is not even use by way of samples or otherwise. In fact, there is no evidence of any use almost anywhere in the Indian market. Some vague suggestion has been made that this match with this trade mark was used in Goa when it was a Portuguese territory. But use of the Indian registered trade mark in territories outside India cannot help. It may be pointed out here that there is no evidence that since the merger of Goa with India there has been any use of this trade mark by the appellant on its matches even in Goa, as naturally there could not be under the Indian prohibition.

20. Use abroad and advertisement abroad outside the place where the mark is registered are not of any assistance to the appellant, even if it was established in fact that there was such a foreign use, although even that fact has not been proved or brought on record.

21. In the Matter of Ford-Werke AG's Application for a Trade Mark, reported in (1955) 72 RPC 191, Lloyd-Jacob J. at p. 195 observed as follows:

"No use in this country has been claimed but reliance is placed on user and registration abroad, the association of the applicant Co. with a larger and more extensive organisation of world-wide activities operating under a name of which the word "Ford" forms part, the international aspect of the motor car industry, as well as upon the features of the mark applied for as constituting circumstances which establish a factual adaptability of this mark to distinguish the appellants' goods. In my judgment, such factual adaptability must be in respect of the market in the U. K. and of export therefrom; so that in the absence of information as to the conditions obtaining in overseas territories, no material exists whereby experience abroad can be accurately related to the British Market. This sub-section (Section 9(3)(a)(b)) of the British Trade Marks Act 1938 does not therefore assist the applicants in the present case."

22. Similar observations are also to be found in re Neuchatel Asphalte Co's Trade Mark case, reported in (1913) 2 Ch D 291. Sargant J. in Neuchatel's case, 291 at pp. 301-2 of that report followed the observations of Lindley M. R. in Re Batt and Co's trade mark case, reported in (1898) 2 Ch D 432 at p. 439, where the learned Master of the Rolls observed "A question of law then arises which may be stated shortly as follows: "Can a man properly register a trade mark for goods in which he does not deal or intend to deal?" that must mean "deal or intend to deal in this country" — "meaning by intending to deal having at the time of registration some definite and present intention to deal in certain

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All India Reporter

1969

Delhi High Court

AIR 1969 DELHI 1 (V 56 C 1)

I. D. DUA, C. J. AND V. S.
DESHPANDE, J.

M/s. Indian Pan Works, Delhi, Petitioner
v. The Chief Commissioner, Delhi and
others, Respondents.

Sales Tax Case No. 4-D of 1962, D/-24-
5-1968.

(A) Constitution of India, Articles 227,
226 — Natural justice — Violation of —
Quasi judicial order — Application for re-
ference under Sec. 21 (1), Bengal Finance
(Sales Tax) Act, 1941, without court-fee
stamp — Copy of order challenged not en-
closed — Application entertained by over-
sight but subsequently rejected ex parte —
Principles of natural justice as to right of
audi alteram partem violated — Case fit for
interference by High Court under Art. 227.

Article 227 of the Constitution confers on
the High Court power of general superinten-
dence to be exercised in its judicial discre-
tion with the object of keeping all Courts
and Tribunals within the bounds of their
authority and seeing that they perform their
legal duty in a legal manner. Where the
cause of justice is seriously jeopardised, the
exercise of this power may take the shape
of constitutional obligation. (Para 5)

The fundamental rule of Natural Justice,
that "a man has right to be heard", express-
ing in final analysis, as it does, respect en-
forced by law for the feeling of just treat-
ment, evolved through centuries of British
and American constitutional history and
adopted and developed in our Republic
through years of Indian Constitutional
history, represents a profound attitude of
fairness between man and man and parti-
cularly between individual and the Govern-
ment. This Rule is not confined only to the
Courts strictly so called, but takes within
its sweep all quasi-judicial functions and to

an extent even administrative acts, for, to
give every citizen a fair hearing is just as
much a canon of good administration as a
good legal procedure. (Para 4)

An application under Sec. 21 (1), Bengal
Finance (Sales Tax) Act, 1941 without the
required court-fee stamp and a certified
copy of the order challenged was entertain-
ed by the Chief Commissioner's Office but
subsequently rejected ex parte. Held, the
application should not have been entertain-
ed by the Chief Commissioner's office and
if it was entertained by oversight, it should
have been returned. After having entertain-
ed the application, rejecting the same with-
out giving notice to the applicant and afford-
ing him a chance to be heard, violated
principles of natural justice. (Paras 3, 4)

Merely because the Chief Commissioner
was the executive head of the Union Terri-
tory of Delhi did not absolve him of the
obligation of complying with the rule of
natural justice of affording adequate hearing
to the petitioner before finally disposing of
his application under Section 21 of the
Bengal Finance Act which essentially involv-
ed a judicial function. (Para 4)

(B) Civil P. C. (1908), O. 1, R. 10 —
Misdescription of parties — Sales tax case
against Chief Commissioner of Delhi —
After formation of Delhi State Lt. Governor
taking place of Chief Commissioner during
pendency of proceedings — Omission to
move the Court for amendment so as to have
the Lt. Governor substituted in place of
Chief Commissioner — Held, indicative of
want of care and attention. (Para 6)

S. P. Saini, for Petitioner; K. S. Chawla,
for Respondents.

ORDER: This case came up before us
on 1-5-1968 when we felt that it was a fit
case in which we should consider the ques-
tion of exercising the power of this Court
under Article 227 of the Constitution for
scrutinising and, if necessary, of quashing

the order of the Chief Commissioner dated 2-8-1962 rejecting the application for reference to the High Court made under Section 21 (1) of the Bengal Finance (Sales Tax) Act, 1941.

2. On going through the record, which we had sent for, we find that on 28-7-1962, an application was presented by the petitioner M/s. Indian Pan Works through Shri S. P. Saini, their counsel, in the office of the Chief Commissioner under Section 21 (1) of the Bengal Finance (Sales Tax) Act, 1941, praying for reference to the High Court three questions of law formulated therein. This application did not bear any court-fee stamp, but this deficiency notwithstanding, it was actually entertained by the office of the Chief Commissioner. Along with the application, was attached a challan showing deposit of Rs. 100. It appears that without giving any notice to the petitioner, Shri Bhagwan Sahay, the then Chief Commissioner, recorded on 2-8-1962 the following order underneath the typed office note stating the facts of the case:—

"No question of law has been mentioned which needs reference to the Hon'ble High Court. The petition is unstamped and even a copy of the order referred to has not been filed. The petition is rejected".

Now, it seems that the office of the Chief Commissioner had not raised any objection either on the ground of absence of court-fee stamp on the application or on the score of a certified copy of the order made by the Chief Commissioner on 29-5-1962 on revision having not been attached with the application. From the record, however, it is clear that on 3-8-1962, Shri S. P. Saini, Advocate produced a certified copy of the order of Shri Bhagwan Sahay, Chief Commissioner dated 29-5-1962 in "case No. 92/1961 Court Appeal", with a covering letter. On that letter, we find a note dated 6-8-1962 to the following effect:—

"The petition has since been rejected by the C. C. 2-8-62. Place this on the relevant file".

The date "2-8-1962" appears to have been added after this note was recorded.

3. The facts just noticed clearly show that the office of the learned Chief Commissioner and the learned Chief Commissioner himself had both dealt with this matter in a manner which can by no means be considered to be either satisfactory or judicial. As soon as the application was presented in the office of the Chief Commissioner, it was, in our opinion, incumbent on the officer, entrusted with the duty of receiving it, to check up and satisfy himself if the petition was complete in all respects, including affixation of proper court-fee stamp and production of certified copy of the requisite order. In case it did not bear the court-fee and was not accompanied with a certified copy of the order, assuming such a copy and court-fee were necessary, it should have been declined to be entertained or received,

and in the event of its having been entertained by oversight, returned to the applicant to be refiled after complying with the requirements of law. To entertain such an application without noticing and disclosing to the petitioner, the defects therein and to keep it on the record, discloses lack of due sense of responsibility on the part of the officer concerned. We are assuming that he was aware of his duties and of the requirements of law for appropriately moving the learned Chief Commissioner under Sec. 21 (1) of the Bengal Finance Act in question.

4. And, then having entertained this application, in our view, it was again a violation of the recognised rule of natural justice, requiring notice and opportunity of hearing, to have placed this case for disposal before the learned Chief Commissioner without giving to the petitioner prior notice of the date of hearing. It is a matter of surprise to us that an ex parte order should have been made by the learned Chief Commissioner rejecting the petitioner's application without giving him any prior notice for hearing fixed for 2-8-1962 and without granting him adequate opportunity to be heard. Merely because the Chief Commissioner was the executive head of the Union Territory of Delhi did not absolve him of the obligation of complying with the rule of natural justice of according adequate hearing to the petitioner before finally disposing of his application under Section 21 of the Bengal Finance Act which essentially involved a judicial function. This fundamental rule of natural justice, that "a man has a right to be heard", expressing in final analysis, as it does, respect enforced by law for the feeling of just treatment, evolved through centuries of British and American Constitutional history and adopted and developed in our Republic through years of Indian Constitutional history, represents a profound attitude of fairness between man and man and particularly between individual and the Government. As this rule embraces the whole notion of fair procedure, it is not confined only to the Courts strictly so-called, but takes within its sweep all quasi-judicial functions and to an extent even administrative acts, for, to give every citizen a fair hearing is just as much a canon of good administration as a good legal procedure. Nothing is, in our view, more likely to conduce to just and right decision than the habit of first giving a hearing to any affected party and this element of fair procedure, it may be remembered, has its due place even in administrative justice.

5. In the case in hand, no justification has been offered on behalf of the respondent, for making the ex parte order nor has the exercise of suo motu power by this Court under Article 227 of the Constitution been questioned or disputed. This Article confers on this court power of general superintendence to be exercised in its judicial discretion with the object of keeping all Courts and Tribunals within the bounds of their

authority and seeing that they perform their legal duty in a legal manner. Where the cause of justice is seriously jeopardised, the exercise of this power may take the shape of a constitutional obligation. Such, in our view, is the position in the present case. We accordingly set aside and quash the impugned ex parte order with direction that the application under Section 21 of the Bengal Finance (Sales Tax) Act be disposed of in accordance with law in the light of the observations made above. We have no doubt that the question of permitting proper court-fee to be affixed as also the effect of producing on 3-8-1962 the certified copy of the order would also be considered in accordance with law.

6. Before finally closing, we cannot help observing that the petitioner should have moved this Court for amendment in the Memorandum of parties so as to have the Lt. Governor substituted in place of the Chief Commissioner when the constitutional change took place. Omission to do so, is indicative of want of proper care and attention which is not easy to appreciate. In the peculiar circumstances of this case, we make no order as to costs. On the view that we have taken, the Sales Tax Reference becomes infructuous and the same is declined as such. The record may be returned without avoidable delay.

Petition allowed.

NR/V.B.B.

AIR 1969 DELHI 3 (V 56 C 2)
OM PARKASH. J.

Thomas and others, Appellants v. Messrs. Hotz Hotels Ltd. and others, Respondents.
F.A.F.O. No. 32-D of 1959, D/-15-9-67, from order of Commercial Sub-J., First Class, Delhi, D/-19-1-1959.

Motor Vehicles Act (1939), S. 110-F — Bar of Civil Court's jurisdiction — Change of forum brought in by the provision operates retrospectively—AIR 1964 MP 133 Diss. — (Civil P. C. (1908), Preamble, S. 9).

Exclusion of jurisdiction of Civil Courts is not to be readily inferred and such exclusion must be either explicitly expressed or clearly implied. Section 110-F of the Motor Vehicles Act expressly bars the jurisdiction of a Civil Court to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for the area. (Para 8)

The right to sue for the recovery of compensation for injuries sustained in an accident being a vested right cannot be taken away retrospectively except by an express statutory provision. But the matter of enforcing that right in a Civil Court or in any other forum is only a matter of procedure. Since no one can have a vested right in procedure, the change in the law of pro-

cedure operates retrospectively and is not only prospective. The constitution of the Claims Tribunal does not take away the right of a claimant. It simply changes the forum for enforcing the right. After it has been constituted, claim for compensation for injuries sustained in a motor accident can only be filed before the Tribunal even if the accident had occurred before the constitution of the Tribunal. However, if the claim has already been filed in a Civil Court, before the constitution of the Tribunal, the Civil Court will continue to have jurisdiction to dispose of the claim: AIR 1964 Madh Pra 133, Diss.; AIR 1927 Pat 203, Dist. (Para 9)

Cases Referred: Chronological

(1965) AIR 1965 Punj 102 (V 52)=
66 Pun LR 1083, Unique Motor
and General Insurance Co., Ltd.
v. Kartar Singh 11

(1964) AIR 1964 Madh Pra 133
(V 51)=1962 Jab LJ 661, Sushma
Mehta v. Central Provinces Trans-
port Services Ltd. 12

(1927) AIR 1927 Pat 203 (V 14)=
ILR 6 Pat 296, Gursaran Das v.
Parmeshwari Charan 13

Mohinder Narain, for Appellants; B
Kishore (for No. 1), C. L. Khanna (for
No. 3) and R. L. Tandon (for No. 6), for
Respondents.

JUDGMENT: This appeal, by the plaintiff, is directed against an order returning the plaint filed in the suit, for the recovery of damages, for presentation to the Motor Accidents Claims Tribunal. The suit was based on the following allegations.

2. The plaintiffs Nos. 1 and 2, the employees of plaintiff No. 3, a limited company, incorporated and functioning in London, were sent to India, by plaintiff No. 3, for assisting and supervising the installation of certain machinery in the mills of Messrs. Delhi Cloth & General Mills Co. Ltd., Delhi. Plaintiffs Nos. 1 and 2 had stayed in the Cecil Hotel, Delhi, owned by defendant No. 1. Plaintiffs Nos. 1 and 2 had hired a taxi on the 18th July, 1957 owned by defendant No. 1 and driven by defendant No. 2. The taxi was insured against third party risks by defendant No. 3. The taxi was hired for carrying plaintiffs Nos. 1 and 2 to the premises of the Delhi Cloth & General Mills Co. Ltd. from the Cecil Hotel. As the taxi had travelled a little beyond Bhargava Lane, a truck, driven by defendant No. 5, had struck against the taxi. The truck then swung to the left, knocked down a cyclist and then banged against a tree felling it down. Defendant No. 5 was driving the truck rashly and negligently. The truck was owned by the defendant No. 4 and was insured against third party risks with defendant No. 6. As a result of the accident, plaintiffs Nos. 1 and 2 had sustained serious injuries and had to undergo medical treatment for a considerable time. They had incurred expenses in connection with

the medical treatment. They had also suffered shock and pain. Plaintiffs Nos. 1 and 2 were not fit for completing the work for which they had been sent to India. Plaintiff No. 3 had, therefore, to send two other experts for completing the job. Plaintiffs Nos. 1 and 2 claimed special and general damages to the extent of Rs. 24,098-66 paise and Rs. 8,929-33 paise, respectively, plaintiff No. 3 claims damages to the extent of Rs. 4,666-67 paise as expenses incurred in connection with the sending of two other experts.

3. The suit of the plaintiffs was contested on behalf of the defendants. Besides controverting the various allegations made in the plaint, the defendants had taken up the preliminary objection that the jurisdiction of the Civil Court to try the suit was expressly barred by the provisions of the Motor Vehicles Act.

4. The Court framed a preliminary issue whether the Court had no jurisdiction to take cognizance of the suit in view of the provisions of Section 110-F of the Motor Vehicles Act. The Court held that the claim of plaintiffs Nos. 1 and 2 was barred under the provisions of that section and that though the claim of plaintiff No. 3 was not barred, yet as there was no prayer for splitting the claims, claim of plaintiff No. 3 could not be tried and the plaint as a whole was to be returned. On the basis of this finding, the Court ordered the return of the plaint to the plaintiffs.

5. Aggrieved by the order of the Court, the plaintiffs have come up in appeal.

6. For appreciating the points, canvassed in the appeal, it will be useful to note the relevant provisions of the Motor Vehicles Act (hereinafter referred to as 'the Act') and certain other facts bearing on those points. Sub-section (1) of Section 110 of the Act reads:

"A State Government may, by notification in the official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereinafter referred to as 'Claims Tribunals') for such area as may be specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles."

Section 110-A of the Act is—

"(1) An application of compensation arising out of an accident of the nature specified in sub-section (1) of Section 110 may be made—

(a) by the person who has sustained the injury; or

(b) where death has resulted from the accident, by the legal representatives of the deceased; or

(c) by any agent duly authorised by the person injured or the legal representatives of the deceased, as the case may be;

(2) Every application under sub-sec. (1) shall be made to the Claims Tribunal

having jurisdiction over the area in which the accident occurred, and shall be in such form and shall contain such particulars as may be prescribed;

(3) No application for compensation under this section shall be entertained unless it is made within sixty days of the occurrence of the accident:

Provided that the Claims Tribunal may entertain the application after the expiry of the said period of sixty days if it is satisfied that the applicant was prevented by sufficient cause from making the application in time."

Section 110-F of the Act lays down that—
"Where any Claims Tribunal has been constituted for any area, no Civil Court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon the Claims Tribunal for that area, and no injunction in respect of any action taken or to be taken by or before the Claims Tribunal in respect of the claims for compensation shall be granted by the Civil Court."

7. The material facts bearing on the point of jurisdiction are that the accident was alleged to have taken place on the 18th July, 1957, the Claims Tribunal was constituted for the Union Territory of Delhi on the 25th October, 1957, and the suit for the recovery of damages was filed by the plaintiffs on the 17th July, 1958.

8. It is well settled that, as provided in Section 9, Civil Procedure Code, Civil Courts have jurisdiction to try all suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred. It is, further, well settled that the exclusion of jurisdiction of Civil Courts is not to be readily inferred and that such exclusion must be either explicitly expressed or clearly implied. In the present case, Section 110-F of the Act expressly bars the jurisdiction of a Civil Court to entertain any question relating to any Claims Tribunal (sic) for that area. The claim of plaintiffs Nos. 1 and 2 was for compensation in respect of a motor accident wherein the plaintiffs had sustained bodily injuries. The claim was triable by the Claims Tribunal. The jurisdiction of the Civil Court was barred under Section 110-F of the Act to entertain the claims of plaintiffs Nos. 1 and 2.

The contention, on behalf of the plaintiffs, was that the Claims Tribunal for the Union Territory of Delhi was constituted on the 25th October, 1957 and that it could entertain only those claims which related to accident occurring after the 25th October 1957. The accident, in the present case, had occurred on the 18th July 1957; the Claims Tribunal could not, therefore, entertain the claims of the plaintiffs and the jurisdiction of the Civil Court to try the suit for recovery of damages was not barred under Section 110-F of the Act. The argument, on behalf of the plaintiffs, was that the right to sue for compensation vested in the plaintiffs on the 18th July 1957 and that

1969.

the subsequent constitution of the Claims Tribunal could not take away that vested right. It was, also, submitted that the period of limitation of 60 days, for applying to the Claims Tribunal, had already expired, so far as the plaintiffs were concerned, when the Claims Tribunal was constituted and that, obviously, the plaintiffs could not apply to the Claims Tribunals after the period of limitation.

9. The right to sue for the recovery of compensation for injuries sustained in an accident is, no doubt, a vested right and cannot be taken away retrospectively except by an express statutory provision. But the matter of enforcing that right in a Civil Court or in any other forum is only a matter of procedure. No person has a vested right in procedure and the change in the law of procedure operates retrospectively and is not only prospective. The constitution of the Claims Tribunal did not take away the right of the plaintiffs to claim compensation. It simply changed the forum for enforcing that right from the Civil Court to the Claims Tribunal. After the constitution of the Claims Tribunal, claim for compensation for injuries sustained in a motor accident could only be filed before the Claims Tribunal, even if the accident had occurred before the constitution of the Claims Tribunal.

Of course, if the claim had already been instituted in a Civil Court, before the constitution of the Claims Tribunal, the Civil Court will continue to have jurisdiction to dispose of the claim. In the instant case, the suit was instituted in the Civil Court after the constitution of the Claims Tribunal. The jurisdiction of the Civil Court to try the suit was barred under Section 110-F of the Act. So far as the contention of the plaintiffs that the period of sixty days for filing the claim before the Claims Tribunal had already expired when the Claims Tribunal was constituted, is concerned, it is sufficient to point out that the Claims Tribunal has jurisdiction to condone delay for sufficient cause.

10. The question whether claim for compensation, in connection with the injuries, sustained in a motor accident, which had occurred before the constitution of the Claims Tribunal, is exclusively triable by the Claims Tribunal, was considered in *Palani Ammal v. Safe Service Ltd.*, ACJ 1966 Mad 19, and it was held that such a claim is triable only by the Claims Tribunal and that the Civil Court has no jurisdiction to entertain such a claim. It was observed:

"The Claims Tribunal constituted under Section 110(1) of the Motor Vehicles Act has the exclusive jurisdiction to entertain claims even in respect of accidents that occurred before its constitution provided the remedy under the Civil law is alive and not barred by limitation, at the time of the constitution of the Tribunal."

It was further observed:

"Therefore, the intention of the Legislature must have been that the bar of the jurisdiction of the Civil Court enacted in Section 110-F must only be in regard to matters in respect of which claims had not been entertained by the Civil Court before the constitution of the Tribunal. The terms of that section which provide that no Civil Court shall entertain any question therefore mean that it cannot, after the constitution of the Tribunal under the Act, take cognizance of a suit or other proceeding in respect of such claims. If, before the constitution of the Tribunal, the Civil Court had entertained a suit or proceeding respecting such claim, there is nothing in the Motor Vehicles Act to take away its jurisdiction....."

But, in the present case, no suit or other proceeding has been filed in any Civil Court in respect of the claims for damages for the accidents in question before the constitution of the Tribunal. These accidents which gave rise to the causes of action in favour of the legal representatives of the deceased in the two cases took place before the constitution of the Tribunal. If those persons had so minded, they could certainly have instituted suits for damages in the ordinary Court of the land before the constitution of the Tribunal."

11. The Punjab High Court has, also, in *Unique Motor and General Insurance Co. Ltd. v. Kartar Singh*, (1964) 66 Pun LR 1083 = (AIR 1965 Punj 102), taken the view that where the accident had taken place before the constitution of the Claims Tribunal but no suit was filed in the Civil Court, then, after the constitution of the Claims Tribunal, the claim was exclusively entertainable by the Claims Tribunal and not by a Civil Court.

12. Reliance was placed, on behalf of the plaintiffs, on a decision of the Madhya Pradesh High Court in *Kumari Sushma Mehta v. Central Provinces Transport Services Ltd.*, AIR 1964 Madh Pra 133. This authority supports the contention of the plaintiffs that a claim in respect of an accident occurred before the constitution of the Claims Tribunal can be tried by a Civil Court. With respect, I am unable to agree with the view expressed in the above authority. I have already given reasons for holding that a claim in respect of an accident occurred before the constitution of the Claims Tribunal is exclusively triable by that Tribunal after its constitution. I am in respectful agreement with the view expressed in Madras and Punjab cases.

13. Another case, relied upon by the plaintiffs was *Chaudhry Gursaran v. Akhouri Parmeshwari Charan*, AIR 1927 Pat 203. This case was under the Chota Nagpur Tenancy Act and was not under the Motor Vehicles Act. The case has no application to the facts of the present case.

14. From the above discussion, it follows that the lower Court was right in holding that the claims for compensation of plaintiffs Nos. 1 and 2 was exclusively triable by the Claims Tribunal and that the Civil Court had no jurisdiction to entertain the suit for recovery of compensation.

15. The claim of plaintiff No. 3 was not hit by the provisions of Section 110-F of the Act. But the three plaintiffs had made a joint claim. There was no prayer, either before the lower Court or before this Court, to split up the joint claim and try the claim of plaintiff No. 3 only. In the circumstances, the lower Court was right in ordering the return of the plaint.

16. The appeal fails and is dismissed with costs.

TVN/D.V.C.

Appeal dismissed.

AIR 1969 DELHI 6 (V 56 C 3)

INDER DEV DUA, C. J.

Uma Dutt, Appellant v. R. K. Sardana, Respondent.

Civil Misc. No. 1679 of 1968 in Ex. S. A. No. 235 of 1965, D/-23-5-1968.

Contempt of Courts Act (1952), S. 3 — Jurisdiction of High Court — Process when can be resorted to — Proceedings on application of litigating party—Inherent powers not to be invoked — Duty of High Court — (Civil P. C. (1908), S. 151).

Contempt of Court is a summary and a drastic process which the High Court is very slow to resort to, except in cases of gross affront to the dignity of the Court or in cases where the judicial process has been sought intentionally to be seriously interfered with illegally. It is resorted to only in the interest of the sanctity of the judicial process and the dignity and majesty of the Court of justice and not merely because a private party to a litigation, feeling aggrieved, seems to be inspired by a desire to settle his own scores with his opponent through contempt proceedings. Ordinarily, the High Court would be disinclined to allow its inherent power to be invoked at the instance of a party on the mere ground that his opponent raised incorrect or even false pleas. (Para 2)

JUDGMENT: In this application, the respondent has prayed that the judgment-debtor-appellant Uma Dutt be called upon to show cause why he should not be prosecuted in trying to mislead this Court by concealment of material facts in his application Civil Miscellaneous No. 195 of 1967, dated 11-1-1967. The application is ingenious and indeed it obviously has been inspired by a desire to put pressure on the opposite party. In the heading of the application, it is stated to have been filed under S. 151, Civil P. C., and under Sections 193, I.P.C. and 476, Cr.P.C., but it is obvious that the

application (Civil Misc. No. 195 of 1967) was neither verified by Uma Dutt, nor is there any affidavit which has been suggested to be the basis for the prosecution for which the respondent wants to canvass. During the course of arguments, however, the learned counsel for the respondent has only tried to make out a case for initiating proceedings for contempt of Court.

2. Contempt of Court, it must never be forgotten, is a summary and a drastic process which this Court is very slow to resort to, except in cases of gross affront to the dignity of the Court or in cases where the judicial process has been sought intentionally to be seriously interfered with illegally. It is resorted to only in the interest of the sanctity of the judicial process and the dignity and majesty of the Court of justice and not merely because a private party to a litigation, feeling aggrieved, seems to be inspired by a desire to settle his own scores with his opponent through contempt proceedings. It is undoubtedly true that in Courts in this country, litigants seldom show that respect for truth which they are expected to, and which they may be inclined, as a rule, to show outside the Courts. In fact, their general attitude is that everything, however foul, is fair in litigation. It is a matter of disappointment to this Court that this should be so. This observation, however, goes for most of the litigating parties and merely because one of them chooses to approach this Court with a prayer to proceed against its opponent for the latter's indiscretion in making statements which may be wrong and misleading, this Court is not bound, without something much more, to initiate proceedings by way of contempt of Court. This certainly does not mean that this Court approves of such an attitude of mind on the part of the litigants. The wide sweep of the power of this Court in proceedings by way of contempt, demands a proper self-imposed restraint consistent with its majesty and dignity because such generosity of attitude alone can advance the larger interests of justice. To permit this power to be invoked too frequently and too lightly merely because a litigating party is alleged and even proved to have made misleading or false assertions in an application, may not further the end, the contempt proceedings are designed to serve and promote. Dignified restraint and magnanimous inattention to the usual shortcomings of an average litigant, who does not possess a genuine high sense of regard for truth, and who takes misleading and untrue pleas in his answer to the opponent's case, seems to me to truly befit the high position of power this Court holds. Too frequent action lightly taken for contempt of Court on the basis of every incorrect plea in the pleadings tends to defeat its own purpose. By and large, it is only when there appears a glaring case of deliberate and intentional interference with the purity and free flow

1969

of the stream of justice, by doing something prima facie indefensible and incapable of intelligible explanation, that this Court would be justified in considering the question of initiating contempt proceedings, and ordinarily this Court would be disinclined to allow its inherent power to punish for contempt of Court to be invoked at the instance of a party on the mere ground that his opponent has raised incorrect or even false pleas.

3. For the foregoing reasons, I reject this application, but in the peculiar circumstances, make no order as to costs.
HGP/D.V.C. Application rejected.

AIR 1969 DELHI 7 (V 56 C 4)

T. V. R. TATACHARI, J.

Springdales School, New Delhi and others, Appellants v. Sati Tahilramani, New Delhi, Respondent.

F.A.O. No. 21 of 1967, D/-5-5-1967.

Civil P. C. (1908). O. 23, R. 3 and O. 43, R. 1 (m), S. 7 and O. 50, R. 1 (a) — Applicability — Orders of Additional Rent Controller refusing to record compromise in application under S. 14 of Delhi Rent Control Act — Provisions of O. 23, R. 3, do not apply — Order, therefore, not appealable under O. 43, R. 1 (m).

An application under S. 14 of the Delhi Rent Control Act being one for the recovery of possession of immovable property, provisions of O. 23, R. 3, Civil P. C., are not applicable and as such an appeal against an order of the Additional Rent Controller refusing to record a compromise under O. 23, R. 3, is not maintainable under O. 43, R. 1 (m). (Paras 18 and 19).

None of the matters referred to in S. 36 (2) of the Delhi Rent Control Act relates to the recording of a compromise and passing a decree or order in terms of the compromise under Order 23, Rule 3 of the Civil P. C. The Controller has not been conferred with all the powers as are vested in a Civil Court under the Civil P. C., but has been conferred with only the powers enumerated in Section 36, and the recording of a compromise is not one of the powers so conferred upon him. Rule 23 of the Delhi Rent Control Rules, 1958, also does not make the provisions of Civil P. C. applicable to proceedings before the Rent Controller. In fact, this rule does not empower or enable the Rent Controller to adopt a procedure on the analogy of a provision in the Code of Civil Procedure, if such adoption would be contrary to or inconsistent with the intentment of a specific provision in the Act or in the Rules. Further, reading Section 37 (2) of the Delhi Rent Control Act and Section 17 (1) of the Provincial Small Cause Courts Act together, it is clear that the Controller has to, as far

as may be, follow the practice and procedure of a Court of Small Causes as prescribed in the Civil P. C. and the Provincial Small Cause Courts Act, save, in so far as is otherwise provided by that Code or by the Provincial Small Cause Courts Act. Section 15 (1) of the Provincial Small Cause Courts Act, read with Article 4 of the Second Schedule to the said Act, makes it clear that a suit for the possession of immovable property or for the recovery of an interest in such property is excepted from the cognizance of a Court of Small Causes. An application under the Proviso to S. 14 of the Delhi Rent Control Act is in the nature of a suit for possession of immovable property. Therefore, the provision under Order 23, Rule 3 of the Civil P. C. for recording a compromise and for passing a decree or order in terms of the compromise, in so far as it relates to a suit for possession of immovable property, cannot and does not apply to an application under the Proviso to Section 14 of the Delhi Rent Control Act. (Paras 13, 14, 16-A and 18)

Cases Referred:	Chronological	Paras
(1967) 3 Delhi LT 1, Central Bank of India Ltd. v. Gokal Chand		20
(1966) 2 Delhi LT 262, Central Bank of India Ltd. v. Gokal Chand		20

G. S. Vohra with M. K. Chawla, for Appellants; N. H. Hingorani with M. Wadhvani, for Respondent.

JUDGMENT: This appeal was filed by the appellants-tenants under Order 43, Rule 1 (m) of the Code of Civil Procedure against the order of the Additional Rent Controller, Delhi, dated 2-1-1967, dismissing an application filed by the said appellants-tenants for recording an alleged compromise in the Application No. 877 of 1963, on his file.

2. The above-mentioned Application No. 877 of 1963 was filed by the respondent-landlord before the Additional Rent Controller, Delhi, under Section 14 of the Delhi Rent Control Act, 1958, praying for the eviction of the appellants-tenants from the premises, "Sati Villa", No. 1945/14, situated on Patel Road, West Patel Nagar, New Delhi-12, and included in Municipal Ward No. 17, on the grounds of sub-letting, assignment or parting with the possession of the premises, misuser of the premises for a purpose other than that for which the premises were let out, etc.

3. In the course of the said proceedings, the respondent herein filed an application on 1-8-1966 under Section 15 (2) of the Delhi Rent Control Act praying that the appellants-tenants may be ordered to deposit arrears of rent at the agreed rate of Rs. 1,300 per mensem with effect from 15-9-1964, and also to deposit the rent for the subsequent months at the said rate in accordance with the provisions of law. In the said proceedings, the appellants herein raised the plea of the fixation of standard rent. On 13-10-1966, the Additional Rent Controller passed an order directing the

appellants-tenants Nos. 1 and 2 to deposit within one month from that date the arrears of rent at Rs. 1,300 per mensem from 15-9-1964 up to 13-10-1966, after deducting Rs. 350 per annum on account of costs of repairs for the years 1962 to 1965, and the said appellants-tenants Nos. 1 and 2 were further directed "to deposit future rent at the said rate, month by month, by the 15th day of each next following month." The case was ordered to come up on 19-11-1966.

4. Then, on 21-11-1966, the appellants-tenants filed an application under O. 23, R. 3, Civil Procedure Code, alleging, *inter alia*,—

(a) that after the order dated 13-10-1966 passed by the Rent Controller, the appellants met the respondent and a compromise was made;

(b) that the respondent wrote the compromise in the form of a receipt in the following terms:—

"Received Rs. 32,400 up to 14th November, 1966. Deposit the future rent in my Savings Bank Account No. 94, United Commercial Bank, East Patel Nagar, New Delhi."

(c) that thereafter the respondent herein having received the money and also the future rent in terms of the said agreement of compromise, wanted to resile from the compromise, and that the said compromise was liable to be recorded by the Rent Controller, and the respondent was estopped from denying the same;

(d) that the effect of the compromise was that the respondent herein continues to recognise the tenancy of the appellants on the terms stated by her, and also grants the future tenancy on payment of the existing agreed rate of rent, and that the appellants herein, in consideration thereof, gave up their claim to the fixation of standard rent and agreed to pay future rent at the agreed rate, and also to give up their claim for deduction of the amount due for repairs in respect of the year ending in February 1966; and

(e) that, therefore, the application be disposed of in the said terms, and the compromise be recorded.

5. The respondent herein filed her reply to the said application for recording compromise, denying the alleged compromise, and resisting the said application filed under Order 23, Rule 3 of the Code of Civil Procedure. She pleaded in her reply that the real facts were—

(a) that on 17-10-1966, Mr. Y. Kumar, counsel for the appellants herein, came to the respondent's place and told her that he had come to pay the arrears in accordance with the order of the Rent Controller, that he also said that instead of depositing future rents with the Rent Controller, it would be convenient for him and also for the respondent herein if the payments were credited directly in the respondent's Bank

Account, and suggested that if the respondent gave him her bank account number, he would have the rents credited month by month in her account, that Mr. Kumar also brought a typed letter addressed to the respondent, and delivered one copy to her and got her acknowledgment on another copy, and that the two relevant passages in the said letter were as under:—

"(i) The Court has passed an order for payment of the rent of 13, West Patel Nagar, less a deduction of Rs. 350 per annum for last four years.

(ii) Instead of depositing the amount in Court, I could deposit the money direct in your bank account if you agree and I can also do the same every following month."

(b) that Mr. Kumar also gave the respondent herein a cheque for Rs. 32,400 for the arrears of rent, that the respondent took the cheque and gave Mr. Kumar a receipt and the number of her bank account, and that those arrears of rent were up to 14-11-1966 after deducting Rs. 1,400 on account of repairs for four years;

(c) that later, the respondent informed her counsel about what had happened, that the counsel told her that the Rent Controller had ordered the rents to be deposited with him, and that direct payment was likely to be misinterpreted, and that he advised that a joint application should be made to the Rent Controller for making a suitable modification in the order;

(d) that on 20-10-1966, the respondent herein accordingly sent a draft of the joint application to Mr. Kumar along with a covering letter;

(e) that on 16-11-1966, when the respondent had her bank account pass book brought up-to-date, she discovered that on 4-11-1966 a sum of Rs. 1,300 had been deposited in cash in her account, presumably for one month from 15-11-1966 to 14-12-1966;

(f) that, on the advice of her counsel, the respondent collected the cheque for Rs. 32,400;

(g) that the appellants herein, in the meantime, had filed an appeal against the order of the Additional Rent Controller passed on 13-10-1966 on the application under Section 15 (2) of the Delhi Rent Control Act, and also an application for stay, and that no plea of compromise was set forth in the grounds of appeal or in the stay application;

(h) that no compromise was ever made, that all that was done was that instead of payment through the Rent Controller, direct payment was accepted, that the appellants' stay application in the aforesaid appeal itself referred to it as "a mode of payment", that the deposit of Rs. 1,300 was made by the appellants herein in the bank account of the respondent without any previous notice to her, that the effect of the payment was not to continue the tenancy or to create a new tenancy, and that it was incorrect to say that in consideration of the

when a question relating to procedure was not specifically provided by the Act and the Rules. This means also that the Rent Controller, in deciding a question relating to procedure not specifically provided by the Act and the Rules, cannot apply a provision of the Code of Civil Procedure even as an analogy, if such application would be contrary to or inconsistent with what is specifically provided by the Act and the Rules. In other words, Rule 23 does not empower or enable the Rent Controller to adopt a procedure on the analogy of a provision in the Code of Civil Procedure, if such adoption would be contrary to or inconsistent with the intentment of a specific provision in the Act or in the Rules.

15. Section 37(2) of the Delhi Rent Control Act provides that—

“Subject to any rules that may be made under this Act, the Controller shall, while holding an enquiry in any proceeding before him, follow, as far as may be, the practice and procedure of a Court of Small Causes, including the recording of evidence.”

16. Chapter 4 of the Provincial Small Cause Courts Act (No. 9 of 1887), contains the provisions regarding the practice and the procedure of a Court of Small Causes. Section 17(1) of the said Act provides that—

“The procedure prescribed in the Code of Civil Procedure, 1908, shall, save in so far as is otherwise provided by that Code or by this Act, be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits.”

16-A. Reading Section 37(2) of the Delhi Rent Control Act and Section 17(1) of the Provincial Small Cause Courts Act together, it is clear that the Controller has to, as far as may be, follow the practice and procedure of a Court of Small Causes as prescribed in the Code of Civil Procedure and the Provincial Small Cause Courts Act, save in so far as is otherwise provided by that Code or by the Provincial Small Cause Courts Act. In other words, if any of the provisions of the Code of Civil Procedure are not applicable to a Court of Small Causes, the said provisions will not be applicable to the proceedings before the Rent Controller.

17. Section 7 of the Code of Civil Procedure provides that “so much of the body of the Code as relates to suits excepted from the cognizance of a Court of Small Causes” shall not extend to Courts of Small Causes. Order 50, Rule 1(a) of the Code of Civil Procedure also provides that “so much of this Schedule as relates to suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits” shall not extend to Courts of Small Causes.

18. Section 15(1) of the Provincial Small Cause Courts Act read with Art. 4 of the second schedule to the said Act

makes it clear that a suit for the possession of immovable property or for the recovery of an interest in such property is excepted from the cognizance of a Court of Small Causes. An application under the proviso to Section 14 of the Delhi Rent Control Act is in the nature of a suit for possession of immovable property. Therefore, the provision under Order 23, Rule 3 of the Code of Civil Procedure for recording a compromise and for passing a decree or order in terms of the compromise, in so far as it relates to a suit for possession of immovable property, cannot and does not apply to an application under the proviso to Sec. 14 of the Delhi Rent Control Act. That being so, the Rent Controller cannot apply the provision in Order 23 Rule 3 of the Code of Civil Procedure even by way of analogy or guidance under Rule 23 of the Delhi Rent Control Rules, as it would be contrary to or inconsistent with the intentment of the provisions in Section 37(2) of the Delhi Rent Control Act, Sec. 17(1) of the Provincial Small Cause Courts Act, and Section 7 and Order 50, Rule 1(a) of the Code of Civil Procedure read with Section 15(1) of, and Article 4 of the second schedule to the Provincial Small Cause Courts Act. Thus, the application filed in the present case before the Additional Rent Controller, under Order 23, Rule 3 of the Code of Civil Procedure, was itself not maintainable, and should have been dismissed by the Additional Rent Controller on that ground.

19. Even otherwise, i.e., even if the application under Order 23, Rule 3 was maintainable, the further question which arises for determination is as to whether the order of the Additional Rent Controller on the said application was appealable under Order 43, Rule 1(m) of the Code of Civil Procedure. Order 50, Rule 1(b) of the Code of Civil Procedure clearly provides that Order 43 of the Code of Civil Procedure does not apply to Courts of Small Causes. Therefore, no appeal can be preferred under Order 43, Rule 1(m) of the Code of Civil Procedure against the order of the Rent Controller under Order 23, Rule 3 of the Code of Civil Procedure.

20. Shri Hingorani further contended that the order of the Additional Rent Controller on the application under Order 23, Rule 3 of the Code of Civil Procedure, was an order of the Controller made under the Delhi Rent Control Act within the meaning of Section 38 of the said Act, and that, therefore, an appeal lay against that order to the Rent Control Tribunal under Sec. 38 of the said Act, and not to the High Court. He relied upon the decision in the Central Bank of India Ltd. v. Gokal Chand, 1966 (2) Delhi LT 262, which was affirmed by the Supreme Court in the Central Bank of India Ltd. v. Gokal Chand, 1967 (3) Delhi LT 1, in support of his contention. On the other hand, Shri Vohra contended that the order of the Additional Rent Controller was not an order under the Delhi Rent Control Act,

but was an order under Order 23, Rule 3 of the Code of Civil Procedure, and that, therefore, the appeal lay to the High Court. In my opinion, it is not necessary for me to go into this contention, in the view taken by me regarding the appealability of the order passed by the Additional Rent Controller on the application filed under O. 23, Rule 3 of the Code of Civil Procedure.

21. Shri Hingorani next contended that even if the appeal to this Court lies under Order 43, Rule 1 (m) of the Code of Civil Procedure, the learned Additional Rent Controller was right in holding on the merits that there was no compromise as alleged by the appellants herein. As the learned counsel for both the parties desired to argue on the merits of the appeal as well, I heard their arguments on the merits also.

22. On the merits of the appeal, Shri Vohra submitted firstly that his clients should have been allowed an opportunity to adduce evidence in support of their application under Order 23, Rule 3 of the Code of Civil Procedure. There is no substance in this contention. As already stated, the respondent herein filed his application under Section 15 (2) of the Delhi Rent Control Act on 1-8-1966. The appellants herein filed their reply to it on 12-9-1966. The Additional Rent Controller passed his order under Section 15 (2) of the Act on 13-10-1966. Shri Y. Kumar gave the cheque for the arrears to the respondent herein on 17-10-1966. The respondent sent a letter with a draft joint application to the appellants on 20-10-1966. Shri Y. Kumar, without giving any reply to the said letter, filed an appeal before the Rent Control Tribunal on 25-10-1966 against the order of the Additional Rent Controller, dated 13-10-1966.

23. The main application for eviction filed under the proviso to Section 14 of the Act came up before the Additional Rent Controller on 19-11-1966 for further evidence. On that date, Shri Y. Kumar filed an application under Order 23, Rule 3 of the Code of Civil Procedure for recording the alleged compromise. The respondent herein filed her reply to that application on 30-11-1966, and on that date the case was adjourned to 20-12-1966. Again on 20-12-1966, the case was adjourned to 23-12-1966, on which date the arguments on the application under O. 23, R. 3 were heard. The Additional Rent Controller passed his order on the said application on 2-1-1967.

24. The above facts and dates are not disputed. Either on 30-11-1966 or on 20-12-1966, the appellants did not ask for any time or opportunity for adducing evidence in support of their application. The order of the Additional Rent Controller, passed on 30-11-1966, which was in Urdu, was translated into English by the Reader of my Court as follows:—

"The counsel for the parties are present. The reply has been filed. The documents have also been filed. The file has not been

received back from the appellate Court. The file be summoned for the 20th December, 1966. The documents produced will be admitted and denied on this date. The arguments on the respondent's application under Order 23, Rule 3, will be heard". The order passed by the Additional Rent Controller on 20-12-1966, as translated into English by the Reader of my Court was as follows:—

"The counsel for the parties are present. The file has been received. (They) want more time for arguments. Hence, the case to come up on the 23rd December, 1966". Thus, the appellants merely prayed for adjournment and never requested the Additional Rent Controller for time or opportunity for adducing evidence in support of their application. No such grievance was made by them even in the grounds of appeal to this Court.

Shri Vohra argued that it was the duty of the Additional Rent Controller to ask the parties to adduce evidence, and that he failed to do so. There is no such duty cast on the Controller to ask the parties to adduce evidence, when the parties themselves did not offer to adduce evidence or request for time or opportunity to adduce evidence. It is for the parties to adduce such evidence as they may have in support of their contentions, and it is not for the Rent Controller to invite the parties to adduce evidence. This contention of Mr. Vohra has, therefore, no basis, and is rejected.

25. The next contention of Shri Vohra is that the finding of the Additional Rent Controller that there was no compromise as alleged by the appellants, was erroneous.

26. The letter of Shri Y. Kumar, dated 17-10-1966, does not contain anything which is suggestive of the alleged compromise between the parties. He merely referred in that letter to the order for the payment of rent passed by the Rent Controller, and suggested only a different mode of payment of the amounts directed to be deposited. Even the receipt which is said to have embodied the terms of the compromise, does not contain anything which supports the contention of the appellants. The original receipt was not produced by the appellants at all. They only purported to extract it in their application dated 19-11-1966. The said receipt, as set out in the said application of the appellants, is as under:—

"Received Rs. 32,400 upto 14th November, 1966. Deposit the future rent in my Saving Bank Account No. 94, United Commercial Bank, East Patel Nagar, New Delhi.

Sati Ram Chand".

27. It merely reads as a receipt for the sum of Rs. 32,400 which was admittedly given by cheque to the respondent, and refers to the deposit of future rent in her Bank Account as suggested by Shri Y. Kumar in his letter, dated 17-10-1966. The amount of Rs. 32,400 represented the arrears for

the period which ended on 14-11-1966, after deducting Rs. 1,400 on account of repairs for 4 years as provided in the order of the Additional Rent Controller. The subsequent deposit of the monthly rent of Rs. 1,300 on 4-11-1966, in the Bank Account of the respondent, presumably for one month from 15-11-1966, was without any prior notice to the respondent, and no compromise of the nature as was alleged by the appellants can be spelt out from the said deposit. The appellants filed an appeal on 25-10-1966 before the Rent Control Tribunal against the order of the Rent Controller, dated 13-10-1966. As pointed out by the learned Rent Controller, no plea of settlement or compromise was mentioned or set forth in the grounds of the said appeal or in the application for stay filed by the appellants in the said appeal.

All these circumstances do not show at all that there was a compromise as was alleged by the appellants, but merely show that the respondent agreed to the direct payment of the future rents directed to be paid by the Additional Rent Controller in his order dated 13-10-1966, instead of their payment by deposit with the Rent Controller. In fact, in their application for stay referred to above, the appellants referred to the said arrangement as "mode of payment". Further, in the grounds of appeal against the order of the Rent Controller, dated 13-10-1966, the appellants reiterated their plea for fixation of standard rent and challenged the order of the Controller on the ground that the Controller directed the deposit of rent without at first fixing the standard rent or at least the interim rent. This clearly belies the version of the appellants that in the alleged compromise, the appellants agreed to give up the plea for fixation of standard rent in consideration of the continuance of the tenancy or the creation of a fresh tenancy.

28. On a consideration of all the circumstances, I am of the opinion that the Additional Rent Controller was right in holding that it is clear that what was actually sought to be managed by Shri Y. Kumar was that the respondent herein might accept the arrears of rent directly and the future rent might be directly got credited in her Bank Account instead of depositing the same with the Rent Controller in pursuance of the aforesaid order of the Rent Controller; that, in that way, merely the mode of payment was sought to be changed; that it cannot be said that the payment of the arrears of rent was made, and the future rent was agreed to be got credited in the respondent's Bank Account independently of the order of the Additional Rent Controller, dated 13-10-1966; and that it cannot also be said that thereby the respondent agreed to continue the present tenancy or to create any fresh future tenancy. I am also of the opinion, that the Additional Rent Controller rightly held that no compromise of the

nature alleged by the appellants was effected by the parties, and, therefore, there is no question of recording and passing an order or decree in terms of such compromise under Order 23, Rule 3 of the Code of Civil Procedure.

29. For the above reasons, the appeal fails, and is dismissed with costs.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 DELHI 12 (V 56 C 5)

I. D. DUA, C. J.

Moulvi Musharraf Ahmed, Petitioner v. State, Respondent.

Criminal Revn. No. 197 of 1968, D/-24-5-1968.

Criminal P. C. (1898), S. 117 (3) — Interim order for security — Order should not be mechanically passed by merely relying on police report.

The law-giver has entrusted the power of making orders under Section 117 (3) to a Magistrate and has also enjoined on him to record his reasons in writing before directing the person concerned to execute the bond thereunder. This postulates application of his judicial mind by the Magistrate, whose order is subject to judicial scrutiny by superior Courts of revision and superintendence. He cannot completely mortgage his decision, or abdicate his power or surrender his own responsibility in favour of the police, though it would be well within his competence, in a given case, to take into account the police report for what it is worth in forming his own conclusion on the material legally available to him. He would indeed be failing in his solemn duty if he were to mechanically adopt the police report without evaluating for himself its worth and usefulness and without forming his own independent judgment on the material before him. In such cases also, justice must not only be done but it must indisputably be seen to be done and the order of the Magistrate must clearly reflect the application of the Magistrate's own judicial mind to the facts and circumstances properly before him. (Para 3)

However summary the proceedings under Chapter VIII, Criminal P. C. may be considered, they are judicial proceedings and have to be conducted in accordance with the Code and the Magistrates holding these proceedings must see that the fundamental elements of the judicial process find expression in the machinery for administering justice. (Para 4)

A. C. Gambhir with A. D. Mehndroo, for Petitioner; V. D. Misra and Dinesh Chand Mathur for S. K. Malik, for Respondent.

JUDGMENT: Shri B. L. Nagpal, Additional Sessions Judge, Delhi, has forwarded this case with a recommendation that the order of Shri N. C. Jain, Sub Divisional

GL/IL/D207/68

Magistrate, Delhi, dated 5-12-1967 be modified to the extent that the part of the order relating to action under Section 117 (3) Cr. P. C. against Maulvi Musharraf Ahmed petitioner be set aside.

2. It appears that the station House Officer, Police Station Lahori Gate, Delhi, made a report for action under Section 107, Cr. P. C., against the petitioner and on that report, on 5-12-1967, the learned Sub-Divisional Magistrate passed an order as contemplated by Section 112, Cr. P. C. directing the petitioner to show cause why he should not be asked to furnish a bond in the sum of Rs. 5,000, with one surety in the like amount to keep the peace for a period of one year. In the same report, the police had also asked for action against the petitioner under Section 117 (3) Cr. P. C., and on that report, the learned Magistrate making the enquiry, also directed the petitioner to furnish a bond under Section 117 (3) for Rs. 5,000 with one surety in the like amount. As the recommendation of the learned Additional Sessions Judge shows, the recitals in the police report disclosed the existence of a dispute between the petitioner and one Mohd. Ahmed relating to the office of religious head in the Masjid Fatehpuri, Delhi. The matter in dispute is suggested to be pending adjudication in a Civil Court. On the complaint of Mohd. Ahmed, the Station House Officer, Police Station, Lahori Gate, visited the Masjid Fatehpuri, Delhi and finding an apprehension of breach of peace, made the report mentioned above. The challenge to action under Section 107, Cr. P. C., was considered by the learned Additional Sessions Judge to be without substance, but in regard to the order under Section 117 (3) Cr. P. C., the impugned order was held to be unsupportable. According to the recommendation, the learned Magistrate made the order under Section 117 (3) Cr. P. C., only because a request to that effect had been made by the police without himself properly considering the question of existence of emergency justifying immediate drastic action under Section 117 (3) Cr. P. C.

3. I have myself gone through the whole record and I am constrained to observe that the matter has been dealt with by the learned Magistrate in a most unsatisfactory manner and it certainly does not reflect the requisite judicial approach on his part; nor does it show that he has devoted to the case the anxious thought it demanded. Section 117 (3) Cr. P. C. provides as follows: "Pending the completion of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under Sec. 112 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion

of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded:

Provided that—

(a) no person against whom proceedings are not being taken under Section 108, Section 109, or Section 110, shall be directed to execute a bond for maintaining good behaviour, and

(b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under Section 112".

It is obvious that to justify an order under this sub-section, the learned Magistrate must first himself consider that immediate measures are necessary for the prevention of a breach of the peace or the disturbance of the public tranquillity or the commission of any offence or for the public safety and then after recording his reasons in writing, direct the person concerned to execute a bond for keeping the peace etc., until the conclusion of the enquiry. The Legislature has quite clearly disclosed its anxiety not to leave the citizens in this respect at the mercy of the executive authorities who may arbitrarily and in a light-hearted manner direct execution of bonds. The law-giver has entrusted the power of making orders under this sub-section to a Magistrate and has also enjoined on him to record his reasons in writing before directing the person concerned to execute the bond thereunder. This postulates application of his judicial mind by the Magistrate, whose order is subject to judicial scrutiny by superior Courts of revision and superintendence. He cannot completely mortgage his decision, or abdicate his power or surrender his own responsibility in favour of the police, though it would be well within his competence, in a given case, to take into account the police report for what it is worth in forming his own conclusion on the material legally available to him. He would indeed be failing in his solemn duty if he were to mechanically adopt the police report without evaluating for himself its worth and usefulness and without forming his own independent judgment on the material before him. In such cases also, justice must not only be done but it must indisputably be seen to be done and the order of the Magistrate must clearly reflect the application of the Magistrate's own judicial mind to the facts and circumstances properly before him.

4. From the record of the case, I find that on 4-12-1967, an order was recorded in Urdu (presumably by the Reader) which in clear terms suggests that a settlement was stated by Shri Mohammad Mian son of Maulvi Musharraf Ahmeed to have been arrived at between the parties and the proceedings were adjourned to 5-12-1967, on which date the impugned order was made in Hindi. On 4-12-1967, it is worth noting

Maulvi Musharraf Ahmed was not present, but instead his son Shri Mohammed Mian appeared. But curiously enough, I find on the record a cyclostyled notice under Sections 107 and 112, Cr. P. C. dated 4-12-1967 in English signed by Shri D. V. Kapoor, Sub-Divisional Magistrate, requiring Maulvi Musharraf Ahmed to show cause why he should not be ordered to execute a bond in the sum of Rs. 5,000 for keeping the peace for one year. At the bottom of this notice, I find the following footnote:—

"Notice read over and fully explained to the accused".

This is also signed by Shri D. V. Kapoor. The learned Magistrate did not even care to read the Urdu proceedings in which it was unequivocally suggested by Shri Mohammad Mian and by other respectable people, who had also appeared, that the controversy had been mutually settled and there was no reasonable apprehension of any breach of peace. Mohammad Mian of course undertook on behalf of his father that he would appear in Court on the following day. The order in Hindi under Section 117 (3) dated 5-12-1967 was passed exclusively on the report of the Deputy Superintendent of Police and the learned Magistrate does not seem even to have cared to consider the previous day's proceedings in which Mohammad Mian and other respectable persons appearing had assured that the matter had been mutually settled. What has really come to me as a surprise is the fact that in the order dated 5-12-1967, the period for which the bond for keeping the peace was directed to be taken, was fixed as one year, which it is not denied by the State counsel, is contrary to the terms of Section 117 (3). The cyclostyled order in English dated 5-12-1967, however, does mention that the bond in the sum of Rs. 5,000 was to be executed for keeping the peace until the conclusion of the proceedings under Section 107, Cr. P. C. This state of the record leads me to the irresistible conclusion that whosoever had recorded the order in Hindi was not aware of the terms of Section 117 (3), Cr. P. C. and the learned Magistrate, whose signatures in English this order bears, had not at all taken care to apply his own mind to the proceedings before him. He seems to have signed this order mechanically as if it was a routine order. The conflict between the order in Hindi and the cyclostyled order in English also furnishes a sad commentary on the working of the Court below and this Court cannot too strongly disapprove of the manner in which proceedings in this case have been conducted. However summary the proceedings under Chapter VIII, Cr. P. C. may be considered, they are judicial proceedings and have to be conducted in accordance with the Code and the Magistrates holding these proceedings must see that the fundamental elements of the judicial process find expression in the machinery for administering justice. Cases like the present only tend to breed and promote distrust

of our criminal judicial process, which must, in the final result, adversely affect the law and order position in Delhi and the sooner the quality and standard of our criminal administration of justice is improved, the better. The capital of our Republic is expected to provide ideal administration of justice. This Court has repeatedly drawn the attention of the authorities concerned to the highly unsatisfactory state of criminal administration of justice in the capital, but unfortunately its urgency and importance does not seem to have been fully realised so far, with the result that cases keep coming to the notice of this Court disclosing a progressive deterioration in this branch of our judicial process. This Court would be failing in its duty if it did not point out that laxity and indifference on the part of the Presiding Officers of the Courts in criminal matters may also tend to encourage and foster corruption on the part of their ministerial staff which is likely to shake the people's confidence in the impartial dignity, effectiveness and majesty of the administration of criminal justice resulting in adverse impact on the law and order situation and on our democratic way of life.

5. In so far as this case is concerned, I am constrained to accept the recommendation of the learned Additional Sessions Judge and set aside and quash the impugned order as recommended.

RSK/D.V.C.

Order accordingly.

AIR 1969 DELHI 14 (V 56 C 6)

D. K. MAHAJAN, J.

M/s. Indra Perfumery Co. and others,
Appellants v. Moti Lal Lal Mal and another,
Respondents.

Second Appeal No. 185-D of 1963, D/-
13-10-1966.

T. P. Act (1882), Secs. 106, 111 (d) — Houses and Rents — Delhi Rent Control Act (59 of 1958), Ss. 14, 15 (1) — Application for eviction for non-payment of rent — Part of building rented out by A to B — B subletting part of it to C — C purchasing building including portion rented to B — By reason of purchase C not paying agreed rent to B — Held, transfer by A to C did not wipe out tenancy in favour of B and B continued to be landlord of C and C was liable to pay rent even after he had purchased the whole building. (Para 3)

S. N. Chopra with Vijay Kishan, for Appellants; Yogeshwar Dayal, for Respondent.

JUDGMENT: This appeal was settled by Grover J., by his order dated 7th of February, 1966, on the basis that the same had become infructuous, the application for eviction having been dismissed. That order was passed by Grover J., at the instance of the respondents without notice to the ap-

DL/GL/B522/68

1969

pellants and without hearing them. In this situation, an application was filed for setting aside of the order of Grover J. This application is not objected to by the learned counsel for the respondents. I would accordingly vacate the order of Grover J., and restore the appeal for hearing.

2. This second appeal is directed against the decision of the Rent Control Tribunal upholding the decision of the Rent Controller under Section 15 (1) of the Delhi Rent Control Act, 1958. This case has an interesting history. The premises in dispute form part of a larger building belonging to one Mohd. Shafi. The building is situate in Gandhi Market. The dispute relates to a part of the building denoted by No. 9830. This part of the building was rented out by Mohd. Shafi to the present respondents, Moti Lal and another, on the 6th of April, 1954. The agreed rent was Rs. 436 per mensem. On the 3rd of November, 1956, a part of the rented premises was rented out by the respondents to the appellants Messrs Indra Perfumery Company. There are three partners of this company, namely, Nanak Chand and others. The rent agreed to be Rs. 115 per mensem. The appellant-company purchased the building including the rented portion No. 9830 from Mohd. Shafi. By reason of this purchase the appellants did not pay the agreed rent of the tenanted premises to the respondents, with the result that the respondents filed an application under Section 14 for eviction of the appellants for non-payment of rent. This application was contested by the appellants on the plea that they had become owners of the tenanted premises by reason of the purchase and, therefore, the tenancy had come to an end. This contention was controverted by the respondents. The Rent Controller rejected the appellants contention and passed an order under Section 15 (1) of the Act. An appeal by the appellants to the Rent Control Tribunal met with no success. It is in this situation that the present second appeal has been preferred.

3. It is no doubt true that a question of law does arise, but I am extremely doubtful if that question of law is a substantial question of law. Anyhow, I have thought it fit to determine the question of law raised by the learned counsel for the appellants. His contention is that by reason of the application of the doctrine of merger, the tenancy in his favour has merged into the higher right, which he has acquired by purchase, namely, the ownership right. It is a fundamental principle of law that a lesser estate merges in a larger estate provided there is no intervening estate between the two. The learned counsel's contention is that the tenancy by the previous owner in favour of the respondents is not an intervening estate so far as the appellants are concerned. In my opinion, this contention is not sound. Vis-a-vis the appellants the respondents are the landlords. The transfer by the previous owner to the appellants does not wipe out

the tenancy in favour of the respondents. I can see no reason how one single indivisible tenancy can be partly wiped out. If I were to give effect to the contention of the learned counsel for the appellants, it would be in a way wiping out a part of the indivisible tenancy, a result which cannot be countenanced in law. After giving my careful consideration to the contentions of the learned counsel I see no reason to interfere with the decision of the Courts below.

4. I am also told that the eviction application has been dismissed by the Rent Controller because the order under Sec. 15 (1) has been complied with. I may mention that to me the entire controversy appears to be fruitless, because so far as the appellants are concerned, the only ground on which they can be evicted is non-payment of rent and that ground, in the circumstances of this case, can hardly arise.

5. For the reasons recorded above, this appeal fails and is dismissed. No costs.
RSK/D.V.C. Appeal dismissed.

AIR 1969 DELHI 15 (V 56 C 7)

S. K. KAPUR AND S. N. ANDLEY, JJ.

R. L. Butail, Petitioner v. The Union of India through the Secretary, Ministry of Irrigation and Power, New Delhi and others, Respondents.

Civil Writ No. 1550 of 1967, D/-10-4-1968.

Constitution of India, Articles 311 (2), 14 — Fundamental Rules, R. 56 — Age of superannuation raised to 58 — Compulsory retirement under R. 56 (j) beforehand is not invalid — Rule 56 is not against safeguard given under Art. 14 — Compulsory retirement does not amount to removal or dismissal — What is "public interest" explained.

Under Rule 56 while the age of superannuation or the normal age of retirement has been fixed at fifty-eight years. Such fixation is subject to extension under Clause (d) and curtailment under Clause (j) provided it is in the public interest to do so. In fact the power of retiring at the age of fifty-five years compulsorily if it is exercised for the reasons and in the manner mentioned in Clause (j) overrides the right of the Government servant to remain in service until he attains the age of fifty-eight years.

The contention that Cl. (j) gives arbitrary power to the appropriate authority because the expression "in the public interest" has not been defined and, therefore, there are no well defined limits within which this power can be exercised is incorrect. The fact that the power to retire compulsorily can be exercised only if it is in the public interest to do so is a sufficient safeguard against the arbitrary exercise of this power. Public interest is not a new concept. It is

HL/IL/D563/68

true that it has not been defined but the reason for that is that it is incapable of precise definition. Nevertheless, it is not possible to say that it is a vague concept. What is included in public purpose may differ from time to time and from place to place. In the context in which it has been used, it means the proper functioning of the public service. It is incorrect to say that specification of the age of compulsory retirement without indicating the number of years of service is not specification of the "minimum period of service". All that has to be seen is whether the right to compulsorily retire can be exercised at a very early stage of the career and it cannot be said that when the age of superannuation is fixed at 58 years, the compulsory retirement at the age of 55 years would be retirement at a very early stage of the career. Therefore where the normal period of service is curtailed by compulsory retirement, it does not amount to dismissal or removal. Case Law discussed.

(Paras 5, 8, 10)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 295 (V 54) = (1966) Supp SCR 311, Barium Chemicals Ltd. v. Company Law Board	11
(1965) AIR 1965 SC 280 (V 52) = (1967) 2 Lab LJ 246, Shivacharana Singh v. State of Mysore	10
(1964) AIR 1964 SC 600 (V 51) = (1964) 5 SCR 683, Moti Ram Deka v. General Manager, North East Frontier Rly.	8, 10
(1964) AIR 1964 SC 1585 (V 51) = 1964 (2) Cri LJ 481, Gurdev Singh Sidhu v. State of Punjab	10
(1957) AIR 1957 SC 892 (V 44) = 1958 SCR 571, State of Bombay v. Saubhag Chand M. Doshi	8
(1954) AIR 1954 SC 369 (V 41) = 1955 SCR 26, Shyamlal v. State of U. P.	8, 10

S. N. Chopra with K. C. Sud, for Petitioner; Niren De. Solicitor General of India with S. S. Chadha, for Respondents.

ANDLEY J.: In pursuance of a notice dated May 12, 1967, purporting to have been issued in exercise of the powers conferred by Cl. (j) of Rule 56 of the Fundamental Rules, the petitioner, a permanent Director in the Central Water and Power Commission (Power Wing) New Delhi, was retired from service with effect from August, 15, 1967. It is this retirement which has been challenged by the petitioner on two main grounds, namely, (1) that Fundamental Rule 56 (j) was ultra vires Clause (2) of Article 311 and Articles 14 and 16 of the Constitution of India and (2) that the order of retirement was mala fide and without application of mind to the relevant circumstances of the case.

2. The petitioner was serving as an Electrical Engineer in the Simla Electricity Undertaking until 1949. On September, 7,

1949, he was selected by the Union Public Service Commission for the Class I (Senior Scale) post of a Project Officer in the Central Electricity Commission and was confirmed and became permanent on October 6, 1950. In 1950-51 the Central Electricity Commission was redesignated as the Central Water and Power Commission (Power Wing) and the post of Project Officer was redesignated as Deputy Director. On March 26, 1955, the petitioner became a Director after having been given two promotions and he was confirmed as a permanent Director in April, 1963 with effect from August 5, 1960. In his petition, the petitioner has admitted that in respect of his performance in the years 1964 and 1965, two adverse entries were made in the Annual Confidential Reports. In the affidavit in opposition filed on behalf of the respondents, it was stated that adverse entries were recorded in the Annual Confidential Reports of the petitioner for the years 1955, 1958, 1959, 1960 and 1962 also and these were communicated to the petitioner from time to time. Making of these adverse entries between 1955 and 1962 has not been denied by the petitioner in his affidavit in rejoinder. But his contention is that by reason of his confirmation as permanent Director with effect from August 5, 1960, "these adverse entries had been found as false by the Departmental Promotion Committee". I may only state that with his affidavit in rejoinder, the petitioner has filed a statement (Annexure 'M') quoting these adverse entries.

3. It appears that the Departmental Promotion Committee, on May 30, 1965, found the petitioner unfit for promotion and the complaint of the petitioner is that the adverse entry made for the year 1964 was placed before the Departmental Promotion Committee even before it has been communicated to the petitioner in September, 1965. After receiving the communication in respect of the adverse entry for the year 1964, the petitioner asked for particulars of specific incidents, by his letter dated October 26, 1965. Particulars were not supplied and, therefore, the petitioner filed Civil Writ No. 608-D of 1966 in the Circuit Bench of the Punjab High Court on August 5, 1966 for quashing the aforesaid adverse entry. After this writ had been filed, the adverse entry for the year 1965 was communicated to the petitioner and because the petitioner was aggrieved by this adverse entry also, he filed Civil Writ No. 607-D of 1966 in the Circuit Bench of the Punjab High Court on August 5, 1966. It was during the pendency of these two writs that the impugned notice dated May 12, 1967, retiring the petitioner was issued and Civil Writ No. 525 of 1967 was filed in this Court challenging the petitioners retirement. These three writs had come up for hearing before us on October 26, 1967. For the reasons stated in the order of that date Civil Writ No. 525 of 1967 was dismissed as withdrawn with liberty to file a fresh writ petition and it

was then that the present writ petition was filed.

4. The notice (Annexure 'A') dated May 12, 1967 states:—

"No. 2/4/66-Adm. I
Government of India
Ministry of Irrigation and Power.
New Delhi, the 12th May, 1967.

NOTICE

Whereas the President is of the opinion that it is in the public interest so to do:

Now, therefore, in exercise of the powers conferred by Clause (j) of Rule 56 of the Fundamental Rules, the President hereby gives notice to Shri R. L. Butail, a permanent Director in the Central Water and Power Commission (Power Wing), New Delhi, that he shall retire from service with effect from the date of expiry of three months from the date of the service of this notice on him or with effect from the forenoon of the 15th August, 1967, whichever is later.

Sd/- K. G. R. Iyer,

Joint Secretary to the Govt. of India.
To

Shri R. L. Butail

Director,

Central Water and Power Commission,
(Power Wing), New Delhi".

This notice was received by the petitioner on the same date. It has been issued in exercise of the powers conferred by Cl. (j) of Rule 56 of the Fundamental Rules. It is necessary to set out the necessary clauses of this rule and these clauses are:—

"56 (a) Except as otherwise provided in this rule, every Government servant shall retire on the day he attains the age of fifty-eight years. (d) A Government servant to whom Clause (a) applies may be granted extension of service after he attains the age of fifty-eight years with the sanction of the appropriate authority if such extension is in the public interest and the grounds therefor are recorded in writing:

Provided that no extension under this clause shall be granted beyond the age of sixty years except in very special circumstances.

(j) Notwithstanding anything contained in this Rule, the appropriate authority shall, if it is of the opinion that it is in the public interest to do so, have the absolute right to retire any Government servant after he has attained the age of fifty-five years by giving him notice of not less than three months in writing".

5. The Scheme of this Rule seems to be that the age of superannuation has been fixed at fifty-eight years by clause (a) but this fixation is "except as otherwise provided in this rule". In exercise of the power conferred by Clause (d) of this Rule, an extension of service can be given to a Government servant on attaining the age of fifty-eight years but such extension is to be granted by the appropriate authority if it is in the public interest to do so and the grounds therefor are recorded in writing.

Cl. (j) which starts with the non obstante clause gives an absolute right to retire any Government servant after he has attained the age of fifty-five years by giving him notice of not less than three months provided the appropriate authority is of the opinion that it is in the public interest to do so. Therefore, while the age of superannuation or the normal age of retirement has been fixed at fifty-eight years, such fixation is subject to extension under Clause (d) and curtailment under Clause (j), provided it is in the public interest to do so. In fact the power of retiring at the age of fifty-five years — in other words the power to retire compulsorily — if it is exercised for the reasons and in the manner mentioned in Cl. (j) overrides the right of the Government servant to remain in service until he attains the age of fifty-eight years.

6. The validity of Clause (j) of the Rule in so far as challenge to it on the basis of Article 14 of the Constitution is concerned, is questioned on the ground that this clause gives arbitrary power to the appropriate authority because the expression in the public interest" has not been defined and, therefore, there are no well defined limits within which this power can be exercised. The fact that the power to retire compulsorily can be exercised only if it is in the public interest to do so is a sufficient safeguard against the arbitrary exercise of this power. Public interest is not a new concept. It is true that it has not been defined but the reason for that is that it is incapable of precise definition. Nevertheless, it is not possible to say that it is a vague concept. What is included in public purpose may differ from time to time and from place to place. In the context in which it has been used, it means the proper functioning of the public service. I, therefore, do not find any substance in the plea that Clause (j) of Rule 56 confers arbitrary power which is repugnant to Article 14 of the Constitution.

7. No argument was addressed to us as to how Clause (j) of this Rule is hit by Article 16 of the Constitution nor are any grounds relevant to Article 16 mentioned in the petition and, therefore, nothing more need be said in so far as the bare challenge on the ground of Article 16 is concerned.

8. In so far as the challenge under Cl. (2) of Article 311 is concerned, the first argument is that the curtailment, by compulsory retirement of the age of retirement fixed under Clause (a) of this rule, amounts to dismissal or removal and, therefore, Cl. (j) of this Rule is unconstitutional. This argument has no substance in view of the various decisions of the Supreme Court which were considered in Dekka's case reported in AIR 1964 SC 600. With regard to the decision in Sham Lal's case, AIR 1954 SC 369, it was observed:—

"Confining itself to the special features of compulsory retirement which was effected under Article 465-A and Note 1 appended thereto, the Court came to the conclusion

that compulsory retirement was not removal. We may add that subsequent decisions show that the same view has been taken in respect of compulsory retirement throughout and so, that branch of the law must be held to be concluded by the series of decisions to which we shall presently refer.

The Supreme Court then considered another of its decision relating to compulsory retirement reported in AIR 1957 SC 892, *State of Bombay v. Saubhag Chand M. Doshi*. In this case Venkatarama Aiyar J. had observed:—

“Question of the said character could arise only when the rules fix both an age of superannuation and an age for compulsory retirement and the services of a Civil Servant are terminated between these two points of time. But where there is no rule fixing the age of compulsory retirement, or if there is one and the servant is retired before the age prescribed therein, then that can be regarded only as dismissal or removal within Art. 311 (2).”

With regard to this observation, it was stated:—

“It would be noticed that the rule providing for compulsory retirement was upheld on the ground that such compulsory retirement does not amount to removal under Art. 311 (2) because it was another mode of retirement and it could be enforced only between the period of age of superannuation prescribed and after the minimum period of service indicated in the rule had been put in. If, however, no such minimum period is prescribed by the rule of compulsory retirement, that according to judgment, would violate Art. 311 (2) and though the termination of a servant's services may be described as compulsory retirement, it would amount to dismissal or removal within the meaning of Art. 311 (2). With respect, we think that this statement correctly represents the true position of law”.

It is needless to refer to the other cases noticed in Deka's case and it will be quite enough to state that the ultimate conclusion at which the Supreme Court arrived was that compulsory retirement does not per se amount to dismissal or removal. There is, therefore, no force in the broad contention of the petitioner that the mere fact that the normal period of service is curtailed by compulsory retirement amounts to dismissal or removal.

9. The second argument in this connection which has been urged by the petitioner is based upon the following observation of the Supreme Court in Deka's case:—

“Apart from date, we think that if any Rule permits the appropriate authority to retire compulsorily a civil servant without imposing a limitation in that behalf that such civil servant should have put in a minimum period of service, that Rule would be invalid and the so-called retirement ordered under the said Rule would amount to removal of the civil servant within the meaning of Art 311 (2)”.

and the argument is that since no limitation has been imposed in Clause (j) of Rule 56 that the civil servant concerned should have put in a minimum period of service, it is ultra vires. Clause (2) of Art. 311 of the Constitution. According to the petitioner, the fixation of the age at which compulsory retirement can be ordered does not amount to fixation of the “minimum period of service” and what was required was to specify the number of years of service. The argument of the learned Solicitor General on the other hand is that fixation of the age of compulsory retirement is specification of the minimum period of service and the only safeguard that has to be observed is that such age should not be fixed at a very early stage of the career. He relies upon the following observation of the Supreme Court in Deka's case:—

“At this stage, we ought to make it clear that in the present appeals, we are not called upon to consider whether a rule of compulsory retirement would be valid, if, having fixed a proper age of superannuation it permits a permanent servant to be retired at a very early stage of his career”. It has to be remembered that the age of 55 years for compulsorily retiring a civil servant which has been fixed by Clause (j) of Fundamental Rule 56 was the age of superannuation fixed by Fundamental Rule 56 (a) prior to its amendment in 1965. Prior to its amendment this rule provided:—

“except as otherwise provided in the other clauses of this rule the date of compulsory retirement of a Government servant, other than a ministerial servant, is the date on which he attains the age of 55 years. He may be retained in service after the date of compulsory retirement with the sanction of the Local Government on public grounds, which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances”.

The scheme of the pre-existing Rule was that every Government servant must retire on attaining the age of 55 years and power was given to the Local Government to retain him up to the age of 60 years on public grounds. The scheme of the amended R. 56 is that the age of superannuation or retirement for everybody is fixed by Clause (a) at 58 years and it is subject to extension under Clause (d) and to curtailment under Clause (j). Taking this historical background into consideration, it is not possible to accept the contention that fixation of the age of compulsory retirement at 55 years as has been done by Clause (j) of Fundamental Rule 56 would be retirement at a very early stage of the career of a Government servant.

10. I may here refer to another decision of the Supreme Court reported in AIR 1965 SC 280, *T. G. Shivacharana Singh v. State of Mysore*. Their Lordships of the Supreme Court considered Rule 95 (a) and Note I to Rule 285 of the Mysore Civil Services Rules, 1958. Rule 95 (a) provided that the

date of Superannuation of a Government servant would be the date on which he attains the age of 55 years and it authorised the Government to retain the Government servant in service even after the date of superannuation if he was physically fit and if his continuance in Government service was found to be in public interest. Rule 285 dealt with retiring pension and provided that a retiring pension would be granted to a Government servant who was permitted to retire after completing qualifying service for 30 years or such less time as may be prescribed. Note I to this Rule provided, *inter alia*, that Government may, in special cases, require any Government servant to retire any time after he had completed 25 years qualifying service or on attaining 50 years of age if such retirement was considered necessary in the public interest and provided that the appropriate authority would give a notice in writing at least three months before the date on which the Government servant was required to retire. It will, therefore, be seen that power was given to the Government by Note I to Rule 285 to compulsorily retire a Government servant before the age of superannuation fixed at 55 years if he had completed 25 years qualifying service or on attaining 50 years of age. The validity of Note I to Rule 285 was challenged upon the ground that it contravened Articles 14 and 16 (1) of the Constitution. It was observed by the learned Chief Justice :—

“Mr. Venkataranga Iyengar contends that this Rule is invalid, because it contravenes Art. 14 as well as Art. 16 (1) of the Constitution. In our opinion, this contention can no longer be entertained; because it is concluded by a long series of decisions of this Court. Recently, a Special Bench of this Court had occasion to consider the validity of Rules 148 (3) and 149 (3) contained in the Indian Railway Establishment Code in *Moti Ram Deka v. General Manager, North East Frontier Railway, Civil Appeals Nos. 711 to 713 of 1962; 714 of 1962 and 837 to 889 of 1963, D/-5-12-1963 = AIR 1964 SC 600.*

In dealing with the problem raised in that case, this Court has made it perfectly clear that so far as the question of compulsory retirement is concerned, it must be taken to be concluded by several decisions of this Court. This Court then examined the relevant decisions on this point beginning with the case of 1955 SCR 26 = AIR 1954 SC 369 and it has observed that the law in relation to the validity of the Rules permitting compulsory premature retirement of Government servants must be held to be well settled by those decisions and need not be reopened.

The only exception the majority judgment made in that behalf was that it may be necessary to consider whether such a rule of compulsory retirement would be valid if having fixed a proper age of superannuation,

it permits a permanent servant to be retired at a very early stage of his career. This consideration does not arise in the present case, because, as we have already seen, Note 1 to R. 285 requires that the Government servant against whom an order of compulsory retirement is proposed to be passed must have completed either 25 years of active service or attained 50 years of age. We are, therefore, satisfied that the point which Mr. Venkataranga Iyengar wants to raise before us in the present petition is clearly concluded by the decisions of this Court and cannot be allowed to be reopened”.

The contention, therefore, that specification of the age of compulsory retirement without indicating the number of years of service is not specification of the “minimum period of service” cannot be entertained. In my opinion all that has to be seen is whether the right to compulsorily retire can be exercised at a very early stage of the career and it cannot be said with any justification that when the age of superannuation is fixed at 58 years, the compulsory retirement at the age of 55 years would be retirement at a very early stage of the career. The previous decisions of the Supreme Court were again reaffirmed in AIR 1964 SC 1585, *Gurdev Singh Sidhu v. State of Punjab*, where Gajendragadkar, C. J., speaking for the Court has observed :—

“It is hardly necessary to emphasise that for the efficient administration of the State, it is absolutely essential that permanent public servants should enjoy a sense of security of tenure. The safeguard which Art. 311 (2) affords to permanent public servants is no more than this that in case it is intended to dismiss, remove or reduce them in rank, a reasonable opportunity should be given to them of showing cause against the action proposed to be taken in regard to them. It seems that only two exceptions can be treated as valid in dealing with the scope and effect of the protection afforded by Art. 311 (2).

If a permanent public servant is asked to retire on the ground that he has reached the age of superannuation which has been reasonably fixed, Art. 311 (2) does not apply, because such retirement is neither dismissal nor removal of the public servant. If a permanent public servant is compulsorily retired under the rules which prescribe the normal age of superannuation and provide for a reasonably long period of qualified service after which alone compulsory retirement can be ordered, that again may not amount to dismissal or removal under Article 311 (2) mainly because that is the effect of a long series of decisions of this Court”.

11. The next argument of the petitioner is that even if Clause (j) of Fundamental Rule 56 is not *ultra vires*, the compulsory retirement of the petitioner in the circumstances of this case was *mala fide* and, therefore, amounted to a punishment within the

meaning of Clause (2) of Art. 311 (2) of the Constitution. So far as this contention is concerned, the respondents, in their counter affidavit, took the stand that it is for the appropriate authority to decide whether or not it was in the public interest to compulsorily retire a Government servant; that its opinion on the point cannot be challenged before a Court of law and since satisfaction had to be merely subjective, it was not necessary for the Government to specify the grounds of which the satisfaction was founded and that the matter of satisfaction was not justiciable. During the course of arguments, however, the learned Solicitor General did not rightly urge this extreme contention. All that he argued was that Clause (j) of Fundamental Rule 56 provides a subjective test and an order of compulsory retirement cannot be challenged unless it is shown to be mala fide or made without application of mind. This stand is in accord with the view which has been expressed by the Supreme Court in the case of Barium Chemicals Ltd. v. Company Law Board, reported in AIR 1967 SC 295, where it has been held that if it is shown that the circumstances did not exist or that they were such that it was impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion was challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute. It has also been held that though an order passed in exercise of power under a statute cannot be challenged on the ground of propriety or sufficiency, it is liable to be quashed on the ground of mala fides, dishonesty or corrupt purpose or on grounds which are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation.

12. Now, Annexure 'G' to the petition is a statement of mala fides relating, inter alia, to this petition. This statement contains vague and general allegations which have been denied by the respondents and in respect of which the petitioner has not been able to produce any evidence in support. His main complaint is that although he was a very well-qualified person and had done good work he had been superseded by one Mr. Aswath and other persons who were junior to him. The respondents have, on the other hand, contended that appointments to the post of Director (Selection Grade), Deputy Chief Engineer and Chief Engineer are selection posts, promotions to which are made on the basis of merit with due regard to seniority. It is further contended that the post of Member is filled by selection by the Union Public Service Commission on an All India basis and that the petitioner was considered along with other eligible candidates. In paragraph 11 of the counter affidavit, the respondents have submitted that before retiring him, the entire record of service of the petitioner was taken into consideration right from his appoint-

ment to the Simla Municipal Committee in 1949. It is averred that it is apparent from his record of service that he is not amenable to discipline; that there have been adverse entries against him for the years 1953 to 1955; 1958 to 1960; 1962; 1964 and 1965 which have been made, during this period, by nine different officers and that these adverse entries were based on an objective assessment of his work and conduct by his superior officers. No other material has been disclosed by the respondents as they had contended in their counter affidavit that the reasons for the decision to retire compulsorily were not justiciable. However, with his affidavit in rejoinder, the petitioner has filed annexure 'M' quoting the adverse entries which were made in his Annual Character Roll in the years 1955, 1958, 1959; 1962, 1964 and 1965. These entries are:—

"1955: An Officer of below average capacity. His relations with the colleagues are not happy. Notes prepared are unnecessarily long indicating confused thinking, considerable improvement is called for in his work".

1958 : (received in 1960): "His personal contribution has had hardly been to few drafts received from his Directorate on the codes of practice on generation and transmission on the plea that he is still engaged on the study of the various literatures on the subject at which he has been for long over a year or so.

An Officer of average ability, with set ideas. His relation with his colleagues could be happier".

"1959 :— (i) It has not been found easy to deal with him because of the lack of his adaptability, mainly due to pre-set ideas.

(ii) He is inclined to making representations against orders issued in the interest of work".

"1962: His relations with his colleagues and subordinates could have been a happier".

"1964: A problem Director — in that it falls to the inevitable lot of some member to have him under his charge and manage as far as practicable"

"I agree with the above even though the officer is intelligent and capable of good work if he wishes to apply himself wholeheartedly".

"1965: He did not show any improvement in regard to the defects mentioned in the previous confidential report.

His work during the year was below average, considering his senior position in the Director's grade Shri Butail can do good work if he likes to do so".

The contention of the petitioner is that the adverse entries upto 1962 could not be taken into consideration because by reason of his confirmation in April, 1963 as permanent Director with effect from August 5, 1960, these adverse entries had been, as it were, washed off. He further contends that the adverse entries for 1964 and 1965 also could not be taken into consideration for the

purpose of his compulsory retirement because they had been made without complying with the procedure contained in the Home Ministry instructions dated October 31, 1961.

13. The mere fact that the petitioner was confirmed as a permanent Director in spite of the adverse entries made prior to 1963 cannot lead to the conclusion that those adverse entries had ceased to exist. The confirmation to the post of permanent Director was as a matter of course because up to that post, promotion was not by selection. It is in evidence that the petitioner had challenged the adverse entries made against him between 1955 and 1962 by filing a writ petition, Civil Writ No. 188-D of 1965 in the Circuit Bench of the Punjab High Court. This writ petition was dismissed by the High Court in limine and the petitioner was not granted special leave to appeal by the Supreme Court. Therefore, the petitioner himself treated these adverse entries as being alive.

14. With regard to the adverse entries for the years 1964 and 1965, it is in evidence that the petitioner made representations against them which were rejected. But, the complaint of the petitioner is that the adverse entries for the years 1964 and 1965 were not made in accordance with the procedure that has been prescribed by the office memorandum dated October 31, 1961, issued by the Ministry of Home Affairs. This memorandum provides, *inter alia*, that where an adverse entry is made, whether it related to a remediable or to an irremediable defect, it should be communicated; but while doing so, the substance of the entire report, including what may have been said in praise of the officer should be communicated. This memorandum also provides that confidential reports should make a reference to specific incidents by way of illustration to support adverse comments of a general nature, e.g., inefficiency, dilatoriness, lack of initiative or judgment, etc. Further a right is given to the Government servant concerned to make representations against the adverse entries. It is contended that the adverse entry made for the year 1964 was not communicated to the petitioner until September 1965, before which the Departmental Promotion Committee had already, on May 30, 1965, declared the petitioner unfit for promotion on the basis of this adverse entry. It is contended that the adverse entry for the year 1964 and the adverse entry for 1965 could not, therefore, be taken into consideration for the purposes of compulsory retirement of the petitioner as the aforesaid entries have been made in breach of the terms of the memorandum dated October 31, 1961, and since they were taken into consideration, the compulsory retirement amounts to a major penalty under Rule 11 of the Central Civil Services (Classification, Control and Appeal) Rules 1965. Rule 11

provides that compulsory retirement is one of the major penalties but the explanation to this rule says, *inter alia*, that compulsory retirement of a Government servant shall not amount to a penalty if it is in accordance with the provisions relating to his superannuation or retirement. This argument also has no substance because I have already expressed the view that the compulsory retirement was in accordance with Clause (j) of Fundamental Rule 56 and the aforesaid memorandum dated October 31, 1961, is not relevant in so far as the compulsory retirement of the petitioner is concerned.

15. It is, therefore, not possible to say that the adverse entries for the years 1964 and 1965 constitute extraneous or irrelevant matter in so far as the satisfaction for the purposes of compulsory retirement is concerned. In my opinion, it is a relevant consideration and it is not possible to say that if these adverse entries are taken into consideration, it is not possible for any person to come to the conclusion that it would be in the public interest to compulsorily retire the petitioner.

16. I, therefore, do not find any substance in this petition which I hereby dismiss. In the circumstances of the case, I will make no order as to costs.

17. S. K. KAPUR, J.: I agree.
BDB/D.V.C. Petition dismissed.

AIR 1969 DELHI 21 (V 56 C 8)

S. N. ANDLEY, J.

M. M. Kochar, Petitioner v. The State, Respondent.

Criminal Revn. Appln. No. 591-C of 1966, D/-10-1-1968, from order of Addl. S. J., Delhi, D/-10-5-1966.

(A) Criminal P. C. (1898), Ss. 337, 338, 339 and 435—Revision order tendering pardon either under Sec. 337 or S. 338 is not revisable by High Court under S. 435 — Provision under S. 337 (1-A) does not convert order into a judicial act.

The power of the High Court as contemplated under S. 435 of Criminal P. C. cannot be invoked in the case of an order made either under S. 337 or under S. 338 of the Code. The fact that the Magistrate is required by sub-section (1-A) of S. 337 to record his reasons for tendering a pardon cannot convert the tender of pardon into a judicial act revisable by the High Court. Neither can it be suggested that the co-accused being tried along with the person to whom pardon is tendered have any right to object to the making of a tender of pardon. (Paras 18 and 14)

The tender of pardon and its acceptance by the person concerned is a matter entirely between the Court concerned and the per-

CL/GL/B277/68

son to whom it is made and if the tender of a pardon is accepted by the accomplice concerned, the only obligation placed upon the prosecution is to examine him as a witness in the case. He will then be subjected to cross-examination by the co-accused and it will be for the co-accused to show by such cross-examination that the statement that is made by the accomplice is a false statement. (Para 14)

(B) Criminal P. C. (1898), Ss. 401, 402, 337, 338 — Scope and object of the sections — Tender of pardon — Nature of the act — (Constitution of India, Arts. 72 and 161).

Pardon is one of the many prerogatives recognised as being vested in the Sovereign. This sovereign power to grant pardon is recognised in our Constitution in Articles 72 and 161 and also in Ss. 401 and 402, Criminal P. C. These provisions relate to the grant of a pardon after sentence has been imposed and the tender of pardon to an accomplice under certain conditions as contemplated by Ss. 337 and 338 of the Code is a variation of this very power. The grant of pardon, whether it is under Art. 161 or Article 72 of the Constitution, or under Ss. 337, 338, 401 and 402 of the Code is the exercise of sovereign power: AIR 1958 Punj 72 and AIR 1961 SC 112 and (1833) 8 Law Ed. 640, Rel. on. (Para 13)

(C) Criminal P. C. (1898), Ss. 337 (1) and 338 — Stage at which pardon can be tendered — High Court ordering that the accomplice be committed and tried along with other accused — Tender of pardon to accomplice during Sessions trial, held, could not be said to nullify High Court's orders — No limit is placed on the stage of the trial after which a tender of pardon may not be made. (Para 16)

(D) Criminal P. C. (1898), Ss. 337 (1) and 338 — Evidence of an accomplice—Credibility of.

The fact that the tender and acceptance of pardon was after a great deal of delay or the fact that the accomplice accepted the tender of pardon after he had been ordered by the High Court to be committed for trial along with other accused, will be relevant circumstance to determine the weight to be attached to his testimony. (Para 16)

(E) Criminal P. C. (1898), Ss. 338, 337 and 435 — Scope — Exercise of power under Sec. 338 — No revision under S. 435 lies.

Section 338 does not require the Sessions Judge to record his reasons for tendering a pardon. The only requirements of the section are that the Sessions Judge should make an order for the tender of pardon "with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in or privy to, any such offence" and on the same condition as under S. 337 that he should make a full and true disclosure. Therefore, the power exercised by the Ses-

sions Judge under S. 338 is also an executive power and not a judicial power which is revisable under S. 435 of the Code. (Para 13)

(F) Criminal P. C. (1898), S. 339 (2)—Proceeding against the accomplice.

If the accomplice who has accepted a tender of pardon either under S. 337 or under S. 338 has wilfully concealed anything essential or has given false evidence or has not complied with the condition on which the tender was made, he can only be tried in separate proceedings, inter alia, for the offence in respect of which the pardon was tendered as provided for in S. 339. (Para 17)

Cases Referred:	Chronological Paras
(1961) AIR 1961 SC 112 (V 48)=	
(1961) 1 Cri LJ 173, Nanavati, K. M. v. State of Bombay	13
(1958) AIR 1958 Punj 72 (V 45)=	
1958 Cri LJ 413, Mehra, A. L. v. State	12
(1953) AIR 1953 Manipur 2 (V 40)=	
1954 Cri LJ 148, Angomkala Singh v. Manipur State	10
(1952) AIR 1952 Him Pra 57 (V 39)=1952 Cri LJ 1339, Ram Chand v. State	11
(1952) AIR 1952 Vindh Pra 42 (V 39) = 1952 Cri LJ 986, Kartar Singh v. State of Vindhya Pradesh	9
(1948) AIR 1948 Mad 232 (V 35)=	
49 Cri LJ 451, Akbar Sheriff R. In re.	4
(1921) AIR 1921 Pat 499 (V 8) =	
2 Pat LT 125, Sheobhajan Ahir v. King Emperor	8
(1833) 8 Law Ed 640 = 7 Pet 150, United States v. George Wilson	13
A. S. Ishar, for Petitioner; R. K. Verma, for Respondent.	

ORDER: This revision is directed against the order dated May 10, 1966, of the Additional Sessions Judge, Delhi, in Sessions Case No. 20 of 1965 by which he made an order for granting a pardon to Sardari Lal Sabharwal, one of the accused in the aforesaid Sessions case. The revision has been filed by the petitioner who was one of the other co-accused.

2. On September 13, 1959, a complaint was lodged with the Police that the petitioner, along with Durgadas Moondhra and the said Sabharwal had, in or about 1957, entered into a conspiracy as a result of which they forged documents and made unauthorised endorsements on import licences which had been issued to Messrs. E. M. Alloock and Mehta (Private) Ltd., Calcutta, of which the said Moondhra was the Finance Director and the said Sabharwal was the Import Assistant. It was alleged that the petitioner had worked as an Assistant Controller of Imports and Exports in the office of the Chief Controller of Imports and Exports, New Delhi, up to November 4, 1957, and was thereafter working in the cash branch of that office.

1969

M. M. Kochar v. State (Andley J.)

The challan was filed in the Court of a Magistrate, First Class, Delhi, and commitment proceedings took place in the Court of Mr. J. C. Aggarwal, Magistrate, First Class, Delhi, who by his order dated July 3, 1961, discharged the said Moondhra and Sabharwal, but framed the charge against the petitioner for an offence under Sec. 467 of the Indian Penal Code and committed him to the Court of Session. The State filed revision petitions against the discharge of the said Moondhra and Sabharwal and the petitioner filed a revision petition against the charge framed against him. The Sessions Judge, Delhi, by his order dated February 21, 1962, accepted the revisions filed by the State and ordered that the said Sabharwal and Moondhra be also committed to the Court of Session and dismissed the revision filed by the petitioner.

The petitioner, the said Sabharwal and the said Moondhra filed three separate revision petitions against the aforesaid orders dated February 21, 1962, of the Sessions Judge in the Punjab High Court, but these revision petitions were rejected by Khanna, J. by his order dated April 22, 1964, because it was found that there was prima facie material justifying the trial of the petitioner and the said Moondhra and Sabharwal. Thereafter, and on being committed, the aforesaid three accused appeared before the Additional Sessions Judge, Delhi, on November 15, 1965. It was then that, on December 1, 1965, the said Sabharwal applied to the District Magistrate, Delhi, under Section 337 of the Code of Criminal Procedure for a tender of pardon to him.

3. In the aforesaid application, Sabharwal stated inter alia that he was "prepared to make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned in respect of which he had been committed to stand his trial before the Court of Session". He, therefore, prayed that "subject to the applicant remaining on existing bail" he may be granted pardon and thereafter examined as an approver in the case.

An endorsement was made on December 22, 1965 on this application by the Deputy Legal Adviser/P.P. of the Central Bureau of Investigation in these words:

"In the interest of justice, pardon may please be granted to the applicant accused, on the condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned in respect of which he has been committed to stand his trial before the Court of Session under Section 120-B, I.P.C., read with Ss. 467/420, I.P.C., 467/471, I.P.C."

Since the accused had been committed for trial, the District Magistrate forwarded this application to the District Judge "for action,

if he deems fit, under Section 338, Cr.P.C." and since the trial was being held in the Court of Mr. R. N. Aggarwal, Additional Sessions Judge, Delhi, this application came to be dealt with by him.

It appears that notice of this application was given to the other two accused who appeared and argued the matter to urge that pardon should not be granted to the said Sabharwal. It further appears that, as directed by the learned Additional Sessions Judge by his impugned order, Mr. R. N. Malhotra, Magistrate, First Class, Delhi, on May 17, 1966, recorded the statement of the said Sabharwal after tendering pardon as directed by the learned Additional Sessions Judge.

4. It appears that the said Moondhra filed a criminal revision, being Criminal Revision No. 166-D of 1966, against the impugned order in the Punjab High Court which was dismissed in limine by R. P. Khosla J. on May 16, 1966, i.e., one day before the pardon was tendered to the said Sabharwal. It was then that on or about June 28, 1966, that is, about six weeks after the pardon had been tendered to the said Sabharwal, so the present petition was filed in the Punjab High Court. It came up for admission before the Punjab High Court and a notice was issued by an order dated June 29, 1966.

As stated in the order of admission, it appears that the correctness of the judgment of the Madras High Court reported in AIR 1948 Mad 232, *In re R. Akbar Sheriff* was challenged. I may state here that the said judgment of Rajamannar J. (as he then was) states that an order made under Sec. 337 of the Code of Criminal Procedure was not revisable by the High Court. The entire judgment is to this effect:—

"I do not think that the act of the Magistrate under S. 337, Criminal P. C., namely, tendering pardon to a person is revisable by this Court. No authority has been placed before me to show that it is revisable. If there are any irregularities in the grant of the pardon, they can be urged by the accused at the trial. The petitions are dismissed."

5. The first question, therefore, which is to be determined is whether an order made under Section 337 read with Section 338 of the Code of Criminal Procedure is revisable in exercise of the powers of this Court under Section 435 of the Code of Criminal Procedure. Sections 337 and 338 of the Code of Criminal Procedure are as follows:—

"337. (1) In the case of any offence triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to seven years, or any offence under any of the following sections of the Indian Penal Code, namely, Sections 161, 165, 165-A, 216-A, 369, 401, 435 and 477-A, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or

any Magistrate of the First Class may, at any stage of the investigation or enquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof:

Provided that, where the offence is under inquiry or trial, no Magistrate of the First Class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the enquiry or holding the trial, and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof.

(1-A) Every Magistrate who tenders a pardon under sub-section (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record:

Provided that the accused shall pay for the same unless the Magistrate, for some special reason, thinks fit to furnish it free of cost.

(2) Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.

(2-A) In every case where a person has accepted a tender of pardon and has been examined under sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be.

(2-B) In every case where the offence is punishable under Section 161 or Section 165 or Section 165-A of the Indian Penal Code or sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947, and where a person has accepted a tender of pardon and has been examined under sub-sec. (2), then, notwithstanding anything contained in sub-section (2-A), a Magistrate shall, without making any further inquiry, send the case for trial to the Court of the Special Judge appointed under the Criminal Law Amendment Act, 1952.

(3) Such person, unless he is already on bail, shall be detained in custody until the termination of the trial.

338. At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with

the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender a pardon on the same condition to such person."

6. It is evident from sub-section (1) of Section 337 of the Code that a pardon can be tendered to an accomplice "at any stage of the investigation or enquiry into, or the trial of the offence" and the object of tendering a pardon is "with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence", but such tender is to be on condition of the accomplice "making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof....."

Sub-section (1-A) of this section requires that the Magistrate who tenders a pardon under sub-section (1) shall record his reasons for so doing. Sub-section (2) of this section requires that every person accepting a tender of pardon shall be examined as a witness in the trial. Sub-section (2-A) provides that if a person has accepted a tender of pardon and has been examined under sub-section (2), he can still be committed for trial to the proper Court if the Court before whom the proceedings are pending is satisfied that there are reasonable grounds for believing that such person is guilty of an offence. Sub-section (3) of this section provides that a person who has accepted the tender of pardon shall, unless he is already on bail, be detained in custody until the termination of the trial.

7. The contention of Mr. A. S. Johar, learned counsel for the petitioner, is that there must be good reasons which have to be recorded as provided by Section 337(1-A) of the Code before a tender of pardon is made and, therefore, such an order for the tender of a pardon would be revisable under Section 435 of the Code because under the latter section, the superior Court can examine the record of any proceeding before any inferior Criminal Court for the purpose of satisfying itself not only as to the correctness or legality but also as to the propriety of any finding, sentence or order of such inferior Court.

It is the contention of the petitioner that there is nothing either in Sections 337 and 338 or in Section 435 of the Code limiting the jurisdiction of the superior Court from examining the propriety of an order tendering a pardon. He further contends that the tender of pardon in this case would nullify the orders of the Additional Sessions Judge and of the High Court, referred to earlier, whereby the said Sabharwal had been ordered to be tried; that the tender should not have been made to the said Sabharwal as he was the main accused and

1969

that since it was admittedly a case of circumstantial evidence, the tender of pardon after the expiry of a little more than five years after the institution of the challan in Court would gravely prejudice the other two co-accused as the said Sabharwal was likely to stretch his statement so as to implicate the other two co-accused.

8. The first case upon which the petitioner relies is reported in AIR 1921 Pat 499, Sheobhajan Ahir v. King Emperor, in which pardon was granted to a co-accused against whom the case was withdrawn under Section 495 of the Code of Criminal Procedure. The other co-accused were convicted. The matter came to be dealt with by the High Court and Jwala Prasad J. observed that the Magistrate exercised wrong discretion in permitting the case against the approver to be withdrawn. This case does not deal with the contention which has been raised before me and is, therefore, of no help in determining whether a revision is competent against an order made under Section 337 or Section 338 of the Code of Criminal Procedure.

9. The next case cited is a decision of the Judicial Commissioner, Vindhya Pradesh, and is reported in AIR 1952 Vindh Pra 42, Kartar Singh v. State of Vindhya Pradesh. This case also does not deal with the competency of a revision. It merely deals with the weight to be attached to the statement of the approver where the confession is recorded late.

10. The next case is a decision of the Judicial Commissioner Manipur, reported in AIR 1953 Manipur 2, Angom Kala Singh v. Manipur State, which again related to the weight to be attached to the evidence of an approver when considering the appeal of the co-accused against their conviction.

11. The last case cited is a decision of the Judicial Commissioner of Himachal Pradesh as reported in AIR 1952 Him Pra 57, Ram Chand v. The State and this case also deals with the weight to be attached to the evidence of an accomplice. There are observations in this and the other cases cited earlier to the effect that the decision to tender pardon was a matter of discretion with the Court concerned.

12. The nature and conditions for the tender of a pardon have been dealt with in a decision of the Punjab High Court reported in AIR 1958 Punj 72, A. L. Mehra v. the State, where it is stated:

"....the grant of pardon carries an imputation of guilt and an acceptance thereof a confession of it. A pardon has been defined as an act of grace which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is in substance and effect a contract between the State on the one hand and the person whom it is granted on the other. As the greater includes the less, a general power to grant pardons

carried with it the right to impose conditions limiting the operation of such pardon."

13. A pardon is said by Lord Coke to be a work of mercy whereby the King, "either before attainder, sentence or conviction or after, forgiveth any crime, offence, punishment." (3 Inst. 233) and the King's Coronation oath is "that he will cause justice to be executed in mercy". As has been observed by the Supreme Court in AIR 1961 SC 112, K. M. Nanavati v. the State of Bombay:—

"Pardon is one of the many prerogatives which have been recognised since time immemorial as being vested in the sovereign, wherever the sovereignty might lie."

This sovereign power to grant a pardon has been recognised in our Constitution in Articles 72 and 161 and also in Sections 401 and 402 of the Code of Criminal Procedure. These provisions relate to the grant of a pardon after sentence has been imposed and, in my view, the tender of pardon to an accomplice under certain conditions as contemplated by Sections 337 and 338 of the Code of Criminal Procedure is a variation of this very power. There is no doubt in my mind that the grant of pardon, whether it is under Art. 161 or Art. 72 of the Constitution or under Sections 337, 338, 401 and 402 of the Code of Criminal Procedure is the exercise of sovereign power.

A pardon, as has been observed by Marshall, C. J., in the case reported in (1833) 30-33 USSCR 149: (8 Law Ed 640= 7 Pet 150), United States v. George Wilson, "is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive Magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court."

14. By sub-sec. (1) of Sec. 337 power is given to the Dist. Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate, or any Magistrate of the First Class to tender a pardon to any person at any stage of the investigation or enquiry into, or the trial of the offence. Even though such Magistrate is required by sub-section (1-A) of Section 337 to record his reasons for tendering a pardon, it cannot be argued that such tender would become revisable by the High Court under Section 435 of the Code of Criminal Procedure if it is made at the stage of investigation or enquiry. Nor can it be suggested that the other persons against whom investigation or inquiry is going on in connection with the same offence can have any right to object to the making of a tender of pardon. Therefore, the mere fact that reasons have to be recorded cannot convert the tender of pardon into a judicial act revisable by the High

Court under Section 435 of the Code of Criminal Procedure. The tender of a pardon and its acceptance by the person concerned is a matter entirely between the Court concerned and the person to whom it is made and if the tender of a pardon is accepted by the accomplice concerned, the only obligation placed upon the prosecution is to examine him as a witness in the case. He will then be subjected to cross-examination by the co-accused and it will be for the co-accused to show by such cross-examination that the statement that is made by the accomplice is a false statement.

15. The present case does not fall under Section 337 but under Section 338 of the Code of Criminal Procedure because the accused had been committed for trial to the Court of the Sessions Judge and Section 338 does not require the Sessions Judge to record his reasons for tendering a pardon. The only requirements of Section 338 are that the Sessions Judge should make an order for the tender of a pardon "with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence" and on the same condition, namely, of the person to whom the tender is made making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned. I am, therefore, of the opinion that the power exercised by the Sessions Judge under Section 338 is also an executive power and is not a judicial power which is revisable by the High Court under Section 435 of the Code of Criminal Procedure.

16. The fact that a pardon was tendered and accepted after a great deal of delay may be a relevant circumstance to determine the weight to be attached to the testimony of the accomplice. Likewise, the fact that the tender of pardon was accepted by the accomplice after he had been ordered by the High Court to be committed for trial will be a relevant circumstance to determine the weight to be attached to his testimony. But, it is difficult for me to accept the contention that the grant of the pardon in this case would nullify the orders of the Additional Sessions Judge and of the High Court, referred to earlier, ordering the accomplice to be committed for trial. No limit is placed on the stage of the trial, after which a tender of pardon may not be made because the words used in sub-section (1) of Section 337 say that such a tender may be made at any stage of the trial.

17. In the instant case, the petitioner has approached this Court after the tender and acceptance of the pardon and after the said Sabharwal had made what according to him is full and true disclosure of the whole of the circumstances within his knowledge relative to the offence. The inevitable result of this fact is that the said Sabharwal has ceased to be an accused in this case.

If he has wilfully concealed anything essential or has given false evidence or has not complied with the condition on which the tender was made, he can only be tried in separate proceedings, *inter alia*, for the offence in respect of which the pardon was tendered and this is so provided by Section 339 of the Code of Criminal Procedure. Therefore, even if the tender and acceptance of pardon is revisable by the High Court under Section 435 of the Code of Criminal Procedure, this is not a case in which such power is to be exercised.

18. In my view, therefore, the power of this Court as contemplated by Section 435 of the Code of Criminal Procedure cannot be invoked in the case of an order made either under Section 337 or Section 338 of the Code of Criminal Procedure. This revision is, therefore, rejected.

TVN/D.V.C.

Petition dismissed.

AIR 1969 DELHI 26 (V 56 C 9)

I. D. DUA C. J. AND

T. V. R. TATACHARI, J.

Messrs. Fedders Lloyd Corporation (P.) Ltd., Petitioners v. B. A. Lakshminarayana Swami and another, Respondents.

Civil Writ No. 16 of 1968, D/-22-2-1968.

(A) Criminal P. C. (1898), S. 165 (1) — Object and scope of — Provisions are directory and not mandatory — But this does not give police officer discretion to fulfil or not to fulfil its requirement — Requirements have to be fulfilled substantially — Held that there was substantial compliance with the requirements — That the documents for which search was made were "said to be" in possession of petitioner at his factory premises, is reason for belief that the documents may be found in the places mentioned — (Civil P. C. (1908), Preamble — Directory or mandatory provisions — Directory provision does not give discretion).

A reading of sub-section (1) of Sec. 165 shows that it laid down two requirements which are to be fulfilled before the power to search is exercised. They are — (1) The Police Officer should have reasonable ground for believing — (a) that anything necessary for the purposes of an investigation into an offence may be found in any place; and (b) that such thing cannot, in his opinion, be otherwise obtained without undue delay; and (2) He should record in writing the grounds of his belief specifying in such writing, so far as possible, the thing for which search is to be made.

(Para 14)

Search is a process exceedingly arbitrary in character, and therefore, the above two requirements are imposed as conditions on the exercise of the power to search. Since they are conditions for the exercise of the power conferred by the section, they should be complied with by the police officer before

Fedders Lloyd Corporation v. B. A. L. Swami

1969

he exercises the power to search given to him under the section. Even if the said two requirements of Section 165 (1) are regarded, not as conditions for the exercise of the power, but as the mode or the manner in which the power conferred on the police officer is to be exercised, the said power has still to be exercised in the manner provided in the section and in no other way. AIR 1960 SC 210, Rel. on; AIR 1936 PC 253 (2), Ref. (Para 15)

The provisions in sub-section (1) of Section 165 are only directory and not mandatory, and consequently substantial compliance with the requirements of the said sub-section (1) would be sufficient. This view gives effect to both the object of the legislature in conferring the power to search upon the police officers under Section 165 (1) and the object to provide safeguards or protection against any mala fide, whimsical or arbitrary searches by the police officers. AIR 1939 Lah 280 (282, 284), AIR 1957 Mys 24, Rel. on; AIR 1946 Lah 456, Explained and held did not overrule, AIR 1939 Lah 280, AIR 1965 Orissa 136 and AIR 1963 SC 822 and AIR 1961 Ker 8 (FB) and AIR 1953 Trav-Co. 466 and (1963) 65 Pun LR 1128 and (1962) 64 Pun LR 403 and AIR 1968 SC 59, Distinguished. Spl. Civil Appln. No. 1198 of 1967, D/-13-10-1967 (Guj), Considered and commented upon. (Paras 21, 29)

The conclusion that the provisions in Section 165 (1) are directory does not mean that the police officer has a discretion to fulfil or not to fulfil the requirements of the said sub-section. The said requirements should be fulfilled at least substantially before any police officer seeks to exercise the power to search under the section. (Para 30)

Where the police officer before making the search had recorded the necessity of the documents and things to be searched for the purpose of the investigation, the places in which they may be found, and his opinion that the said documents and things could not be otherwise obtained without undue delay, there was thus a compliance, or at any rate a substantial compliance, with the aforesaid two parts of the first requirement in sub-section (1) of Section 165. (Para 31)

Where the reason given by the officer in the record for his believing that the documents and things may be found in the possession of the petitioner at their office and factory premises was that they were "said to be" in the possession of the company at the aforesaid premises, by using the words "said to be", the officer clearly implied that he had information from some source that the documents and things were in the possession of the petitioner at their office and factory premises and that he believed the same. The information which he received was the reason or ground for his belief and the same was stated by him in writing. (Para 31)

(B) Criminal P. C. (1898), S. 165 (1) — The police officer is required to record only the grounds for his belief that the thing may be found in any place and the thing for which search is to be made — Place where search has to be made need not be mentioned.

The last part of sub-section (1) in which the requirement that the police officer should record in writing the grounds of his belief is contained, does not refer to the place in which the search is to be made. The police officer is required to record in writing only the grounds of his belief, and the thing for which the search is to be made. There is thus no specific requirement in that part of sub-section (1) of Section 165 that the place in which search is to be made should also be recorded in writing. The place has to be mentioned incidentally in recording the grounds of the belief of the police officer. But, it would not be correct to say that the place in which the search is to be made has to be recorded in writing as a condition or requirement under the sub-section (1) of Section 165, and that any vagueness in so recording the place of search would render the search bad in law. (Para 32)

In considering the question as regards compliance with the requirements of sub-section (1) of Section 165 the ownership and the names of the owners of the various premises to be searched are not as material as the places or premises. (Para 32)

(C) Criminal P. C. (1898), S. 165 (5) — Provision is directory even though word used is "shall" — But this does not give discretion to police officer — Record under sub-section (3) sent after completion of search — Search is irregular in law — Effect of irregular search pointed out — Court has discretion under Art. 226 of the Constitution not to order return of document seized — (Civil P. C. (1908), Preamble — Interpretation of statutes — Directory or mandatory provisions — Use of word "shall") — (Constitution of India, Art. 226).

Sub-section (5) is intended as an extra safeguard to protect individuals against general or roving searches. If the police officer omits to send the record made under sub-sections (1) and (3) forthwith to the nearest Magistrate, the search made by him would not be one in accordance with the provision in the section of the Code, and would, therefore, be irregular in law. AIR 1926 Cal 663, Rel. on. (Para 37)

But having regard to the object or the purpose of Section 165 as a whole and of the provision in sub-section (5) of Sec. 165, the provision in sub-section (5) of Sec. 165, cannot be regarded as mandatory, even though the word used is 'shall'. The provision has to be regarded as directory. This, however, does not mean that the police officer has a discretion to fulfil or not to fulfil the requirement of sub-section (5). The said requirement has to be fulfilled by a police

officer who seeks to exercise the power to search under Section 165. One consequence of the provision in sub-section (5) being directory is, that in a case in which the police officer is not able to fulfil the requirement in the sub-section for reason beyond his control or for other justifiable reasons, the search would not be regarded as bad in law merely because of the non-fulfilment of the requirement in sub-section (5).

The safeguard and the very purpose of the provision in sub-section (5) of Section 165 are defeated by the submission of the record made under sub-section (3) of Section 165 after the search was completed. Such a search is not at all in accordance with the provisions of sub-section (5) of Section 165, and is therefore, irregular in law. (Para 48)

It cannot be laid down as a general rule that in every case of search in which the requirements in sub-sections (1) and (5) of Section 165, are not fulfilled, the documents or things recovered in such defective search must necessarily be returned to the aggrieved party. The Court has to consider the circumstances of each case and pass such order as it might consider proper. AIR 1968 SC 59, Explained. (Para 51)

Even though a search is not made in accordance with the requirements of Sec. 165 it does not vitiate the seizure and does not make the evidence of seizure inadmissible, and it does not vitiate the trial or conviction if there is no miscarriage of justice or any prejudice to the accused. AIR 1965 Orissa 136 and AIR 1963 SC 822 and AIR 1961 Ker 8 (FB) and AIR 1953 Trav-Co. 466 and (1963) 65 Pun LR 1128 and (1962) 64 Pun LR 403, Ref. (Para 52)

So also, the failure to comply with the provisions in Section 165 (5) does not vitiate the trial or conviction, if the failure to comply was bona fide and not mala fide. AIR 1959 Mad 544, Ref. (Para 52)

Thus, when in a case a defective search is made, and the case is still at the stage of investigation and has not reached the stage of trial or conviction, it is open to the Court to take into consideration the said circumstance, as well as the legal position that notwithstanding that the search is defective because of the failure to comply with the provision in S. 165 (5) the evidence of seizure would not be inadmissible and the trial of the case would not be vitiated, and to refuse to direct the return of the documents and things seized in the course of the said defective search, provided of course, the Court is satisfied that the search and the failure to comply with Section 165 (5), were not mala fide. (Para 52)

Held, that though no explanation was forthcoming as to why the record made under sub-section (3) of Section 165, was not sent forthwith to the nearest Magistrate and the explanation given was only as regards the police officers' absence from the place, there was nothing on the record which showed that the said failure to com-

ply with the provision in Section 165 (5) was mala fide, and further the investigation was not yet completed and the documents and things seized were required for the purposes of the investigation. The documents and things need not be directed to be returned to the petitioners, in the exercise of the Court's discretion under Article 226 of the Constitution. Cri. Writ No. 83 of 1967 (Delhi), Rel. on. (Para 53)

(D) Criminal P. C. (1898), Ss. 165 (5), 190 — Record under Sec. 165 (1) sent to magistrate having jurisdiction to take cognizance and not to Special Judge having exclusive jurisdiction to try offence, though Special Judge could also take cognizance — There is compliance with Sec. 165 (5) — (Criminal Law Amendment Act (1952), Ss. 7 (1) and 8).

A plain reading of Section 8 of the Criminal Law Amendment Act shows that though a Special Judge may take cognizance of the offence without there being any committal proceedings, Section 8 does not deprive a Magistrate of his power to take cognizance of such an offence under Section 190, Criminal Procedure Code, though he would not have the power to try the offence. Under Section 7 (1) of the Criminal Law Amendment Act, the exclusive jurisdiction given to the Special Judge is only as regards the trial of the offence. As regards the jurisdiction to take cognizance of the offence, Section 8 no doubt conferred the same on the Special Judge, but did not make it the exclusive jurisdiction of the Special Judge. Therefore, so far as the taking of cognizance of the offence is concerned, a Magistrate as well as the Special Judge can take cognizance of the offence. AIR 1959 Bom 437, Rel. on. (Para 47)

Consequently where the record made under Sec. 165 (1) Criminal P. C. in respect of search in a case for offence under S. 5 (2) of the Prevention of Corruption Act and the offence of conspiracy (Sec. 120-B I.P.C.) to commit offence under Sec. 5 (2), was sent to the Magistrate 1st class who had jurisdiction to take cognizance of the offence, and not to the Special Judge who had exclusive jurisdiction to try the offence, there is full compliance with the requirement of Sec. 165 (5). (Para 47)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 59 (V 55) = (1968) SCJ 121, Commr. of Commercial Taxes, Board of Revenue, Madras v. Ramkishan Shrikishan Jhaver

(1968) Cri. Writ No. 83 of 1967 = (1968) 70 Pun LR 259, P. Dharam Singh and Co. (P) Ltd. v. Inspector General of Police

(1967) Spl. Civil Appln. No. 1198 of 1967 D/-13-10-1967 (Guj), New Swadeshi Mills of Ahmedabad Ltd. v. Shri S. K. Rattan

26, 50

53

29

- (1965) AIR 1965 SC 895 (V 52): 1965
(1) SCR 970, Raza Buland Sugar
Co. Ltd. v. Municipal Board, Ram-
pur 18
- (1965) AIR 1965 Orissa 136 (V 52) =
1965 (2) Cri LJ 112, State v. Satya-
narayan Mallik 25, 52
- (1965) AIR 1965 Punj 129 (V 52),
Jagdish Chandra Gupta v. Union
of India 20
- (1963) AIR 1963 SC 822 (V 50) =
1963 (1) Cri LJ 809, Radha Kishan
v. State of Uttar Pradesh 25, 27, 52
- (1963) 65 Pun LR 1128, Rulia v. The
State 25, 52
- (1962) AIR 1962 SC 1694 (V 49) =
(1963) 1 SCR 98. Collector of Mon-
ghyr v. Keshav Prasad Goenka 29
- (1962) 64 Pun LR 403 = 1962 Cur LJ
251, Gulzar Singh v. The State 25, 52
- (1961) AIR 1961 Ker 8 (V 48) =
1961 (1) Cri LJ 70 (FB), Cochran
Velayudhan v. State of Kerala 25, 52
- (1960) AIR 1960 SC 210 (V 47) =
1960 Cri LJ 286, State of Rajasthan
v. Rehman 14, 19
- (1959) AIR 1959 Bom 437 (V 46) =
1959 Cri LJ 1153, State v. Shankar
Bhaurao 47
- (1959) AIR 1959 Mad 544 (V 46) =
1959 Cri LJ 1445, In re, Govindan
Nair 52
- (1957) AIR 1957 Andh Pra 172
(V 44) = ILR (1957) Andh-1 (FB),
Satayanarayana v. Venkata Sub-
biah 17
- (1957) AIR 1957 Mys 24 (V 44) =
ILR (1956) Mys 238, Nava v. State
of Mysore 24
- (1953) AIR 1953 Trav Co 466
(V 40) = ILR (1952) Trav Co 937, 25, 52
- Pyli Yacob v. The State
- (1946) AIR 1946 Lah 456 (V 33) =
48 Cri LJ 161, Emperor v. Mohd.
Shah 23
- (1939) AIR 1939 Lah 280 (V 26) =
184 Ind Cas 6, Maingal Singh v.
Ghulam Mohammad 22, 23
- (1936) AIR 1936 PC 253 (2) (V 23) =
63 Ind App 372, Nazir Ahmad
v. King Emperor 15
- (1926) AIR 1926 Cal 663 (V 13) =
27 Cri LJ 542, Lal Mea v.
Emperor 37
- A. S. R. Chari, R. Nagarathnam and B. R.
G. K. Achar, for Petitioners; Prakash Narain,
R. K. Verma, A. B. Saharya, for Respon-
dents.

ORDER:— These are five writ petitions filed under Article 226 of the Constitution of India praying for the issue of a direction in the nature of mandamus commanding the respondents to return certain documents and things seized by the respondents on January 1, 1968, and for certain interim reliefs. Civil Writ No. 16 of 1968 was filed by M/s. Fedders Lloyd Corporation (Private) Limited, represented by Director, S. N. P. Punj, Civil Writ No. 17 of 1968 was filed by M/s. Lloyd Electric and Engineering

Company represented by Partner, V. P. Punj, Civil Writ No. 18 of 1968 was filed by AIRSERCO represented by sole proprietor, T. V. P. Punj, Civil Writ No. 19 of 1968 was filed by M/s. Fedders Lloyd Sales Corporation represented by Partner, S. N. P. Punj, and Civil Writ No. 20 of 1968 was filed by M/s. Lloyd Sales Corporation represented by Partner, Mrs. I. R. Punj. The respondents in all the writ petitions are the same namely, (1) B. A. Lakshminarayana Swami, Dy. S. P. S.P.E.C.I.A. (I), C. B. I., New Delhi, and (2) Jethanand, Dy. S. P., C. I. A. (I), New Delhi. The facts, the contentions, and the reliefs prayed for by the petitioners are all common, and it is, therefore, sufficient to refer to the affidavits and annexures filed in civil writ petition No. 16 of 1968.

2. It was averred in the affidavit of the 1st respondent, B. A. Lakshminarayana Swami, dated 21st January, 1968, filed in reply to the writ petition No. 16 of 1968, that the five petitioner-concerns which have filed the five writ petitions are sister concerns of the Punj family, which is carrying on business under the name and style of (Sic) and is controlling the said five concerns, that he is the Investigating Officer in respect of a cognizable offence alleged to have been committed by M/s. Lloyd Electric and Engineering Company, M-13, Connaught Circus, New Delhi, which is one of the concerns managed by the Punj family, in conspiracy with S. S. Chauhan and H. C. Mehrotra, Investigating Officers of the Northern Inspection Circle, D. G. S. and D., New Delhi for which a case was registered against the said company under First Information Report (Annexure III), No. R. C./12/67, dated 28-12-1967, under the provisions of Section 120-B of the Indian Penal Code, read with Section 420 of the Indian Penal Code and Section 5(2) of the Prevention of Corruption Act No. II of 1947.

3. The first respondent further averred in his aforesaid affidavit that he had reliable information that the aforesaid company and its sister concerns, in conspiracy with the above mentioned S. S. Chouhan and H. C. Mehrotra, cheated the Government of India and some State Governments in supplying sub-standard air-conditioners under a Rate Contract entered into by the aforesaid company and its sister concerns with the D. G. S. and D., that the air-conditioners supplied under the said Rate Contract were fitted with indigenous compressors whereas the requirement of the Rate Contract was for fitting the said air-conditioners with imported compressors made in U. S. A., and that this was done by dishonestly removing the manufacturer's name plate, disfiguring the markings of the Indian compressors, and passing off the units as being fitted with foreign compressors.

4. According to the 1st respondent, for the purpose of the investigation of the said offence, it became necessary to carry out searches and seize documents and other Arti-

cles from the office and factory premises of the said concerns at Connaught Place, New Delhi, and at Kalkaji New Delhi respectively. He, therefore, made a record in writing at 7.30 A.M. on 1-1-1968 under Section 165 (1) of the Criminal Procedure Code, which was filed as annexure 'A' by the petitioners and as Annexure R-2 by the respondents. It runs as under :—

"Special Police Establishment
Central Investigating Agency (1).

Whereas I, B.A. Lakshminarayana Swamy, Dy. Supdt. of Police, Special Police Establishment, CIA (1), CBI, New Delhi, am investigating the case in R. C. 12/67-CIA(1) u/s 120B IPC R/ W Section 420, IPC and Section 5(2) of Act II of 1947, and

Whereas, it has become necessary for purposes of my investigation in the said case to take possession of the following documents and things said to be in possession of M/s Lloyd Electric and Engineering Co. M-13 Connaught Place, New Delhi, at their office premises in Connaught Place and in their factory premises at Kalkaji, New Delhi, viz.

1. Rate Contract file of M/s Lloyd Electric Engineering Co. in No. SE6/RC/6770/1/Lloyd/3472 dated 15-4-65 for the period 1965 to date.

2. All supply orders placed on the said firm in the above Rate Contract including Invoices, Bills, Vouchers, Delivery receipts, Inspection notes etc.

3. Purchase files of the above firm for Air Compressors made from M/s Kirloskar Pneumatics, M/s. Sri Ram Refrigeration Industries, M/s. Usha Refrigeration Co., and other firms for the period 1965 to date.

4. All correspondence files of M/s Lloyd Electric and Engineering Co. Ltd., D. G. S. and D. and other Government Deptt. regarding supply of Air Conditioners for the period 1965 to date.

5. All correspondence files of M/s Lloyd Electric and Engineering Co., M/s Punj Sons (P) Ltd., M/s. Fedders Lloyd Corporation (P) Ltd., and M/s. Fedders Lloyd Sales Corporation for the period 1965 to date in respect of manufacture and sale of Air-Conditioners, purchase of accessories in the above manufacture with other firms and between themselves also.

6. Correspondence files of the above firms with foreign suppliers in respect of Air Compressors during 1965 to date.

7. Correspondence files of the above four firms with Ministry of Finance for Foreign Exchange allocation for the period 1965 to date.

8. All invoices, Bills of entry and Bills raised and delivery receipts pertaining to Air Conditioners of the above said firms for the period 1965-67.

9. Unit Serial No. Register of Air Conditioners manufactured by the said firms for the period 1965 to date.

10. All documents and Registers of the said firms relating to the payment of Excise

Duties on Air-Conditioners for the period 1965 to-date.

11. Gate Passes and Duplicate counter-fail Books of Gate Passes of the Factory showing the sale and transport of Air-Conditioners manufactured in the factory for 1965-66.

12. Cash books and Ledgers, Bahi Katha books of the said firms for the period 1965 to date.

13. Stock, Issue Registers of Air Conditioners manufactured in the Factory and Air Compressors purchased from other firms or imported.

14. One sample Air Compressor of 1. HP, 1.5 H. P. 2 H. P. and 2.5 H. P. manufactured and supplied indigenously and also imported from U. S. A.

15. Discarded name plates of manufacturers of Air compressors supplied by M/s. Kirloskars, other firms including foreign suppliers.

16. Any other documents or things connected with the manufacture or sale of Air Conditioners, Air Compressors during the period 1965 to date with the said Firms; and

Whereas there is reason to believe that the said firms are not likely to produce the said documents or things when asked for and they are likely to be tampered with or otherwise disposed of, and it is not possible to obtain the said documents and things without undue delay, otherwise than by an immediate search of the premises of the said Firms referred to below, I am, therefore, conducting simultaneous searches under Section 165 (1), Cr. P. C. at the following premises of the said firms on this day the 1st of January 1968 immediately for seizure of the said documents and things, if found therein, for purposes of the above investigation.

Premises to be searched:

1. Office premises of M/s. Punj Sons (P.) Ltd., M/s. Fedders Lloyd Corporation (P.) Ltd., (3) M/s. Lloyd Electric Engineering Corporation at M-13, Punj House, Connaught Place New Delhi.

2. Factory premises of M/s. Punj Sons (P.) Ltd. and M/s. Fedders Lloyd Sales Corporation at Kalkaji, New Delhi.

Dated 1st Jan. 1968
7.30 A. M.

Sd/- B. A. Lakshminarayana Swami
Dy. S. P. SPE/CIA (I)
New Delhi.

Submitted to the Magistrate 1st Class (Special), Delhi, for kind information.

Sd/- B. A. Lakshminarayana Swami
Dy. S. P./SPE/CIA (1)".

1-1-68.

5. According to the 1st respondent, simultaneous searches had to be carried out in the office premises at Connaught Place and in the Factory premises at Kalkaji, and as it was physically not possible for him to search both the premises simultaneously, he made an order (Annexure R-1) at 7-45 A.M.

on 1-1-1968 under Section 165 (3) of the Criminal Procedure Code deputed respondent No. 2 to search the office premises at Connaught Place, while he himself searched the factory premises at Kalkaji on the same date. The said order runs as under:—

“To

Shri Jethanand,
Dy. Supdt. of Police,
S. P. E., C. I. A. (I),
New Delhi.

Sub: RC. 12/67-CIA-Investigation of.
Requisition u/s. 165 (3) Cr. P. C.

For purposes of my investigation in the above case, it has become necessary to conduct simultaneous searches at the office premises of M/s. Lloyd Electric and Engineering Co., M-13, Punj House, Connaught Place and at the Factory premises of M/s. Punj Sons (P.) Ltd., Kalkaji, this morning. Copy of the grounds of search submitted to the Magistrate, 1st Class, Delhi, is enclosed for your information.

As I will be engaged in the search of the said factory premises at Kalkaji, I am requesting you to conduct the search of the office premises of M/s. Lloyd Electric and Engineering Co., and other allied concerns located at No. M-13, Punj House, Connaught Place, New Delhi, as detailed in the said grounds of search and to seize the documents and things referred to therein.

This requisition is being made to you in accordance with Section 165 (3) Cr. P. C.

Sd/- B. A. Lakshminarayana Swamy
Deputy Supdt. of Police,
S. P. E., C. I. A. (I),
New Delhi.

Dated 1-1-68.
7.45 A. M.

6. According to the petitioners, the 1st respondent seized the documents and things as detailed in Annexure 'B' to the writ petition No. 16 of 1968, and the 2nd respondent seized documents and things mentioned in Annexure 'C' to the said writ petition No. 16 of 1968. They thereupon filed the present five writ petitions in this Court on 8-1-1968 praying for the issue of “a direction in the nature of a mandamus commanding the respondents to forthwith return the documents and things seized on 1st January, 1968, under Annexures 'B' and 'C'”, and for certain other interim reliefs.

7. The contentions of the petitioners in the writ petitions are—

(1) that the action of the 1st respondent in having searched the factory and in having seized the documents and things mentioned in Annexure 'B' to the writ petition was unauthorised and illegal, firstly on the grounds that he did not record in writing the grounds of his belief as required by Sec. 165 (1) of the Criminal Procedure Code, and secondly on the grounds that the said factory was not one of the premises mentioned

to be searched in Annexure 'A' (Annexure R-2), the record made by him under sub-section (1) of Section 165, Criminal Procedure Code;

(2) that the action of the 2nd respondent in having searched the office premises of the petitioners at Punj House, Connaught Place, New Delhi, and in having seized the documents and things mentioned in Annexure 'C' to the writ petition, was illegal and contrary to the mandatory provisions of sub-sec. (3) of Section 165 Criminal Procedure Code, in that the respondent No. 1 did not make any order in writing recording his reasons for his being unable to conduct the search himself in person, and in that the 1st respondent did not deliver an order in writing to respondent No. 2 specifying therein the place to be searched and the things for which the search is to be made, and the second respondent did not have any such order as is contemplated by Section 165 (3), Criminal Procedure Code, nor did he show any such order to the petitioners; and

(3) that the searches and seizures made by the two respondents were contrary to law and illegal for the further reason that the copies of the record, if any, made under sub-section (1) and sub-section (3) of Section 165, Criminal Procedure Code, were not sent forthwith to the nearest Magistrate empowered to take cognizance of the offence, as provided for in sub-section (5) of Section 165 of the Criminal Procedure Code.

8. In reply to the writ petitions, an affidavit of the 1st respondent, dated 21-1-1968, which has already been referred to above, was filed. As already stated, the 1st respondent averred in the said reply that the five petitioner-concerns are the concerns of the Punj family which is carrying on business under the name and style of and is controlling the five petitioner-concerns. It was further averred that V. P. Punj was shown the requisite orders along with the grounds for search, that the search and seizure were made strictly in accordance with law, that he did make an order under Section 165 (3), Criminal Procedure Code, a copy of which was filed as Annexure R-1 to the reply affidavit, that as it was not physically possible for him to make the searches both at Connaught Place and at Kalkaji, he searched the factory premises at Kalkaji and deputed respondent No. 2 to search the office premises at Connaught Place, that the report prepared under Sec. 165 (3), Criminal Procedure Code, was shown to V. P. Punj who was a partner or executive and represented all the firms, along with a copy of the grounds for search, that in token of having seen them he endorsed the grounds for search with the remark “seen” and signed it, that that fact was also mentioned in the seizure list, a copy of which was given to V. P. Punj and was acknowledged by him, that a copy of the record prepared under Section 165 (3), Criminal Procedure Code, and a copy of the

seizure list were also sent to the Magistrate, 1st Class, Delhi, though there was some delay as the same was sent on 10-1-1968 when the deponent returned from tour which he had to undertake on Government duty immediately after the search and seizure on 1-1-1968, that the record prepared under Sec. 165 (1), Criminal Procedure Code, was sent to the Magistrate on the day of the search itself, and that, therefore, the searches and the seizures were quite legal and in accordance with law.

9. As a rejoinder to the said reply V. P. Punj filed an affidavit, dated 23-1-1968, in which he stated that it was incorrect to say that he was shown "the requisite orders along with the grounds for search", that the only document that was shown to him was Annexure 'A' to the writ petition (i.e. the record made under Section 165 (1), Criminal Procedure Code), wherein he made the endorsement "seen V. P. Punj", that excepting that document, no other document was shown to him by either of the respondents, and that no separate record under Sec. 165 (3) or Annexure R-1 or separate record containing the grounds under Section 165 (1) was shown to him at any time.

10. Shri S. N. P. Punj also filed an affidavit, dated 23-1-1968, as a rejoinder to the reply of the respondents. In this affidavit, it was reiterated that the respondents did not comply with the mandatory provisions of Section 165, Criminal Procedure Code, and it was stated that the First Information Report was dated 28-12-1967, that it contains an endorsement which shows that it was forwarded on the same day to Shri M. S. Joshi, Special Judge, Delhi, that another endorsement thereon shows that it was received by the learned Special Judge at 1-10 P. M. on 3-1-1968, that on 8-1-1968, an application for copies of the record made under Section 165 Criminal Procedure Code, was made by the petitioners in the Court of the Special Judge for S. P. E. cases, Delhi, as provided in the proviso to Section 165 (5) of the Criminal Procedure Code, that the Special Judge directed the Senior Public Prosecutor, CIA (I) to report immediately, that the Senior Public Prosecutor, in his turn, called upon the Investigating Officer to report by 2 P. M. on 8-1-1968, that on 9-1-1968, the record under Section 165 (1), dated 1-1-1968, signed by B. A. Lakshminarayana Swamy, 1st respondent, and the requisition or order under Section 165 (3), also signed by B. A. Lakshminarayana Swamy, were submitted in the Court of the Special Judge, Delhi, and copies of the said two documents were supplied to the petitioners by an order of the Special Judge, Delhi, dated 9-1-1968, that photostat copies of the application, dated 8-1-1968, for emergent copies of the record made under Section 165 (1) with endorsement thereon, the order of the Special Judge, dated 9-1-1968, directing copies of the documents to be furnished, the copies of the First Informa-

tion Report, the record under Section 165 (1), and the requisition or order under Section 165 (3) were filed as Annexures 1 to 5 to this affidavit, and that the above facts show clearly that the provisions of sub-sections (1), (3) and (5) of Section 165 of the Criminal Procedure Code were not complied with at all, and consequently the searches and the seizures were illegal and invalid.

11. The first respondent, B. A. Lakshminarayana Swamy filed a further affidavit dated 27-1-1968, in reply to the aforesaid rejoinder affidavit of V. P. Punj and S. N. P. Punj. In this affidavit it is stated that besides the order issued under Section 165 (1), Criminal Procedure Code, the 2nd respondent, Jethanand, had also shown to V. P. Punj the requisition or order issued by the 1st respondent under Section 165 (3), that the 2nd respondent had, in fact, mentioned this fact in the memo, which he had prepared after the search at the time of taking over the documents on 1-1-1968, and the relevant part of the memo, reads as follows:

"The search has been conducted in pursuance of the request under Sec. 165 (3), Criminal Procedure Code, of Shri B. A. Lakshminarayana Swamy, Deputy Superintendent of Police, Special Police Establishment, C. I. A. (I). It has been shown to Shri V. P. Punj along with the copy of the Grounds of Search", and that the copy of the above search memo was handed over to V. P. Punj who acknowledged the receipt of the same of the original search memo.

12. He further reiterated that the searches were made in accordance with law, and that the provisions of Sec. 165, Criminal Procedure Code, were complied with, and stated that after the case R. C./12/67 had been made over to him for investigation at about 6 P. M. on 28-12-1967, he had carefully applied his mind to the allegations which were required to be investigated by him, that an essential part of his investigation was to establish whether indigenous compressors manufactured by M/s. Kirloskar Pneumatics Limited had been fitted in the place of imported compressors which were to be fitted to two-ton air-conditioners, that the First Information Report had mentioned that the firm had dishonestly removed the manufacturers' plates and disfigured the markings in the compressors fitted with the air-conditioners units, that the essential and vital things for the purposes of investigation was to recover the manufacturers' plates and the markings from the company, that during the course of the investigation on the 29th, 30th and 31st, he had further come to know that M/s. Lloyd Electric and Engineering Company, M/s. Punj Sons (P.) Ltd., M/s. Fedders Lloyd Sales Corporation and M/s. Fedders Lloyd Corporation, were all associate concerns run by the same family members, that the accounts were inter-linked and the said firms were located in one premises and, in fact, the same clerks used to attend

THE All India Reporter 1969

Goa, Daman and Diu J. C.'s Court

AIR 1969 GOA, DAMAN AND DIU 1
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R. S. BINDRA, ADDL. J. C.

The Comunidade of Aquem, Appellant
v. The State, Respondent.

Civil Appeal No. 3575 of 1965, D/-7-6-1968.

(A) Portuguese Law No. 2030, D/-22-6-1948, Ss. 14, 10 and 11 and Portuguese Decree No. 37758, D/-22-2-1950, Ss. 13 and 33 para unico — Valuation of property — Just compensation — Acquired property not meant either for town planning or for opening routes of communication — Real value of the property has to be determined in accordance with S. 10 — Reliance on S. 33 para unico is improper — Real value cannot be determined by taking into consideration its purpose as landed property.

(Paras 2 and 3)

(B) Portuguese Law No. 2030, D/-22-6-1948, S. 10 — 'Just compensation' — Determination — Potentialities of property can be taken into account — S. 607 of Portuguese Civil Procedure Code does not apply.

Phraseology of S. 10 of the Law is full of meaning and it indicates the true intention of the legislature in a demonstrable manner. It is provided in the section that the just compensation shall be determined on the basis of the real value of the acquired property. The expression "just compensation" connotes compensation which is fair to both the parties and favourable to neither. A sovereign State has an undoubted authority to appropriate for purposes of public utility land situate within the limits of its jurisdiction. However, such appropriation without paying its owner its fair value shall be unjust. It is a settled principle that there can be no taking away of private property

without payment of adequate compensation unless expressly stated to the contrary in the relevant statutory provision or such an inference is plain by implication. Section 10, or for that matter any other section of the law, does not contemplate acquisition without payment of just compensation. The import of the expression "just compensation" is reinforced by the other expression "real value" used in that Section. The expression "real value" is obviously in contradiction to the expression 'apparent value'. Hence the Court can take the potentialities of the property into consideration while determining the "just compensation" and that it is not bound to determine that compensation only on the basis of the income of the property on the date of its acquisition. Sec. 607 of the Portuguese Civil P. C., is not applicable to the proceedings for compulsory acquisition of land for public utility. Sec. 607 concerns itself with determining the "legal value" as against the "real value" which has to be found in terms of the provisions of the Law and the Decree for finding out the compensation payable. Hence the provisions of Section 607 of the Code are not applicable for determining the compensation payable.

(Paras 3, 5 and 6)

Expression used in Section 23 of the Land Acquisition Act of 1894 is "market value" while the expression used in Sec. 10 of the Law is "real value". The two expressions appear to have identical import and at any rate the expression "real value" is not less favourable to the owner of the property as compared to the other expression 'market value'. (1968) 1 SCWR 692, Rel. on.

(Para 17)

Cases Referred: Chronological Paras
(1968) 1 SCWR 692 = 1968 SCD
647, Radhakisan Laxminarayan v.
Collector of Akola 17

B. Reis, for Appellant; S. Tamba, Govt.
Pleader, for the State.

HL/HL/D526/68

JUDGMENT: By an order dated 7-8-1963 published in the Government Gazette the Government of Goa, Daman and Diu, hereinafter referred to as the State, declared that it wanted to acquire compulsorily land measuring 118470 square metres belonging to the Comunidade of Aquem for public utility purposes. It appears that the State required the land for constructing buildings meant for the Government Industrial Training Institute, the Common Facility Work shop of Small Industries Service Institute and a Co-operative Industrial Estate. The State and the Comunidade having failed to agree upon the compensation respecting the area in dispute the State referred the matter to the Comarca Court at Margao in terms of Section 14 of the Law No. 2030, dated 22-6-1948, hereinafter referred to as the Law, and Sec. 13 of the Decree No. 37758, dated 22-2-1950, hereinafter called the Decree, for referring the matter to arbitration. Three arbitrators were appointed, one each by the Chief Justice, the State and the Comunidade. The arbitrator appointed by the Chief Justice of this Court reported that the value of the acquired area was Rupees 274000.00; the arbitrator named by the State fixed the value at Rs. 77923.00; while the one appointed by the Comunidade determined the compensation at Rs. 511128.64. In view of this discord between the three arbitrators recourse was taken by them to Section 22 of the Decree. That Section, *inter alia*, provides that in case there is no unanimity or majority amongst the arbitrators, the compensation shall be the average of the two nearest assessments out of the three made by the arbitrators.

On the basis of this statutory provision, compensation suggested by the arbitrators named by the Chief Justice and the State being closest to each other, the compensation worked out to Rs. 175961.50. This compensation was not acceptable to the Comunidade and so it filed an appeal in the Comarca Court at Margao. In terms of the relevant provisions of law a judicial inspection of the property was done with the aid of five experts and report of a technical expert was also secured. Taking all the data into consideration the Court reached the conclusion that the proper amount of compensation was only Rs. 59603.60. However, since the State had offered to pay the compensation at the rate of rupee one per sq. metre the Court found it legally difficult to give practical shape to its finding in face of Section 31 of the Decree which prescribes that the compensation fixed cannot be lower than that offered by the person for whom the acquisition is made. Consequently the Court fixed the compensation at Rupees 118470.00. It is against this order of the Court that the instant appeal was filed by the Comunidade.

2. It was commonly agreed between Shri Reis, representing the appellant and Shri Tamba, representing the State, that the compensation has to be determined in terms of

Section 10 and not of Section 11 of the Law. The first para of Section 10 provides that the 'just compensation' shall be determined on the basis of the 'real value' of the property acquired for public purposes. Sec. 11 concerns itself with the acquisition of properties meant for "town planning" or "opening of great routes of communications". It is not the contention of either of the contestants that the land in dispute was either meant for town planning or for opening routes of communications. Therefore Sec. 11 in terms has no application to the case in hand.

A perusal of the judgment under appeal would show that the real controversy between the parties centred around the point whether the compensation should be adjudged on the footing of income yielded by the property in dispute in its existing shape or the potentialities of the property should also be looked into. The trial Court was of the opinion that the potentialities of the property have to be severely ignored and in support of this conclusion it placed reliance on para unico of Section 33 of the Decree. That para is to the effect that the real value of the landed property shall be determined by taking into consideration its purpose and income as landed property. Shri Reis, vigorously contended that the trial Court was wrong in taking recourse to para unico of Section 33 for finding out the scope of the expression 'real value' used in Section 10 of the Law as Section 33 has no applicability to the case in hand. I think this criticism is perfectly valid. Section 33 relates to acquisition of land meant for town planning or opening great routes of communications. This Section corresponds with Section 11 of the Law and it has been observed above that the parties' counsel were agreed in this Court that it is Section 10 and not Sec. 11 of the Law which applies to the present case. Hence the trial Court was clearly in error in applying the special statutory provision governing determination of the real value of the landed property acquired for town planning or opening of great routes of communications to the case in hand. If the legislature meant to apply the provisions enacted in para unico of Section 33 to govern the acquisitions contemplated by Section 32 of the Decree, which corresponds to Section 10 of the Law, it would have been easy for it to state that that para would apply to the acquisitions mentioned in Section 32. This having been not done there is no warrant for the proposition that the provisions of para unico of Section 33 also govern Section 32.

3. Shri Reis was equally critical of another conclusion of the trial Court, namely, that for finding out the real value of a landed property the only relevant factors are the use for which the property was meant on the date of acquisition and the income which it was yielding from that user. Here, again, Shri Reis, it looks clear, was on sound footing. If the income of landed property on

1969

the date of acquisition has to be the sole criterion for determining the compensation payable to the owner, then conceivably a plot of landed property not yielding any income either on account of its nature or because of indifference on the part of owner to put it to a profitable use could be acquired by the State for a song though in view of its location it can be put to industrial, commercial, or residential use. Obviously the consequences which can flow from the criterion applied by the trial Court may be fantastic in some cases if not all. The income of the property on the date of acquisition is undoubtedly an important factor in determining the compensation but that cannot be the sole or exclusive factor to be taken into account.

The phraseology of Section 10 of the Law is full of meaning and it indicates the true intention of the legislature in a demonstrable manner. It is provided in the section that the just compensation shall be determined on the basis of the real value of the acquired property. The expression "just compensation" connotes compensation which is fair to both the parties and favourable to neither. A sovereign State has an undoubted authority to appropriate for purposes of public utility land situate within the limits of its jurisdiction. However, such appropriation without paying its owner its fair value shall be unjust. It is a settled principle that there can be no taking away of private property without payment of adequate compensation unless expressly stated to the contrary in the relevant statutory provision or such an inference is plain by implication. Section 10, or for that matter any other section of the Law, does not contemplate acquisition without payment of just compensation. The import of the expression "just compensation" is reinforced by the other expression "real value" used in that Section. The expression "real value" is obviously in contradiction to the expression "apparent value". Hence I have no misgivings on the point that the Court can take the potentialities of the property into consideration while determining the "just compensation" and that it is not bound to determine that compensation only on the basis of the income of the property on the date of its acquisition.

4. The point under discussion is not barren of authority. In its judgment dated 6-6-1961 the Supreme Court at Lisbon held that there are properties which though not yielding high income have nevertheless a high intrinsic value which they can fetch in a transaction of sale, and that since the owner is really deprived of the latter value that alone must be the basis for the determination of the "just compensation". The Supreme Court observed further that if the plot and the buildings standing over it have higher value as compared to that which can be worked out on the basis of the present income of the property as a whole it is the former value which would determine the compensation payable to the owner. In an

earlier judgment dated 8-4-1960 the Supreme Court upheld the view of the Tribunal de Ralacao that while adjudging the just compensation for a property acquired it is relevant to take into consideration the factors that the property is situate in a locality already partially urbanised and that it is in the proximity of an existing public road. Obviously the judgment of the Supreme Court amounts to endorsing the proposition that while determining the compensation not only the income arising out of the present user of the property has to be taken into consideration but it is legitimate to consider the potentialities of the property. In another judgment dated 12-1-1960 the Supreme Court observed that it is the intrinsic value of the property on the basis of which the compensation should be awarded and not the value determined on its present income.

5. The translations of the three Supreme Court judgments referred to above were furnished by Shri Reis, the learned counsel for the appellants. Shri Tamba, the State Counsel, was given enough of opportunity to study the case law with a view to finding out if there is any judgment of the Supreme Court to the contrary. Shri Tamba frankly conceded that he had not been able to lay hand on any contrary judgment. Therefore, the interpretation placed by the Supreme Court, as reproduced above, on the provisions of Section 10 of the Law cannot be ignored by this Court, especially when that interpretation appears to be in consonance with the phraseology used in Section 10. I would, therefore, hold that the potentialities of the property can be legitimately and lawfully taken into consideration while determining the just and fair compensation which the Court is bound to award in terms of Section 10 of the Law.

6. Before taking up the question of fixation of the compensation I would like to dispose of another point which arises out of the judgment of the Comarca Court and which was emphasized by Shri Tamba. The Comarca Court firstly determined the income of the acquired area and then by taking recourse to Section 607 of the Portuguese Civil Procedure Code, hereinafter referred to as the Code, fixed the compensation on multiplying the annual income with 20. Shri Reis contended that Section 607 of the Code has no relevancy for determining the compensation payable in respect of an acquired property. This contention of Shri Reis appears to be well founded.

Section 607 concerns itself with determining the valuation of the properties, moveable or immoveable, with a view to fixing the jurisdictional value of the suits involving those properties. Such a valuation, it is apparent, need not necessarily correspond with the market value of the property in dispute. The compensation in respect of the acquired property has to be determined on the basis of the provisions contained in the Law or the Decree which statute specifical-

ly governs that matter. In its judgment dated 10-4-1949, published on p. 318 of Gazette No. 86, the Supreme Court at Lisbon held that Section 607, No. 1, of the Code is not applicable to the proceedings for compulsory acquisition of land for public utility. The Supreme Court held further that Section 607 concerns itself with determining the "legal value" as against the "real value" which has to be found in terms of the provisions of the Law and the Decree for finding out the compensation payable. Hence the Comarca Court was clearly wrong in adopting the provisions of Section 607 of the Code for not determining the compensation payable to the Comunidade.

7. The available evidence indicates that the acquired area is very favourably situated and it has high potentialities of developing into industrial estate or a residential locality. It has been mentioned above that the Government wants to construct the premises of the Government Industrial Training Institute, the Common Facility Workshop of Small Industries Service Institute and the Co-operative Industrial Estate over the acquired area. According to the report made by the Director of Agriculture, whose services were availed of by the Comarca Court as a technical expert, the acquired land is situate by the side of a major district road, a municipal road runs through that land, and it is at a distance of about 1 km. from the town of Margao. The Director said further that the acquired area is a piece of fertile paddy land of ker type. The entire area has a level surface except for a piece meant for threshing the crop and another small part on the south over which a bund bearing coconut trees has been constructed.

The Director also mentioned that the area is well developed paddy land having good soil and that with a little more attention it is capable of yielding 40 khandis of paddy per hectare as compared to the present yield of 20 khandis. The arbitrator appointed by the Chief Justice had observed in his award dated 9th June 1964 that the acquired property is a paddy field, that it abuts on a national highway and a municipal road, that it is at a stone's throw from the city, and that it is situate in a locality where there is great demand for plots for construction purposes. That arbitrator also affirmed that multi-storeyed buildings meant for business and dwelling purposes were springing up near the acquired area. To the same effect were the observations made by the arbitrator named by the Comunidade. Four out of the five experts associated with the judicial inspection also affirmed that the major portion of the area acquired lies along the national highway and it is located at a stone's throw from the heart of the city of Margao as also from the railway station. They also happened to affirm that this area is included in the proposed extension of the limits of the Salcette Municipality. Shri Tamba did

not challenge any of the observations made by the arbitrators or the experts.

8. A short analysis of the amount of compensation suggested by the arbitrators, the experts associated with the judicial inspection, and the technical expert appointed by the Comarca Court looks to be clearly necessary. Out of the three arbitrators appointed in terms of the Law the one named by this Court fixed the compensation at Rs. 274000.00. He found that out of the total acquired area measuring 118470.00 sq. metres, the major portion measuring 116270 sq. metres was under paddy cultivation and the rest of it was lying uncultivated. The total yield of the cultivated part was assessed at 91 khandis of paddy.

At the rate of Rs. 35 per khandi the value of the produce was determined at Rupees 3185.00. To that sum was added a small amount of Rs. 8, representing the income of the coconut trees standing on the bund, giving a total of Rs. 3193. He multiplied this total by 20 in terms of Section 607 of the Code and determined the price of the cultivated part of the property at Rupees 63860.00. He assessed the value of the uncultivated part at Rs. 1140.00 (without indicating the measure applied) and so put the value of the entire area at Rs. 65000.00. However, he was of the opinion that a strip of 25 feet in depth abutting on the roads running close or through the acquired area could be used for construction purposes, that the area of that land works out to 22175 sq. metres, that this part of the land is worth Rs. 10 per sq. metre, and that as such its value comes to Rs. 221750.00. The rest of the land was evaluated by the expert at Rs. 52250.00 on the basis of its paddy yield and so in this manner he fixed the amount of the compensation at a total of Rs. 274000.00.

9. The arbitrator appointed by the Comunidade also split the acquired area into two parts, one meant for construction purposes and the other for paddy cultivation. He found that an area measuring 28221.5 sq. metres could be used for construction purposes and that its market price was nothing less than Rs. 15 per sq. metre. On that basis he determined its compensation at Rs. 423337.50. The area meant for paddy growing was evaluated at Rupee 1 per sq. metre and its price was assessed at Rupees 87533.50. The balance area used for threshing floor was evaluated at Rs. 257.64 at the rate of 12 Np. per sq. metre. The total amount of compensation was consequently assessed at Rs. 511128.64.

10. The arbitrator named by the State proceeded to determine the amount of compensation on the basis that it must correspond with the deprivation of the income which the owner ceases to receive as a result of acquisition and that the provisions of Section 607 of the Code furnish the proper yardstick for determining the market value. None of these two premises is sound in law.

The principle that the compensation should be assessed on the basis of the income of the property would completely fail where the acquired property happens to be fetching no income on the date of the acquisition, a situation not altogether improbable.

I have held above that the principles enacted in Section 607 of the Code for finding out the legal value of the property in dispute with the object of ascertaining the jurisdictional value of the suit have nothing to do with determining the compensation payable in respect of an acquired property. Hence the approach of this arbitrator appointed by the State was altogether unjustified in law. He assessed the total paddy yield of the acquired area at 91 khandis per annum. The price of that much paddy was determined at Rs. 3185 at the rate of Rs. 35 per khandi. A sum of Rs. 8 was added to that amount on account of the fruit yield of the trees on the bund. The annual rent of the property was therefore adjudged at Rs. 3193 and by multiplying this amount by 20 the valuation was fixed at Rs. 63860.00. A sum of Rs. 1074 representing the price of the threshing floor was added thereto and so the total value of the property was adjudged at Rs. 64934.00. Since the acquired area abuts on a road, the arbitrator allowed 20 per cent premium on Rs. 64934.00 and thus fixed the compensation payable at Rs. 77923.00.

11. Since the compensations determined by the three arbitrators did not disclose either unanimity or majority, the decree made by the arbitrators, in terms of the relevant provisions, must represent the average of the two nearest assessments made by the arbitrators. Those assessments being of Rs. 274000.00 (made by the arbitrator named by this Court) and of Rs. 77923.00 (arrived at by the arbitrator appointed by the State), the compensation payable was determined at Rs. 175961.50.

12. An outstanding feature of the case which escaped notice on all hands is that the compensation of Rs. 175961.50 adjudged by the arbitrators had the force of a decree and unless that decree was assailed in appeal it would be binding on the parties. It has to be emphasised that it is the Comunidade alone which filed the appeal and the prayer made in that appeal was that the compensation fixed by the arbitrators was much too small as compared to the real value of the acquired area and so it should be suitably enhanced. The State did not assail the correctness of the decree that followed the award of the arbitrators and as such it was bound by it. It passes comprehension how did the Comarca Court slash down the amount of compensation to Rs. 118417.00 while disposing the appeal of the Comunidade. This palpable error committed by the Comarca Court has to be rectified.

13. During the course of proceedings in the appeal the trial Court carried out judi-

cial inspection with the aid of five experts, three of whom were appointed by the Court itself and one each by the Comunidade and the State. The four experts appointed by the Court and the Comunidade were of the opinion that in view of the favourable situation of the acquired area and its close vicinage to the city of Margao, coupled with the prospects of its being brought within the municipal limits, they would fix its value at the flat rate of Rs. 8 per sq. metre on the basis that it would continue to be used as agricultural area. At the rate mentioned the value of the property was assessed at Rs. 947336.00. The experts said further that the area was destined to be utilised for industrial township and that on that basis it would be worth Rs. 40 per sq. metre. The expert named by the State determined the annual paddy yield of the area at 91 khandis and at the rate of Rs. 35 per khandi he determined the gross annual income at Rs. 3640.00. He deducted from that sum the taxes paid at the rate of 18.45 per cent, and so determined the annual net income at Rs. 2968.00. The expert said further that this net annual income should represent 4 per cent, return on the actual value of the acquired area in terms of Sec. 209, No. 7, of the Code of Comunidades, and so the total value of the property under paddy crop would come to Rs. 74200.00. The value of the bund area plus the price of the trees standing thereon was assessed at Rs. 377.50, while the area covered by the threshing floor and the roads was evaluated at Rupees 665.25. In this manner the total compensation payable was fixed at Rs. 75242.75.

14. The technical expert appointed by the Court, who was none other than the Director of Agriculture of the State Government, was of the opinion that the compensation could possibly be adjudged on the following two bases:—

(1) valuation purely from an agricultural point of view; and

(2) valuation considering its situation, i. e. close proximity of a developing town and presence of good roads in the area.

While applying the first basis, the Director observed that the average yield of the land is 25 khandis per hectare and the value of that yield at the rate of Rs. 40 per khandi comes to Rs. 1000 per hectare. He added thereto a sum of Rs. 100 representing the from the total sum of Rs. 1100 the cost of price of the fodder, and after deducting cultivation, he assessed the net income at Rs. 650 per hectare. To secure that much income at the rate of interest of 5 per cent. per annum, the Director observed, the value of the land would come to Rs. 13000.00 per hectare. In applying the second yardstick mentioned above the Director put a premium of 25 per cent, over the rate of Rs. 13000 per hectare and fixed the value of the land at Rs. 16250 per hectare, or Rs. 1.625 per sq. metre.

15. Parties did not lead any further evidence before the Court in support of their

rival contentions. Hence the only data available for determining the compensation is that which I have dealt with above.

16. During the course of arguments in this Court Shri Reis urged that the rate of Rs. 8 per sq. metre suggested by the four experts represents a fair rate for fixing the compensation payable to the Comunidade. Shri Tamba, on the other hand, urged that the Comarca Court was justified in its conclusion that though the proper compensation would work out to only Rs. 59603.60 but since it could not be fixed at less than Rupee 1 per sq. metre as offered by the State, the compensation legally payable to the Comunidade is Rs. 118417.00. I think the truth lies somewhere in between the two extreme views expressed by the parties' counsel.

17. It is in order to mention here that the relevant expression used in Section 23 of the Land Acquisition Act of 1894 is "market value" while the expression used in Sec. 10 of the Law is "real value". The two expressions appear to have identical import and at any rate the expression "real value" is not less favourable to the owner of the property as compared to the other expression 'market value'. In a recent judgment in the case of Radhakisan Laxminarayan v. Collector of Akola, (1968) 1 SCWR 692, the Supreme Court held that it is a settled principle that Section 23 of the Act requires that the market value of the land under acquisition must be estimated not by the existing use of such land but the best use which a willing purchaser would make of it and that as such its potentiality in the foreseeable future either as a building or industrial site should be taken into account. The area involved in the instant case is meant to be used for building and industrial purposes according to the terms of the notification dated 7-8-1963 itself. I have shown above that the area is very favourably situated and is in the close proximity of Margao, a highly developing town. I have decided to fix the flat rate for the whole of the area in dispute for, I believe, the whole of it can be put immediately to building and industrial use, though obviously some area adjoining the national highway and the municipal road may fetch more price as compared to the rest of it. Taking all the factors into consideration I have reached the conclusion that the fair value of the entire area in dispute is Rs. 3 per sq. metre. Shri Reis undoubtedly contended that some plots near the area in dispute had been sold at a much higher rate but the sale of small plots does not furnish a dependable guide for fixing the valuation of large tracts of land. It was held in the case of Radhakisan Laxminarayan (Supra) that it is well known that small plots generally fetch a higher value than large plots for the simple reason that there are more ready purchasers of small plots involving as they do lesser amount of investment. The Supreme Court observed further that there can, therefore, be no comparison between the valuation made for a small plot

and larger area. Para 6 of the Supreme Court's judgment makes an instructive reading. A small area measuring 31 gunthas out of survey No. 65 was evaluated by the High Court of Bombay at about Rs. 7000 per acre, the notification under Section 4 of the Land Acquisition Act respecting that area having been made on 17th of August 1948. Subsequently, another notification dated 2nd of February 1955 was issued respecting a big portion out of the same survey No. 65. In respect of this acquisition the High Court fixed the valuation at Rs. 1650 per acre. It was contended before the Supreme Court that the High Court was wrong in fixing the market value at Rs. 1650 per acre on 2nd of February 1955 as against the market value fixed by the same High Court at about Rs. 7000 per acre on 17th of August 1948. The Supreme Court rejected that submission on the basis that small plots generally fetch a higher value as compared to plots of much larger area. Hence I feel safe in ignoring an instance or two mentioned by Shri Reis respecting small plots of land.

18. As a result, I accept this appeal and fix the real value of the acquired area at the flat rate of Rs. 3 per sq. metre. The appellant shall also get the costs incurred by it in this Court from the State. Advocate's fee is fixed at Rs. 200.

ORDER: Announced in open Court. Parties or their counsel be informed.

GGM/D.V.C.

Appeal allowed.

AIR 1969 GOA, DAMAN AND DIU 6
(V 56 C 2)

V. S. JETLEY, J. C.

Govind Narayan Tilve, Petitioner v. Government of Goa, Daman and Diu and others, Respondents.

Writ Petn. No. 3512 of 1965, D/-15-7-1968.

(A) Constitution of India, Art. 226 — Principle of natural justice — Applicability to administrative orders — Even administrative orders have to conform to principles of fair play and natural justice. AIR 1967 Goa 102 and AIR 1959 SC 308 and AIR 1967 SC 122 and AIR 1967 SC 1269 and AIR 1968 SC 718, Rel. on. (Para 10)

(B) Mines and Minerals (Regulation and Development) Act (1957), Ss. 4(1), Proviso and 9 — Scope — Provisions of S. 4(1) and rules are prospective while that of S. 9 are retrospective — Proviso to S. 4(1) preserves and respects vested rights — Rights to extract china clay granted under Portuguese Government Decrees of 1905 and 1906, respectively known as "Regulamento sobre a lavra de pedreiras nas Provincias ultramarinas" and "Regulamento das minas" before 1-10-1963 when the Act was brought into force in Goa, Daman and Diu,

HL/HL/D525/68

1969

held were vested rights and were not affected. AIR 1965 SC 470, Rel. on.

(C) Civil P. C. (1908), Preamble—Interpretation of Statutes — Retrospective operation — Statute affecting vested right — Express language fairly capable of either interpretation — Prospective operation should be given.

It is a well settled principle of construction that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. But if the language is plainly retrospective, it must be so interpreted where vested rights are affected, *prima facie*, it is not a question of procedure. 1896 AC 240, Rel. on. (Para 8)

(D) Civil P. C. (1908), Preamble—Interpretation of Statutes — That construction of word has to be adopted which harmonises with the context and promotes the policy and the object which the Legislature had in view. (Para 7)

(E) Easements Act (1882), Ss. 4, 13 and 15 — Sub-soil rights — Right to extract minerals is a valuable right — Any subsidiary right leading to the enjoyment of the minerals and their extraction is also a valuable right — Right to extract minerals acquired under Portuguese Government Decree of 3-11-1905 is a vested right. AIR 1956 Nag 34, Rel. on. (Para 7)

(F) Portuguese Government Decree of 20-9-1906 — Regulamento das minas, Art. 3 — Expression “owner of the soil”—Meaning—Expression “ought not to be narrowly construed” — A lessee obtaining a lease of 2000 years is a qualified owner of the soil and his consent is effective. AIR 1955 SC 41, Rel. on. (Para 7)

(G) Portuguese Government Decree of 3-11-1905 — Regulamento sobre a lavra de pedreiras nas Provincias ultramarinas, Art. 1 — China clay is covered by Art. 1. (Para 6)

Cases Referred: Chronological

- (1968) AIR 1968 SC 718 (V 55) = 10
- (1968) 1 SCWR 553, Union of India v. Anglo-Afghan Agencies
- (1967) AIR 1967 SC 122 (V 54) = 10
- (1966) Supp SCR 401, State of Jammu and Kashmir v. Bakshi Gulam Mohammad
- (1967) AIR 1967 SC 1269 (V 54) = 10
- (1967) 2 SCR 625, State of Orissa v. Binapani Dei
- (1967) AIR 1967 Goa 102 (V 54), Xec Ayub v. Govt. of Goa, Daman and Diu
- (1965) AIR 1965 SC 470 (V 52) = 10
- (1963) Supp 2 SCR 235, Hassanji & Sons v. State of Madhya Pradesh

(1959) AIR 1959 SC 308 (V 46) = 10
(1959) Supp 1 SCR 319, G. Nageswara Rao v. A. P. S. R. T. Corporation

(1956) AIR 1956 Nag 34 (V 43) = 8
ILR (1956) Nag 27, C.P.M. Ore Co. v. State of Madhya Pradesh

(1955) AIR 1955 SC 41 (V 42) = 7
1955 SCR 777, State of Bombay v. Bhanji Munji

(1896) 1896 AC 240 = 65 LJPC 16, Reynolds v. Attorney-General for Nova Scotia

(1890) 15 AC 384 = 59 LJPC 68, Main v. Stark

(1863) 14 CB (NS) 180 = 143 ER 414, Cooper v. Wandsworth Board of Works

R. Jethmalani assisted by S. K. Sonak, for Petitioner; S. Tamba, Govt. Pleader, for the (State) Respondents.

ORDER: The short question for consideration in this petition under Articles 226 and 227 of the Constitution is whether the action of the respondents is prejudicially affecting the right of the petitioner to extract china clay from the land leased to him, has the authority of law. The respondents impleaded are—(1) Government of Goa, Daman and Diu; (2) The Union of India; (3) Secretary, Industries and Mines, Government of Goa, Daman and Diu; and (4) Director of Industries and Labour, Government of Goa, Daman and Diu. The petition is supported by an affidavit of the petitioner.

2. The case of the petitioner—Govind Narayan Tilve—is that by a deed dated 15th April 1926 Madeva Bicu Boto Sahacari, gave on lease one-half of the land known as ‘Xelcho Fond’ on the western side belonging to him, to Apa Malu Xete Arsencar, for a period of 2000 years. The lease money stipulated was Rs. 4 per annum. This land Apa Malu Xete Arsencar, in his turn, gave on lease to the petitioner by a deed dated 10th April 1962 for a period of 9 years. One of the terms stipulated was that the petitioner had the right to extract, utilise, transport and sell clay of the kind known as “china clay” existing in the said land. The petitioner was required to pay to Apa Malu Xete Arsencar a sum of Rs. 250 per annum. The petitioner apprised the Administrator of Sanguem of this sub-lease as required by Article 16 of the Portuguese Government Decree dated 3rd November 1905, known as “Regulamento sobre a lavra de pedreiras nas Provincias ultramarinas” (hereinafter referred to as ‘the 1905 Decree’).

The china clay could be freely exploited in terms of Article 1 of 1905 Decree and Article 3 of the Portuguese Colonial Mining Laws as approved by the Decree of 20th September 1906 known as “Regulamento das Minas” (hereinafter referred to as ‘the 1906 Decree’). The petitioner invested large amount in mining operations. He was

freely exploiting and extracting china clay when, on 22nd February 1963, he received orders in writing from the Administrators of Sanguem and Ponda talukas asking him to suspend the "clandestine transport of the china-clay". The petitioner questioned the legality and propriety of these orders, and in this connection, he made representations. On 27th March 1963 orders were passed by the Director of Economic Services, whereby he was permitted "to continue extraction of china-clay". On 28th March 1963 the State Government published an order dated 22nd February 1963 in respect of mining leases for china-clay and other varieties of clay.

The petitioner submitted an application by way of abundant caution in accordance with the said order. This was on 3rd April 1963. The quality of the mineral applied for was china-clay and ochre and the period of lease indicated was five years. This application was for the mining lease of the above land leased to him. On 6th April 1963 a copy of the letter addressed by the Director of Industry and Labour to the Administrator of Sanguem was received by the petitioner for his information. In that letter it was stated that the petitioner is authorized, as a special case, to transport only the quantity of china clay extracted by him till 22nd February 1963 lying at the pit-mouth on payment of Rs. 250 to the Government in accordance with Clause IV of the said Order. It was further stated that the petitioner had no right to continue extraction of china clay from the said land until other applications made in accordance with the requirements of the said Order are considered. This action was regarded by the petitioner as illegal and improper and, as before, he made representations. On 19th August 1963 he received intimation from the Secretary, Department of Industries and Labour, that he had been granted lease for extraction of china clay in the said land, vide Order, dated 13th August 1963. He was also asked to clarify as to what compensation was paid or proposed to be paid by him to Ramkrishna M. Sahakari, son of Madeva Bicu Boto Sahakari.

By his letter dated 26th August 1963 the petitioner replied that compensation had already been paid to the holder of the property under the deed duly registered on 10th April 1962. The petitioner thereafter continued with the mining operations when on 5th December 1963 a telegram was received by him asking him to call on the Chief Secretary on 7th December 1963, along with his documents. On 6th December 1963 he sent a telegram regretting his inability to come due to sickness. On 13th December 1963, to his surprise, he was informed by the Director of Industries and Mines that his application for the grant of china clay lease had been rejected by the Chief Secretary, and the order dated 13th August 1963 may be treated as cancelled. The petitioner found himself in a difficult

situation and, apart from representations and protests, he preferred an appeal known as 'hierarchical appeal' to the Minister for Industries on 31st December 1963, against the order of the Chief Secretary. He also moved the Chief Minister.

On 6th October 1964 the petitioner was informed, on behalf of the State Government, that the Mineral Concession Rules came into force from 1st October 1963 and as the said lease had not been granted to him before that date therefore the application made by him on 3rd April 1963 should be regarded as having lapsed. The petitioner was later informed on 5th November 1964 that the appeal made by him is not accepted. He once again moved the Chief Minister by petition dated 1st December 1964 explaining his case at length that the Mineral Concession Rules could not affect his right to extract china clay. He got no relief. He felt aggrieved. He regarded the action of the State Government as unjust and illegal. He had therefore no alternative left except to approach this Court and seek justice. This, in short, is the background of the case of the petitioner.

3. The case of the respondents set out in the affidavit sworn by Prabhakar Camotim, Director of Industries and Mines (respondent No. 3), is that the 1905 Decree did not apply to extraction and mining of china clay and, consequently, the petitioner had no right to extract china clay from the land. The free exploitation of china clay in terms of Article 3 of the 1906 Decree was subject to the laws in force, including the Mines and Minerals (Regulation and Development) Act, 1957. There was no compliance by the petitioner with the requirements of the order dated 22nd March 1963 published by the Government on 28th March 1963. The petitioner did not move the concerned department for inspection and demarcation, as required by the said order and, in absence of any lease obtained thereunder, the petitioner acquired no right to extract china clay from the land leased to him. The said order applied to mining leases of china clay. The deed executed in April 1962 in favour of the petitioner was "without any authorisation or knowledge of the Goa Administration". The mining operations were suspended on 28th February 1963 because a complaint was received from one Abdul Razak that the petitioner had been extracting china clay from a part of the land which had already been "manifested" by him on 8th January 1962.

A complaint was also received from Rama Krishna Sahakari, owner of the land, objecting to extraction of minerals by the petitioner. On 27th March 1963 the petitioner was permitted to continue with extraction of china clay on condition that he would pay the taxes that may be levied in future, and to comply with the legal formalities which may be prescribed in future in this territory. The order passed on 6th April 1963 permitting the petitioner, as a special

1969.

G. N. Tilve v. Govt. of Goa (Jetley I. C.)

case, to transport only the quantity of china clay extracted by him till 22nd February 1963, was intended to assist the petitioner. It did not in any way recognize any of his rights to the said land.

In accordance with the provisions of the Constitution, the grant of china clay mine could be made only in the name of the President of India and authenticated by an authority empowered under Article 299 of the Constitution. There was no lease in favour of the petitioner according to law and therefore the question of its cancellation by the Chief Secretary did not arise. The Secretary, Industries and Labour Department, could not grant and, in fact, did not grant, any lease to the petitioner on 19th August 1963. The impugned action of the respondents (in not recognizing the sub-lease in favour of the petitioner and thereby preventing him from extracting china clay) is perfectly legal and fully justified in the larger interests of the country and in accordance with the fundamental principles enshrined in the Constitution. This action is not against the principles of natural justice.

The respondents acted in accordance with the provisions of law. It is not admitted that the petitioner was enjoying any china clay lease prior to 28th March 1963 or prior to 1st October 1964. The action taken by the Government is not contrary to the Mines and Minerals (Regulation and Development) Act, 1957. The petition is misconceived and hence it is not maintainable. The petitioner has made out no case for grant of the writs, etc., applied for. The petition accordingly should be rejected. This, in substance, is the case of the respondents.

4. The first and foremost question for consideration is whether the petitioner acquired any right to extract china clay from the said land under the law in force. In order to answer this question we may turn to the deeds of 1926 and 1962. Apa Malu Xete Arsencar is a lessee under the 1926 deed. This fact is not in dispute. It is also not in dispute that the petitioner is sub-lessee of the said land in terms of the 1962 deed. What is in dispute is that the 1905 Decree is not applicable to china clay and the requirements of the 1906 Decree were not followed by the petitioner and therefore, he acquired no right to extract minerals from the said land. Mr. Ram Jethmalani, learned counsel for the petitioner, drew my attention to Articles 1, 16 and 23 of the 1905 Decree and also Articles 2 and 3 of the 1906 Decree in support of his argument that the petitioner acquired this right and that it is not taken away by the Mines and Minerals (Regulation and Development) Act, 1957 and the Mineral Concession Rules, 1960, made thereunder. I shall briefly refer to these provisions.

The 1905 and 1906 Decrees and some other laws promulgated by the Portuguese

Government were in force in this country before liberation. They were continued in force by virtue of Section 5 (1) of the Goa, Daman and Diu (Administration) Act, 1962, enacted by Parliament on 27th March 1962. The said Act came into force in this territory with back effect on 5th March 1962. The 1905 and 1906 Decrees continued to operate and have effect until the Mines and Minerals (Regulation and Development) Act, 1957 and the Mineral Concession Rules, 1960, made thereunder, were brought into force in this territory from 1st October 1963 by a notification, in exercise of the powers conferred by Section 3 (2) of the Goa, Daman and Diu (Laws) Regulation, 1962. The 1905 Decree regulated working of the quarries—open and underground. Article 1, inter alia, referred to clay and other minerals specified therein. It provided that these minerals under the general description of 'stone quarries' could be freely exploited and availed of by the owner of the soil or by any other person, with his consent, in conformity with requirements of Articles 16 and 23. Article 16 stated that open or surface quarries existing in private land could be worked without obtaining licence from the Government, but no one shall do so without giving intimation to the local administrative authority. Article 23 was concerned with underground working of quarries, and it required prior licence from the District Governor before starting mining operations.

Article 1 of 1906 Decree had effect in all Portuguese overseas colonies, as the 1905 Decree. Article 2 provided that the ownership of metals and metalliferous minerals, including other minerals specified therein, belonged to the State, and that such beds could not be prospected or worked without licence and concession by Government. Paragraph (1) of that Article enumerated metals and metalliferous minerals contained in alluvials existing in the beds of rivers, etc., which could be freely exploited. This was one exception to the requirements of the licence and concession. The second exception was the minerals referred to in Article 3. Under that provision, deposits of mineral substances not included in Art. 2 could be freely exploited by the owner of the soil or by any other person with his consent, independently of any permission from the Government. The Articles cited are on the lines of the principle of English Common Law. The owner of surface land is entitled prima facie to everything beneath or within it, down to the centre of the earth. This principle is, however, subject to exceptions; thus, at Common Law, mines of gold and silver belong to the Crown (See Halsbury's Laws of England, Volume 26, Third Edition, page 326).

5. The argument developed by Mr. Jethmalani was that the petitioner acquired a right to extract, transport and dispose of china clay under a valid deed of 1962. China clay is one of the varieties of clay and there-

fore governed by Article 1 of the 1905 Decree. Article 1 referred to clay in general. 'Clay' is the genus and 'China clay' its species. The latter could be freely exploited by the petitioner but subject to the requirements of Article 16. Article 16 did not require any licence for mining operations in the open and surface quarries existing in private land, as in the instant case. What it required was that intimation thereof should be given to the local administrative authority, so that necessary security measures could be taken. Such an intimation was given by the petitioner. A prior licence for underground working of the quarries was required in terms of Article 23. That Article obviously did not apply, because the petitioner was concerned with open and surface quarrying and not with underground excavation. There was thus compliance with the 1905 Decree. There was also compliance with the 1906 Decree.

China clay is one of the deposits of mineral substances, not included in the substantive part of Article 2 and, therefore, could be freely exploited by the owner of the soil or by any other person with his consent independently of any permission from the Government in terms of Article 3. It is admitted by the respondent No. 3 in his counter-affidavit that China clay is a non-metallic mineral. Therefore it is governed by Article 3. Article 2 applies to metallic minerals. The expression "owner of the soil" in this Article and also in Article 1 of the 1905 Decree would include Apa Malu Xete Arsencar, a lessee for a period of 2000 years. It should not be construed in a narrow sense, for such construction would defeat the object of free exploitation of non-essential minerals such as China clay. It was not the case of the respondents at any stage during the lengthy correspondence with the petitioner that Article 3 was applicable to the sub-lease and as there was no consent of Madeva Bicu Boto Sahacari or his son, R. M. B. Sahacari, therefore, the petitioner is barred from extracting, transporting and disposing of China clay.

As against the trend of this argument, the contention of Mr. Tamba, learned Government Pleader, is that Article 1 of the 1905 Decree did not apply to China clay, but clay only and therefore the provisions of Art. 16 were inapplicable and consequently China clay could not be freely exploited by the owner of the soil, or by any one else with his consent. Assuming for the sake of argument that China clay is included in the general expression "clay" even then there was no compliance with Article 1 for the simple reason that the petitioner is not the owner of the soil nor did he obtain consent of the owner before exploiting and extracting China clay. China clay, it is true, is governed by Article 3 of the 1906 Decree and not Article 2 thereof. The expression "owner of the soil" in Article 1 of the 1905 Decree and Article 3 of the 1906 Decree would not include Apa Malu Xete Arsencar,

a lessee. The case of the petitioner for free exploitation of China clay is thus not covered by the 1905 and 1906 Decrees and accordingly the petitioner acquired no right to extract China clay. It is subject to the Mines and Minerals (Regulation and Development) Act, 1957, and the rules made thereunder. In the premises the State was legally justified in preventing him from extracting, transporting and disposing of China clay.

6. It is common ground that the petitioner gave intimation in terms of Art. 16 of the 1905 Decree. Article 23 being inapplicable, we have to fall back upon Art. 1. The argument of Mr. Tamba that China clay is not 'clay' within the purview of that Article does not seem to deserve serious consideration. China clay is one of the varieties of clay and, in absence of any provision in the Decree, drawing a distinction between 'clay' and 'China clay', I have no hesitation in accepting the argument of Mr. Jethmalani that Article 1 applied to China clay. In Ext. G, dated 25th March 1966, addressed to the respondent No. 3, the petitioner cited passages from certain standard books supporting his point of view that China clay is clay. Did the petitioner obtain consent of the owner of the soil before extracting China clay as required by Art. 1 of the 1905 Decree and Article 3 of the 1906 Decree? This question is important. According to Mr. Jethmalani, want of consent of the owner of the land is a pure question of fact and as there is no proper issue raised therefore it is not open to the respondents to contend that there is no right to extract, transport and dispose of China clay from the said land. This contention, he went on to submit, could only be made by the parties to the 1962 deed. I am unable to accept this argument.

The respondents could, I think, properly contend that failure to comply with the provisions of the said Articles in so far as want of consent of the owner of the land is concerned, would not confer the said right. I agree with Mr. Jethmalani that it may not be open to the respondents to question the validity of the 1962 deed, but regulation of quarries, in a limited sense, for the purposes of these Articles, is a matter which falls squarely within their jurisdiction. Mr. Jethmalani next argued that it should be presumed under Section 114 of the Evidence Act that such a consent was obtained by the petitioner. I am afraid the rule of evidence in this section is inapplicable in view of the complaint of Ram Krishna Sahacari, the owner of the land. The common course of human conduct envisaged by this section militates against raising such a presumption. In this connection the averment in the counter-affidavit about this complaint is not denied. I agree with Mr. Tamba that there was no consent of the owner of the land, but is not consent of Apa Malu Xete Arsencar sufficient for the purposes of the said Articles?

7. That takes me to the next question as to what is precisely meant by the expression "the owner of the soil". (In Article 3 of the 1906 Decree also the Portuguese word "solo" is used, which means "soil" and not "ground", as translated in the printed translation available in this Court). "Soil", according to Aiyer's 'Manuel of Law Terms and Phrases' generally denotes land together with whatever is in or upon or about it. In the strict sense it is land without minerals. According to Stroud's Judicial Dictionary, this word (and notably in Inclosure Acts) frequently means the surface of the land only and does not include minerals. In 'Words and Phrases' by Burrows, *prima facie*, it would include anything above or below it.

According to Mr. Jethmalani, Apa Malu Xete Arsencar, being a lessee for 2000 years, having an interest in the land and owning minerals therein, is equally an owner of the soil, within the meaning of the said Articles. He argued that leasehold interest is an immovable property itself. Apa Malu Xete Arsencar is not a full owner, he conceded; nevertheless he emphasized that Apa Malu Xete Arsencar is a qualified owner. Consent of the owner of the soil, he added, is merely a compendious expression. In this connection he drew my attention to 'Roman Private Law', by R. W. Leage, Third Edition, page 218 where by the fifth century, perpetual and long term leases, originally known by the Greek name 'Emphyteusis' were regarded as having the effect of a clear right in rem. Such leases were not merely a contractual right, but they had also the support of *actio in rem*. The tenant (*emphyteuta*) became entitled to the profits of the land by *fructuum separatio*. He could create servitude over it and his rights passed to his heir or legatee.

Mr. Jethmalani also drew my attention to 'Salmond on Jurisprudence' where the law on 'incorporeal ownership' and 'corporeal ownership' is discussed in Chapter 12, page 300. Applying that law to the facts of the present case, Apa Malu Xete Arsencar is the owner of the lease created in his favour. This lease is an encumbrance and Apa Malu Xete Arsencar is the encumbrancer. A tenant for life is regarded as a "limited owner". The right of the owner of the land in this case is all but eaten up by the dominant rights of Apa Malu Xete Arsencar; his ownership is reduced to a mere name rather than a reality; a mere shadow rather than a substance. The substance is with Apa Malu Xete Arsencar and the shadow with the owner of the land. I agree with Mr. Jethmalani that Apa Malu Xete Arsencar is a qualified owner and his consent is effective for the purposes of the said Articles. It may be added that the lease in favour of Apa Malu Xete Arsencar does not bar Apa Malu Xete Arsencar from extracting the minerals from the said land. Mr. Jethmalani cited 'State of Bombay v. Bhanji Munji', AIR 1955 SC 41 (44), where, for the purposes of Article 19 (1) (f) of the

Constitution, in the context of the orders of requisitioning passed under the Bombay Land Acquisition Act, 1948, it was observed by Bose, J., speaking for the Supreme Court, that "the right to occupy the premises has gone as also the right to transfer, assign, let or sub-let. What is left is but the mere husk of title in the leasehold interest: a forlorn hope that the force of this law will somehow expend itself before the lease runs out". This decision is relied upon to show that the owner of the land in the instant case has "the mere husk of title".

In view of the long term of the lease for ages in favour of Apa Malu Xete Arsencar the expression "owner of the soil", in my opinion, need not be construed in a narrow sense, as argued by Mr. Tamba. A long term lease is a form of ownership. It is a type of property although less comprehensive than full ownership. This lease was not only of the land but also of minerals, as they are a part of the land. The owner of the land did not retain the right to possess minerals. Ownership is divisible. He voluntarily parted with possession of the land. A 999 year lease is not uncommon under our system of law. It is not the case of the respondents that this lease for 2000 years was uncommon under Portuguese system of law and that it is opposed to public policy. This construction would not promote the object of the law-making authority under the 1905 and the 1906 Decrees, which is free exploitation of clay and other non-essential minerals found in privately owned lands.

The principle of construction is well settled that that sense of the word is to be adopted which best harmonises with the context and promotes the policy and object which the law-makers had in view. Mr. Tamba did not cite any decision of the Portuguese Supreme Court or any other Court in support of his argument that the owner of the soil in this case could be none else than Madeva Bicu Boto Sahacari and his descendants, and that this expression would not take in Apa Malu Xete Arsencar. It may be added that the Decrees of 1905 and 1906 were adopted as our law and they are to be construed according to our system of law and not Portuguese system of law.

It may be said in passing that the Judges under the Portuguese system of law based on Code Napoleon have wider powers in the matter of interpretation of the laws in order to mitigate the rigidity of the laws or in case of lacuna or unforeseen difficulty, to declare that a case should be treated similarly as some other identical case directly foreseen in the law or that it should be governed by a rule framed by the Court according to certain principles extracted from the law. When called upon to deal with laws in accordance with their system we have to pass from an environment of case-law into a 'world governed by Codes'. The Judges in England and in our Country follow the canons of interpretation which enable them to ascertain the intention of the

legislature in employing certain words but they cannot remedy the lacunae in law as do the Judges on the Continent. The continental legislatures are content to lay down a principle and leave it to the Judges to work out the details. In English system judicial creativeness flows through narrow channels. The need for certainty embodied in the principle of stare decisis is to be respected. Having regard to the facts of the case, I am of the view that there was compliance with the said Articles and in terms thereof the petitioner has a mining right to extract, transport and dispose of China clay except when it can be shown that this right is taken away expressly or by necessary implication by a new law. "Mining rights" under Clause (f) in the preliminary definition of the 1906 Decree meant "all rights derived from the dispositions of the law concerning mines".

8. Mr. Jethmalani next submitted that the right to extract, transport and dispose of minerals is an important right and, in this connection, he cited 'C. P. M. Ore Co., Ltd. v. State of M. P.', AIR 1956 Nag 34 (37), decided by the Nagpur High Court, where Hidayatullah J., (as he then was), observed that the right to extract minerals is a right which is valuable, and that any subsidiary right leading to the enjoyment of the minerals and their extraction is also a valuable right. I may also seek the assistance of Salmond and Holland, and according to them, every interest or right which is recognized and protected by the State, that is, by the laws of the State, is a legal right and every such legal right involves a legal duty or obligation.

"Rights", says Ihrring, "are legally protected interests". The petitioner has a vested right to extract minerals etc., as a sub-lessee. This right is not contingent. A person can only claim to have a vested right under a statute when he complies with all the formalities prescribed thereby and before then the right is only an inchoate right. The petitioner did comply with the formality as prescribed by Article 1 read with Article 16 of the 1905 Decree. This principle is illustrated in 'Reynolds v. Attorney General for Nova Scotia', 1896 AC 240. It is a well settled principle of construction that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. But if the language is plainly retrospective it must be so interpreted. . . . where vested rights are affected, prima facie, it is not a question of procedure. (Maxwell on Interpretation of Statutes, 11th Edition, page 205). Vested or substantive rights also can be taken away if the legislature speaks in language expressly or by necessary implication. In the case of

Reynold (supra), Lord Morris delivering judgment of the Judicial Committee, observed:—

"No doubt the maxim *omnis nova constitutio futuris formam imponere debet non praeteritis* has been applied to the extent that a new law ought to be construed so as to interfere as little as possible with vested rights and in *Main v. Stark*, (1890) 15 AC 384 at p. 388, the Earl of Selborne says, 'words not requiring a retrospective operation, so as to affect an existing status prejudicially, ought not to be so construed'. Yet the result is that in all cases it is necessary to ascertain what the legislature meant".

9. The entire range of the new law relating to mines and mineral development is covered by the Mines and Minerals (Regulation and Development) Act, 1957, (hereinafter referred to as 'the Act') and the Mineral Concession Rules 1960 made thereunder (hereinafter referred to as 'the said Rules'). These laws and also the Mines Act 1952 and the Mines Rules 1952, as modified by the Goa, Daman and Diu (Laws) Regulation, 1962, were brought into force in this territory on 1st October 1963. The latter laws are not material for the present purpose. What is material is the Act and the said Rules made thereunder. Do they affect the vested rights of the petitioner? According to Mr. Jethmalani, they do not. Mr. Tamba felt differently.

The scheme of the Act may be broadly reviewed. It was enacted to provide for the regulation of mines and the development of minerals under the control of the Union. The subject-matter of the Act is substantially relatable to Entry 54 of the Union List—'Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest'. Section 2 contains the declaration envisaged by this entry. Section 3 is a definition section. Clause (a) defines "minerals" as including all minerals except mineral oils. China clay is a mineral. "Mining lease" in Clause (c) means a lease granted for the purpose of undertaking mining operations, and includes a sub-lease granted for such purpose. Cl. (d) defines "mining operation" as any operations undertaken for the purposes of winning any mineral. "Minor minerals" under Clause (e) means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government may, by notification in the official Gazette, declare to be a minor mineral. China clay is not specifically mentioned in the definition of "minor minerals" and for good reasons.

Section 4 is divided into two sub-sections. Sub-section (1), to the extent it is relevant for the present purpose, prohibits any person from undertaking any mining operations in any area, except under and in accordance with the terms and conditions of a mining

lease granted under the Act and the rules made thereunder. The said rules are made in exercise of the power conferred on the Central Government under Section 13 of the Act. The sub-lease in favour of the petitioner was not granted under the Act and the said rules and, therefore, sub-section (1) is not attracted. The proviso to this sub-section is important, and it is this provision particularly which is relied upon by Mr. Jethmalani. The proviso provides that nothing in this sub-section shall affect any mining operations undertaken in any area in accordance with the terms and conditions of a mining lease granted before the commencement of this Act which is in force at such time and had effect when the Act was brought into force on 1st October 1963. The proviso preserves and respects vested rights in accordance with the normal legislative practice.

Sub-section (2) prohibits grant of a mining lease otherwise than in accordance with the provisions of the Act and the said rules made thereunder. The effect of this sub-section seems to be that with effect from 1st October 1963 no fresh mining lease could be granted in this territory under any law in force before that date. Section 4 is prospective in effect. Section 5 (1) applies to land owned by the State. Section 5 (2) (a) states that as respects any minerals specified in the First Schedule, no mining lease shall be granted except with the previous approval of the Central Government. China clay is not specified in this Schedule. Section 6 is intended to prevent monopoly and it gives effect to the Directive Principles of State Policy mentioned in Article 39 of the Constitution.

Section 8 (2) relates to renewal of mining leases granted. Section 9 refers to royalties in respect of mining leases. Sub-section (1) thereof requires the holder of a mining lease granted before the commencement of the Act to pay royalty in respect of minerals removed at the rates specified notwithstanding anything contained in the instrument of lease or any law in force at such commencement. This provision has retrospective effect. The language is plainly retrospective. Section 10 governs applications for mining leases in respect of any land in which the minerals vest in the Government. There is no other substantive provision in the Act which deals with minerals not vesting in the Government.

Section 14 provides that the provisions of Sections 4 to 13 (inclusive) shall not apply to mining leases in respect of minor minerals. Section 16 relates to modification of mining leases. It was made applicable to this territory on 15th January 1966, vide notification No. 2/D1/2 dated 4th January 1966 published in the Government Gazette dated 13th January 1966 in exercise of the powers conferred by sub-section (2) of Section 3 of the Goa, Daman and Diu (Laws) Regulation, 1962. It follows from this provi-

sion that the mining leases granted before that date could be modified so as to bring them in conformity with the relevant provisions of the Act and the said Rules. The language is plainly retrospective, as in the case of Section 9 (1). Section 19 states that any mining lease granted, renewed or acquired in contravention of the Act or any rules or orders made thereunder shall be void and of no effect. The mining lease in the instant case would be due for renewal on 10th April 1971. The other provisions are not material and therefore need not be cited. As will appear from the scheme of the Act, the right of the petitioner to extract China clay, transport and dispose it of in terms of the sub-lease granted in his favour is not affected except for certain purposes in future with which we are not concerned in this petition.

The said Rules replaced the Mineral Concession Rules, 1949, made in exercise of the power conferred on the Central Government, under the Mines and Minerals (Regulation and Development) Act, 1948. The rules in Chapter IV of the said Rules relate to grant of mining leases in respect of land in which the minerals vest in the Government. The rules in Chapter V regulate procedure for obtaining mining leases in respect of land in which the minerals vest in a person other than the Government. The other rules are not relevant for the present purpose. The rules in Chapter V also do not affect the said right of the petitioner under the sub-lease granted in his favour. They have no back effect.

In *M/s. Hassanji and Sons v. State of M. P.*, AIR 1965 SC 470, cited by Mr. Jethmalani, it was held by the Supreme Court that the Mineral Concession Rules 1949 which came into force in India on 25th October 1949, "apparently have no retrospective effect". This observation equally applies to the said rules. In reaching this conclusion their Lordships of the Supreme Court relied on Section 4 of the 1948 Act, similarly worded as Section 4 of the Act. Mr. Tamba could not cite any provision of the Act and the said rules in support of his contention that the said right to extract etc. China clay under the sub-lease was taken away or affected. The argument that the 1962 deed required prior approval of the Government seemed to overlook the scheme of the 1905 and 1906 Decrees. No such prior approval was necessary, nor was it sought, and for valid reasons.

Mr. Tamba, however, cited the order dated 22nd March 1963 published in the Government Gazette on 28th March 1963 in support of the said contention. This order, argued Mr. Jethmalani, has prospective effect only and it seems to apply to the land owned by the Government and not to the land owned by private individuals; and further it does not affect the vested right of the petitioner to extract China clay. As will appear therefrom it applies to the leases granted thereafter. It contains 'rules and

regulations'. What is the provision of the law under which the said order is issued was not explained by Mr. Tamba. Is it administrative? Alternately, is it quasi-legislative? The Act and the said rules had not come into force on that date. The 1905 and 1906 Decrees were not cited by Mr. Tamba in support thereof. The petitioner partially complied with the said order and paid two sums of Rs. 200 and Rs. 500 and also the taxes, as would be clear from his application dated 3rd April 1963 (Exh. L). This was done 'ad cautelam' so that his right to extract China clay is not affected as specifically stated therein. This was also done, continued Mr. Jethmalani, in the light of the previous sad experience following the Orders C and D dated 22nd March 1963, whereby the petitioner was directed to "suspend immediately the clandestine transport of the China clay", and also the order dated 27th March 1963, whereby he was permitted to continue extraction of China clay.

Mr. Jethmalani went on to add that the petitioner need not have applied for lease in accordance with the said order which had no back effect, but having done so the right to extract, transport and dispose of China clay is not affected. This argument is not without force. The principle of estoppel is not invoked on behalf of the respondents and for cogent reasons. According to Mr. Jethmalani, the petitioner was asked to pay taxes when the law did not so provide. In Chapter VIII of the 1906 Decree there are provisions for mining taxes. It is not the case of the respondents that the tax was levied under that Chapter. This point, however, is not material, for the fact remains that the said order does not affect the vested right acquired by the petitioner under the 1905 and 1906 Decrees. I agree with Mr. Jethmalani that it has prospective effect only, assuming it has the authority of the law. The petitioner was not under any legal obligation to comply with the provisions of the said order. Mr. Tamba next invoked the provisions of Article 299 of the Constitution and in this connection he invited my attention to Para. 27 of the counter-affidavit of respondent No. 3. It is stated therein that "the grant of China clay mine could be made only in the name of the President of Republic of India, and authenticated by an authority empowered under Article 299 of the Constitution". The Constitution was applied to this territory by the Constitution (Twelfth Amendment) Act, 1962, enacted by Parliament on 27th March 1962, with back effect from 20th December 1961. This was the date when this territory was liberated. According to Mr. Tamba, the contract of sub-lease executed in favour of the petitioner on 10th April 1962 is void, because it does not conform to Article 299. This argument seems to be devoid of substance. The land leased does not belong to the Government. The said contract was not between the Government and the petitioner.

It was between Apa Malu Xete Arsenkar and the petitioner. Article 299 applies to contracts by Government, where formalities prescribed thereunder are to be strictly followed. In this connection reference may also be made to the material part of Article 298 of the Constitution according to which the executive power of the Union shall extend to the making of contracts for any purposes. Article 299 has been wrongly invoked.

10. Mr. Jethmalani next argued — and not without ample justification — that the aforesaid vested right of the petitioner was interfered with without following the principles of natural justice and fair play. In Para. 34 of the counter-affidavit it is affirmed by respondent No. 3 that the "impugned action is not against the principles of natural justice or against equity and good conscience. I further say that the respondents have acted within the framework of the law and did not do any injustice to the petitioner". What is the "impugned action" in this case? On 22nd February 1963 the petitioner was asked to "suspend immediately the clandestine transport of the China clay he is making in the plot on lease". (Exhs. C and D). This was the first prejudicial action against him. He had a right to extract China clay and therefore the question of "the clandestine transport of China clay" was meaningless. By order dated 27th March 1963 the petitioner was informed "that his application regarding the continuation of the extraction of China clay from the landed property named X. F. situated at C. of S., having been approved" he should pay the taxes and "fulfil all the legal formalities which may be promulgated by the Government of this territory, in connection with the said extraction".

This order was reasonable and in conformity with the law, submitted Mr. Jethmalani, except for the requirement that the petitioner should comply with the legal formalities, etc. The legal formalities prescribed under the 1905 and 1906 Decrees had already been complied with. By letter dated 6th April 1963 the petitioner was intimated through the Administrator of Sanguem Taluka that "it has been decided by order of the higher authorities that Shri Tilve can be exceptionally authorized to transport only the quantity of China clay extracted by him till 22-2-63, from the said site and presently lying at the pit-mouth, on the payment of Rs. 250 to the Government in accordance with No. 4 of the order published in the Government Gazette No. 13, I Series dated 28-3-1963. It has also been decided that Shri Tilve shall have no right to continue the extraction of China clay from the said area until such applications that are being submitted by Police in accordance with the above said order of 28-3-1963, are being studied and appreciated by this Department".

This was the second prejudicial action against him. On 19th August 1963 the peti-

1969

tioner was intimated by the Secretary, Industries and Labour Department, that he had "been granted the lease for extraction of China clay vide Order No. 5864/1516 dated 13th August 1963". This was a happy news for him, and in return, he thanked the Secretary, by his letter dated 26th August 1963 (Exh. S). The matter did not end here. The petitioner received, to his surprise, a letter dated 13th December 1963 (Ext. T), intimating that "we regret to inform you that by order of Chief Secretary, dated 11-12-1963, your above application for the grant of China clay lease at "Xelexho Fondo" of Camarconda of Sanguem Taluka is rejected". As will appear from the aforesaid orders — not very consistent — the Director of Industries, Labour and Mining (respondent No. 3) and the then Chief Secretary were not clear in their mind.

The sub-lease for extraction of China clay had already been granted to the petitioner under the 1962 deed and, therefore, the question of granting him another lease for the same mineral did not arise. In the premises the said order of the Chief Secretary was also meaningless. It may be emphasized that the petitioner was asserting throughout that he had a subsisting sub-lease, and that his right thereunder to extract and carry away China clay is not affected, by the law in force. Mr. Tamba was asked to cite the provisions of law other than those already relied upon in support of the prejudicial action taken against the petitioner. He was not able to justify it on the basis of any other provision of law. The Act and the said rules being inapplicable this prejudicial action had not the support of law. There was a lis or dispute between the Government and the petitioner but in absence of any legal authority to determine the said dispute the impugned action cannot be regarded as quasi-judicial.

In *Xec Ayub v. Government of Goa, Daman and Diu*, AIR 1967 Goa 102, distinction between administrative functions and quasi-judicial functions was explained at some length relying upon the decisions of their Lordships of the Supreme Court and other important decisions. In that case the petitioner *Xec Ayub* was ordered to pay fine without complying with the principles of natural justice and therefore that order was quashed by an appropriate writ. It was stated that a recognised rule is that no one shall be condemned, punished or deprived of his property unless he has had an opportunity of being heard. The prejudicial action against the petitioner in the present case was administrative in its nature but even so, in accordance with the principles of fair play, it was necessary for the State Government and its officers to have followed these principles. In *G. Nageswara Rao v. A. P. S. R. T. Corporation*, AIR 1959 SC 308, S. R. Das, J., (as he then was), while concluding his judgment, observed that action may be administrative but that does not

absolve the State Government from observing the ordinary rules of fair play. In the words of his Lordship:—

"To say that action to be taken under Sec. 53-A is an administrative action is not to say that the State Government has not to observe the ordinary rules of fair play. Reference to the observation made by Fortesque J., in *Dr. Bentley's case* about God asking Adam and Eve whether they had eaten the forbidden fruit appearing in the judgment of Byles J., in *Cooper v. Wandsworth Board of Works* (1863), 14 CB (NS) 180=143 ER 414, is apposite".

In *'State of Jammu and Kashmir v. Bakshi Gulam Mohammad'*, AIR 1967 SC 122, Sarkar, C. J., speaking for the Supreme Court, observed that the rules of natural justice require that a party against whom an allegation is being inquired into should be given a hearing. Lastly, in *'State of Orissa v. Binapani Dei'*, AIR 1967 SC 1269, it was stressed by their Lordships of the Supreme Court that an administrative order which involves civil consequences must be made consistently with the rules of natural justice after informing the party concerned of the case of the State, the evidence in support thereof and after giving an opportunity to that party of being heard and meeting or explaining the evidence. In the instant case, as will appear from the record, the petitioner was not given this opportunity. He was not apprised of the contents of the complaints made against him by Abdul Razak and R. K. Sahacari. The order conveyed in letter dated 6th April, 1963 involved serious consequences, and I agree with Mr. Jethmalani that the respondents were under a duty to comply with the principles of fair play and natural justice. In *'Union of India v. Anglo Afghan Agencies'*, AIR 1968 SC 718, decided on 22nd November 1967 by the Supreme Court, Shah J., speaking for the Supreme Court, observed:—

"Under our Constitutional set-up, no person may be deprived of his right or liberty except in due course of or authority of law. If a member of the executive seeks to deprive a citizen of his rights or liberty otherwise than in exercise of power derived from the law — common or statute — the Courts would be competent and indeed would be bound to protect the rights of the aggrieved citizens".

The Director of Industries, Labour and Mining, (respondent No. 3) and the then Chief Secretary of the State Government interfered with the vested right of the petitioner to extract China clay, otherwise than in accordance with the provisions of law. They dealt with this matter in a rather casual way. In a manner of speaking, the petitioner ran from pillar to post in order to seek justice but it was denied to him. It may be emphasized that the basic rights including the right to acquire, hold and dispose of property are guaranteed by our

Constitution and they cannot be interfered with except by authority of law.

11. The appropriate order in this case would be to issue a mandamus or a direction in the nature of mandamus directing the respondents to refrain from acting contrary to the provisions of law. They are hereby directed not to interfere with the vested right of the petitioner to extract, transport and dispose of China clay, except by authority of law. In the view taken of this matter, the orders conveyed in letters (Exhs. C and D) dated 22nd February 1963 and in letter (Exh. M) dated 6th April 1963, shall have no effect. The petition filed by the petitioner is allowed with costs which are assessed at Rs. 250. Order accordingly.

GGM/D.V.C.

Petition allowed.

AIR 1969 GOA, DAMAN AND DIU 16
(V 56 C 3)

V. S. JETLEY J. C.

Goa Dock Labour Union, and another,
Petitioners v. Government of the Union
Territory of Goa, Daman and Diu and
others, Respondents.

Writ Petn. No. 40 of 1967, D/-28-6-1968.

(A) Constitution of India, Article 226 — Material facts must be disclosed by petitioner.

The petitioners seeking extraordinary relief under Art. 226 are expected to disclose material facts. They may be against them, but that is no reason to keep them back from the Court.

(Para 5)

(B) Civil P. C. (1908), S. 9 — Jurisdiction cannot be conferred by acquiescence, where there is no initial jurisdiction — This is so even in regard to Tribunal — Distinction in this respect in cases of inferior and superior Courts, pointed out — Reference of industrial dispute by Government which is not appropriate Government — Award is prima facie without jurisdiction even when no objection is taken to its jurisdiction — Industrial Disputes Act (1947), Ss. 10, 15.

Where by reason of any limitation imposed by statute a Court (or a tribunal) lacks jurisdiction to entertain any particular matter, neither acquiescence nor consent of the parties can confer the same upon it. No appearance, answer or request for extension of time can give jurisdiction which is conferred by statute. If the State Government is not competent to refer the industrial dispute because it is not an appropriate Government then no award can be made by the tribunal. Such an award ex facie would be without jurisdiction and therefore illegal and inoperative. It is immaterial, in that case, that objection was not taken by the petitioner before the Tribunal challenging its jurisdiction. Any exercise of unauthorized

jurisdiction by the Tribunal would amount to usurpation of the sovereign power of the State. This is particularly so in respect of inferior Courts as distinguished from the superior Courts. Prima facie, no matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior Court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular Court. What is true of inferior Courts is equally true of tribunals of limited authority. The plea of estoppel by acquiescence is no bar if the Tribunal lacks jurisdiction. AIR 1951 SC 230 and (1887) ILR 9 All 191 (PC) and AIR 1967 SC 1, Ref. (Para 5)

(C) Industrial Disputes Act (1947), S. 10 — Decision of jurisdictional facts — Tribunal can decide whether dispute relates to major port and whether reference is by appropriate Government — Decision can be challenged by writ. AIR 1954 Bhopal 17, Dissented from — Civil P. C. (1908), S. 9 — Constitution of India, Arts. 226, 227.

The jurisdiction of every judicial or quasi-judicial tribunal is derived from and limited by the statute or other instrument by which it has been created, and every judicial or quasi-judicial tribunal has power to determine the boundaries of its own jurisdiction, of its own motion, even though it is not raised by the parties. It is true that the tribunal of limited authority, as industrial tribunal, cannot consider the question whether the Act or any provision thereof whereunder it functions is invalid but the question of validity of the reference can be decided by it where exercise of jurisdiction depends upon the existence of a preliminary or collateral fact which goes to the jurisdiction. The Industrial Tribunal can decide collateral issues which confer jurisdiction upon it. It can decide whether an industrial dispute exists or not. Where the question is whether the dispute relates to major port, in which case the State Government which referred the dispute is not the appropriate Government and therefore the Tribunal has no jurisdiction, the decision of the question is decision of collateral facts to the actual matter referred to the Tribunal and the Tribunal has jurisdiction to decide this question. It can decide whether the Central or the State Government is the appropriate Government. The Act does not say that the opinion of the appropriate Government on this question is final and the Tribunal cannot enquire into it. It is open to parties to raise the question of jurisdiction as a preliminary issue for the decision of the Tribunal. This decision can be challenged by them in a proceeding under Articles 226 and 227, in case it was erroneous for no Tribunal can confer jurisdiction upon itself by misconstruing a section. Case Law Ref. AIR 1954 Bhopal 17, Dissented from. (Paras 6, 7, 8)

THE All India Reporter

1969

Gujarat High Court

AIR 1969 GUJARAT 1 (V 56 C 1)
FULL BENCH

N. M. MIABHOY C. J., J. B. MEHTA
AND A. D. DESAI JJ.

Sabuddin Sheikh Mansur, Petitioner v.
J. S. Thakar and another, Respondents.

Special Criminal Appln. No. 90 of 1966,
D/- 4-5-1967, against order of Sub. Divi-
sional Magistrate, Baroda, D/- 21-8-1966.

(A) Bombay General Clauses Act (1 of
1904), S. 15 — Bombay Police Act (22 of
1951), S. 56 — Power under S. 56 confer-
red on Sub Divisional Magistrate by
virtue of his office — It does not cease
to be a special conferment of power.
AIR 1943 Sind 107, Diss. from. AIR 1948
Bom 156, Foll. (Para 7)

(B) Bombay Police Act (22 of 1951),
S. 56 — Expression "specially" as used in
section — Construction — Special confer-
ment of power and general conferment
of power — Distinction explained — In
regard to Sub Divisional Magistrate,
power under S. 56 must be conferred
upon that officer either by his name or
by his office — Notification conferring
general power held did not satisfy require-
ment of S. 56 — (Bombay General Clauses
Act (1 of 1904), Ss. 15, 16, 18) — (Civil
P. C. (1908) Pre. — Interpretation of
Statutes — Statutes conferring power).

The expression "specially" as used in
the adjectival clause "(who is) specially
empowered by the State Government in
that behalf" in S. 56 of Bombay Police
Act has reference to the Sub Divisional
Magistrate, and the reference is made in
order to emphasize that the Sub Divi-
sional Magistrate, on whom the power

is to be conferred must be selected or
chosen by the State Government and
that, such officers must not be generally
selected for the conferment of the power.
Whether the officer is selected by name
or by virtue of his office, the person who is
so selected must be an individual in whom
the State Government has faith that he
will be able, by virtue of his experience
and equipment and similar other consi-
derations to discharge the responsibility
or duty cast upon him by the section.
AIR 1915 Mad 1159 & AIR 1943 Sind 107
& AIR 1948 Bom 156, Foll. (Para 8)

When a person belonging to a certain
class of office occupies a particular office,
then, power can be conferred upon him
in virtue of the office occupied by him.
But, if power is conferred upon the whole
class to which the officer belongs, then it
is done by virtue of his official title.
Therefore, if power is conferred upon
Sub Divisional Magistrates, then, it will
be a general power. But, if power is con-
ferred upon a Sub-Divisional Magistrate
occupying a particular office at any given
time and place then, it would be special
conferment of power on him. If, on the
other hand if an officer alone is not given
power but the whole class, of which he
is one, then, it will be general conferment
of power. (Distinction between special
conferment of power and general confer-
ment of power explained). (Para 8)

If a notification empowers, not a person
holding a particular office at a particular
point of time, but, empowers all his suc-
cessors in office, then, the Government
does not select any particular person an
individual or an officer, for the confer-
ment of power, but it selects a place and
confers power upon all officers who may
happen to be transferred at that place,
including an officer who may not have

been in service at the time when the notification was issued and about whose capacity or experience the Government may not have the slightest idea at the time when the notification is issued. It is wrong to regard such a notification as a special conferment of power and not general. AIR 1924 Mad 256 held to be not inconsistent with AIR 1915 Mad 1159, Case Law Discussed. (Para 8)

Therefore in order that there may be a special conferment of power under S. 56 of Bombay Police Act in regard to a Sub Divisional Magistrate, power must be conferred upon that officer either by his name or by virtue of his office. In either case, Government must have definitely before its mind's eye the particular individual or person who is being selected for the conferment of power. If that is not so, then, the officer is not specially empowered. On the other hand, if power is conferred upon the class of Sub Divisional Magistrates, which will be the case if more than one particular individual is intended by the Government — and specially if the Government intends to empower the successors in office of the Sub Divisional Magistrates concerned — then, it is a general conferment of power. Case Law Discussed. (Paras 9, 11)

Where under a notification conferring power under S. 56 not only the Sub Divisional Magistrate working in the respective Sub Division at the time when the notification was issued, but, all his successors were also intended to be included, and also the persons who were not born in the cadre on the date of publication of notification, that notification conferred a general power on the Sub Divisional Magistrates concerned and, as such, did not satisfy the requirement of Sec. 56. Such Sub Divisional Magistrates acting under S. 56 were not specially appointed under the notification within the meaning of the expression "specially empowered" used in S. 56. AIR 1967 SC 1532 Explained. Case Law Discussed. (Paras 13, 14)

(C) Civil P. C. (1908), Pre. — Interpretation of Statutes — Internal aid — Aid of sub-section — Rule of construction.

Courts may be justified in taking the aid of the sub-section when construing statutes in pari materia or statutes dealing with criminal matters. But, at the same time, they must remember, whenever they are called upon to interpret an expression in a different statute, that the primary duty is to construe the expression according to the ordinary canons of construction in the context in which the expression is used in that particular statute. But, all the same, in the absence of any indication in the statute to be construed, if the legislative mind is sought to be understood with the aid of the sub-section, there is no flaw in that approach,

although, while taking the aid of the sub-section courts must bear in mind that it cannot be regarded as a definition clause or as conclusive, overriding all other considerations. (Para 8)

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- (1924) AIR 1924 Mad 256 (V 11) =
24 Cri LJ 846, Alaga Pillai v. Emperor 8, 10
- (1915) AIR 1915 Mad 1159 (V 2) =
16 Cri LJ 268, Mahomed Kasim v. Emperor 8, 10
- H. K. Thakore, for Petitioner; K. H. Kaji, Actg. Advocate General with G. T. Nanavati, Asst. Govt. Pleader, for Respondents.

MIABHOY C. J. : — The following two points have been referred to this Full Bench by a Division Bench consisting of two of us :—

- (1) What is the correct interpretation of the expression "the Sub Divisional Magistrate specially empowered by the State Government in that behalf" as used in section 56 of the Bombay Police Act; and
- (2) Is respondent No. 1 specially appointed within the meaning of the above expression by the notification No. 6304/6 Home Department dated 1st August 1961, of the State of Bombay?

The main point which arises for determination in this case is a short one. It is, what is the correct interpretation of the word "specially" used in section 56 of the Bombay Police Act, 1951 (hereafter called the Act).

2. In this case, petitioner challenges the externment order, Exhibit 'F', dated 21st August 1966, passed by one Shri Thakar, Sub Divisional Magistrate, Baroda. The order was passed under section 56 of the Act, directing petitioner to remove himself outside the district of Baroda by a certain route within three days from the date of the receipt of the order and prohibiting him from entering or returning to the said district for a period of two years from the date of the order without his permission in writing or that of the District Magistrate, Baroda. The externment proceedings were started as a result of a notice, dated 21st August 1965, given to petitioner by one Shri Dhruv, the Sub Divisional Magistrate in charge of the city of Baroda, on whose transfer subsequently, Thakar probably took charge. One of the grounds on which petitioner attacks the above order is the competence of the Sub Divisional Magistrate to pass the impugned order under Section 56 of the Act. Therefore, it is first necessary to read that section, which is as follows:—

"56. — Whenever it shall appear in areas for which a Commissioner has been appointed under section 7 to the Commissioner and in other area or areas to which State Government may, by notification in the Official Gazette, extend the provisions of this section, to the District Magistrate, or the Sub Divisional Magistrate specially empowered by the State Government in that behalf (a) that the movements or acts of any person are causing or calculated to cause alarm, danger or harm to person or property, or (b) that there are reasonable grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involving force or violence or an offence punishable under Chapter XII, XVI or XVII of the Indian Penal Code, or in the abetment of any such offence, and when in the opinion of such officer witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property, or (c) that an outbreak of epidemic disease is likely to result from the continued residence of an immigrant, the said officer may, by an order in writing duly served on him or by beat of drum or otherwise as he thinks fit, direct such person or immigrant so to conduct himself as shall seem necessary in order to prevent violence and alarm or the outbreak or spread of such disease or to remove him-

self outside the area within the local limits of his jurisdiction or such area and any district or districts, or any part thereof, contiguous thereto by such route and within such time as the said officer may prescribe and not to enter or return to the said area or the area and such contiguous district, or part thereof as the case may be, from which he was directed to remove himself."

A plain reading of the section shows that the first part of the section mentions the officers who are competent to act under the section. The officers mentioned are (1) the Police Commissioner, (2) the District Magistrate and (3) the Sub Divisional Magistrate. The powers of externment are not automatically conferred upon all these three officers. It is only the Police Commissioner who has been invested with the power under the section by the statute itself. The District Magistrate also has been invested with the same power, but his power is dependent upon the determination of the State Government as to whether the provisions of section 56 should or should not be applied to the district in which the District Magistrate presides. If and when the provisions of section 56 happen to be extended by the State Government, then the District Magistrate, by the impact of the notification concerned, will get the power under the section. However, the Sub Divisional Magistrate does not get the power under the section by virtue of either the statute or by virtue of the notification which the State Government is empowered to issue for extending the provisions of the section to a district or a part thereof. In order that the Sub Divisional Magistrate may get the power under the section, it is necessary that he should further be specially empowered by the State Government in that behalf. Therefore, so far as a Sub Divisional Magistrate is concerned, it is quite clear that, before he can get the power to act under section 56, Firstly, there must be a notification by the State Government extending the provisions of the section over the Sub Division over which the Sub Divisional Magistrate presides, and secondly, that, he must be specially empowered by the State Government to act under the section. It is only when these two conditions are satisfied that the Sub Divisional Magistrate would be competent to act under the section. Therefore, in order to decide the question, it is necessary to ascertain whether Shri Dhruv, the Sub Divisional Magistrate who passed the impugned order, was or was not specially empowered within the meaning of section 56 aforesaid. Now, there is no dispute in the present case that the State of Bombay, which was the relevant authority then, issued a notification in its Home Department, No. 6304/6, dated 1st August

1951, extending the provisions of section 56 to a number of areas specified in a schedule appended thereto, in which was included the district of Baroda. There is also no dispute that, on the same date, by another notification bearing the same number and date and published at page 5272 in the Bombay Government Gazette dated August, 16, 1951, Part I, powers were conferred under section 56, inter alia, upon the Sub Divisional Magistrates in charge of the Sub Divisions specified in column 1 of the schedule appended thereto in the districts specified against them in column 2 thereof. Amongst the places mentioned in this notification are the four Sub Divisions of the district of Baroda named (1) Baroda City, (2) Baroda (3) Dabhoi, and (4) Chhota Udepur. The relevant part of the notification reads as follows:—

"In exercise of the powers conferred by sections 55, 56 and 57 of the Bombay Police Act, 1951 (Bom. XXII of 1951) the Government of Bombay is pleased to empower the Sub Divisional Magistrates in charge of the Sub Divisions specified in column 1 of the Schedule appended hereto in the Districts specified against them in column 2 thereof for the purpose of the said sections 55, 56 and 57:

SCHEDULE

Sub Division	District.
1	2
...	...
1. Baroda City	...
2. Baroda.	...
3. Dabhoi.	Baroda
4. Chhota Udepur	
....."	

The rival contentions are based upon the language used in this notification. According to respondents' contention, Shri Dhruv, the Sub Divisional Magistrate concerned, has been "specially empowered" within the meaning of section 56 under this notification and, therefore, the entrustment of the power is good. According to petitioner, Shri Dhruv has not been specially empowered under that notification. According to him, the entrustment of the power is general and, therefore, it is void.

3. Therefore, the first question which arises for determination in the case is, what is the connotation of the word "specially" as used in Sec. 56. Mr. Thakore's contentions are two in number. His first contention is that, a special entrustment connotes an entrustment by name. His second contention is that, even if a special entrustment connotes an entrustment in virtue of one's office, an entrustment to a class of officials in virtue of their title is not a special entrustment but a general

one. On the other hand, the learned acting Advocate General contends that, a special entrustment does not need an entrustment by name and that, an entrustment in virtue of office is also a special entrustment. He, therefore, contends that, a special entrustment is not necessarily confined to a particular individual, but that, an entrustment to an officer working in a particular office so as to enure not only for the benefit of the officer for the time being working at the date of the notification but his successor in office, will also be a special entrustment.

4. Before we undertake a detailed discussion of the rival contentions, it will be useful to indicate broadly the interpretation which the learned acting Advocate General places upon the notification in question, which is the second point which has been referred to this Full Bench.

5. Now, it is conceded that the above notification does not confer power under Sec. 56 by name on the Sub Divisional Magistrate, Baroda City, from which this case comes. The power is conferred upon that officer in virtue of his office. Under section 15 of the Bombay General Clauses Act, 1904 (hereafter called the Clauses Act), where, by any Bombay enactment, a power to appoint any person to fill any office or execute any function is conferred, then, unless it is otherwise expressly provided, any such appointment may be made either by name or by virtue of office. According to the learned acting Advocate General, therefore, the above notification is valid under section 15 of the Clauses Act. Under section 17(1) of the Clauses Act, it is sufficient for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, to mention the official title of the officer at present executing the functions, or that of the officer by whom the functions are commonly executed." According to the learned acting Advocate General, under this section, for the purpose of indicating that the Sub Divisional Magistrate, Baroda City, is to exercise the functions of a Sub Divisional Magistrate under section 56, it is enough for the State of Bombay to mention the official title and that a notification so issued would have the effect of conferring power upon the Sub Divisional Magistrate to execute the functions assigned to a Sub Divisional Magistrate under Section 56. Under section 18 of the Clauses Act, it shall be sufficient "for the purpose of indicating the relation of a law to the successors of any functionaries . . . to express its relation to the functionaries . . .". Therefore, according to the learned acting Advocate General, the aforesaid notification under the above

section not only confers power upon the Sub Divisional Magistrate who occupied that position on the date of the notification, but, all his successors in office. Therefore, according to the learned acting Advocate General, the proper interpretation of the notification in the light of the provisions contained in sections 15, 17 and 18 of the Clauses Act, is that, it confers power, not only on the Sub Divisional Magistrate who occupied that position on the date of the notification, but also all his successors who happen to be appointed Sub Divisional Magistrates in the Sub Division of the city of Baroda.

6. According to the learned acting Advocate General, the entrustment of power to the Sub Divisional Magistrate in the above manner is still a special entrustment. According to Mr. Thakore, the entrustment is not special but is general. It is in the context of these two rival contentions that the question has to be answered as to what is a special empowerment within the meaning of S. 56 of the Act.

7. The expression which requires to be construed is, "the Sub Divisional Magistrate specially empowered by the State Government in that behalf." The key word in this expression appears to be the adverb "specially". The expression, when amplified, would read, according to the rules of grammar, as follows: "the Sub Divisional Magistrate who is specially empowered by the State Government in that behalf." It may be noticed that, the adverb "specially" qualifies the verb "empowered" and the expression "Sub Divisional Magistrate" is qualified by the adjectival clause "(who is) specially empowered by the State Government in that behalf." Therefore, reading the expression apart from any authority, according to rules of grammar, the result is that, the Sub Divisional Magistrate contemplated by the expression is the one who is specially empowered by the State Government concerned. Reading the expression from a different angle, it is quite clear that, the authority which can entrust power is the State Government. The authority on which power can be conferred is the Sub Divisional Magistrate. But, in order that power may be so conferred, the Legislature requires that the power must be specially conferred. Therefore, in order that the expression may be satisfied, it is not merely enough that the State Government must entrust the power to the Sub Divisional Magistrate. It is necessary that the same should be done specially. Now, according to the ordinary canons of construction, the Legislature must be taken to have used the word "specially" advisedly. One cannot proceed on the assumption that the expression "specially" is superfluous. If that was the intention, then, the Legislature would have carried

out its meaning by merely using the expression "the Sub Divisional Magistrate empowered by the State Government in that behalf." Having regard to the fact that the Legislature has qualified the entrustment of the power by the adverb "specially", there is no doubt whatsoever that the Legislature does intend to convey that the entrustment of the power must be done specially and not otherwise. It is true that, the word "specially" may have a different connotation in different contexts. But, from the context in which the word appears in the above expression, the Legislature appears to have used the word "specially" in contradistinction to the word "generally". In other words, in order that the expression may be satisfied what the State Government must do is to entrust the power specially and not generally. If the entrustment is general, then, it does not satisfy the expression. But, the above approach leads only to a negative conclusion. It does not convey clearly the ideas as to what exactly is special and what is general. The idea may have to be ascertained with the aid of dictionary or other aids which are usually adopted for construing statutes. But, before we undertake this task, in our judgment, it is easy to dispose of the contention of Mr. Thakore that, in order that an entrustment may be special, it must be by name and in no other way. In support of this argument, Mr. Thakore brings to aid the fact that sec. 56 confers wide power upon the officers named therein. The power is to restrict the movements of a citizen. He contends that, the legislative policy appears to be that the enjoyment of such wide power must necessarily be restricted to the hands of a highly placed officer like the Commissioner or the District Magistrate and that, if the same is to be placed in the hands of an officer of a lower rank like a Sub Divisional Magistrate, then, the entrustment thereof must be done by the State Government by an exercise of its special discretion and that this restriction is placed on the State Government in order that the Government may bear in mind not merely the official position of a Sub Divisional Magistrate, but, it must also satisfy itself that the person concerned has also the special experience and equipment which would ensure it that the power will be enjoyed with propriety and justice. Mr. Thakore contends that, the latter result can be obtained only if the expression is construed to mean that, in each case, the State Government must consider the name of the Sub Divisional Magistrate concerned and if it is satisfied that the officer has the necessary experience and equipment, it should name the officer accordingly so as to ensure that the power will not be abused. Now, in our judgment, there is considerable force in

the argument of Mr. Thakore that the Legislature intends that the power conferred by the State Government must be exercised by a special choice. But, in our judgment, it does not follow therefrom that the power can be conferred only on the officer concerned by name and not in any other manner. It is true, as we shall presently point out, that the main idea is that the officer who is to be the repository of the power, must be selected and chosen by the State Government and that this process can be done only if the identity and individuality of the officer concerned is clearly borne in mind by the State Government. But, in our judgment, that does not mean that if once the identity and individuality is established, the officer must necessarily be named and cannot be entrusted with the power by virtue of his office. It is true that, if the State Government has confidence in a particular person, who is a Sub Divisional Magistrate for the time being, and the State Government has the authority to confer power by name on him. But, if that is not the intention of the Government, and the Government wants that a particular person occupying the position of a Sub Divisional Magistrate at a place to exercise the power whilst he is occupying the office at a particular place, there does not appear to be any restriction inherent in the aforesaid expression which would oblige the Government not to entrust the power to him by official designation. Moreover, such a limited construction of the above expression is not justified by the wide language used in section 15 of the Clauses Act. Under that section, the State Government has the authority to appoint any person to execute any function by name or by virtue of his office, unless it is otherwise expressly provided. In our judgment, the word "specially" as used in the aforesaid expression cannot be regarded as a special provision to the contrary, excluding the conferment of power on a person by virtue of his office. In our judgment, section 15 of the Clauses Act is applicable both when the State Government has the authority to confer power specially or generally. In order that the State Government may be restricted in the aforesaid manner, in our judgment, the statute must clearly state that the conferment of power was intended to be by name and not by virtue of office. Mr. Thakore derives support for his above contention from the judgment of the Sind Court in *Emperor v. Udho*, AIR 1943 Sind 107. In that case, the Sind Court was called upon to construe the expression "by an Assistant or Deputy Superintendent especially empowered by Government in this behalf." In that case, Davis C. J., after observing that the above expression implies the exercise by,

Government of a certain selection or discrimination as regards an individual on whom power is to be conferred, goes on to consider the objection raised on behalf of the Government, on administrative grounds, and goes on further to observe that no such difficulty is likely to arise if the officer is to be empowered by name. However, the learned judge has not given any special reason for this conclusion of his that the entrustment of power should be by name. In our judgment, the learned Judge has omitted to consider the effect of section 15 of the General Clauses Act. The above interpretation of the above expression was definitely differed from by a Division Bench of the Bombay High Court in *Emperor v. Savlaram Kashinath Joshi*, 49 Bom LR 798=(AIR 1948 Bom 156) on the basis of sec. 39, sub-section (1) of the Code and section 15 of the Clauses Act. As we shall presently point out, there is a sharp cleavage of judicial opinion on the correct interpretation of the expression that we are called upon to construe as used in various statutes. But, the Sind Court is the solitary Court which holds that the expression requires entrustment of power by name. None of the other Courts have gone to that extent. For the above reasons, we are not in agreement with the first part of Mr. Thakore's contention that the expression aforesaid requires conferment of power by name and in no other way. We hold that if power is conferred upon the Sub Divisional Magistrate by virtue of his office, then, it does not cease to be a special conferment of power.

8. That brings us to the question about the concept of special conferment of power. The learned acting Advocate General contends that the term "specially" is intended to emphasise the fact that the power which is to be conferred by the State Government is the special power mentioned in section 56. We are unable to agree with this interpretation. In our judgment, the power which is intended to be conferred under section 56 is only one power, namely, the power of externment. Therefore, it is hardly probable that the Legislature intends, by the use of the expression "specially," to designate the power of externment. Such an interpretation must be rejected on more than one ground. In the first instance, the same result can be obtained by the omission of the word "specially" and, in that view, the word "specially" would be superfluous. Moreover, the idea of the power is contained in the expression "in that behalf." There can be no reason for the Legislature to use that expression "in that behalf" if the same was intended to be conveyed by the use of the word "specially". Moreover, the above interpre-

tation would conflict with the grammatical reading of the expression as a whole. In our judgment, the expression "specially" as used in the adjectival clause "(who is) specially empowered by the State Government in that behalf" has reference to the Sub Divisional Magistrate, and the reference is made in order to emphasise that the Sub Divisional Magistrate on whom the power is to be conferred must be selected or chosen by the State Government and that, such officers must not be generally selected for the conferment of the power. Whether the officer is selected by name or by virtue of his office, the person who is so selected must be an individual in whom the State Government has faith that he will be able, by virtue of his experience and equipment and similar other considerations, to discharge the responsibility or duty cast upon him by the section. This is the interpretation which was placed by the Madras High Court which had to construe a similar expression used in the Indian Opium Act, in the case of Mahomad Kasim v. Emperor, AIR 1915 Mad 1159. The same interpretation is placed by the Sind Court in Udho's case, AIR 1943 Sind 107, already referred to. The Bombay High Court in Savlaram's case, 49 Bom LR 798=(AIR 1948 Bom 156) already referred to, adopted the same interpretation. We are respectfully in agreement with the above interpretation placed in the above three authorities. In the cases of Mahomad Kasim, AIR 1915 Mad 1159, and Savlaram, 49 Bom LR 798=(AIR 1948 Bom 156) support is derived from the language used in sub-section (1) of section 39 of the Code. In Udho's case, AIR 1943 Sind 107 however, the same result is obtained on a consideration of the language of the expression without reference to the latter section. Spencer, J. in Mahomad Kasim's case, AIR 1915 Mad 1159 has expressed himself as follows at page 1160:

"Section 39, Criminal P. C. throws light on what is meant by specially empowering persons.

It declares that the local Government may empower classes of officials generally by their official titles or persons specially by name or in virtue of their office. When therefore a class of officials is invested with powers to try certain offences, it would appear that they are 'generally' empowered. The word 'generally' is in contrast to the word 'specially' which is used in speaking of individuals."

Seshagiri Aiyar J., who concurred with Spencer J., has given two more reasons for reaching the above conclusion. One reason is that, if the above expression were to be construed in a general way, then, it would be enlarging the definition of the word "Magistrate" as defined in the Opium Act. The second and, in our

judgment, very weighty reason which is given by the same learned Judge, is that, the word "special" excludes the concept of the conferment of power on the successors of the person selected for the entrustment of the power. The same idea is forcefully expressed by Davis C. J. in Udho's case, AIR 1943 Sind 107 as follows:—

"Apart from all other considerations the very wording of the sub-section 'or by an Assistant or Deputy Superintendent especially empowered by Government in this behalf' clearly to our minds implies the exercise by Government of a certain selection or discrimination as regards an individual on whom special power is to be conferred; and to authorise the deputy Superintendent of Police of Bohri, whoever he may be, however numerous the successors to this office may be, would be to go against the principle of selection embodied in this sub-section and to be something in the form or nature of a general and not a special power."

Sub-section (1) of section 39 of the Code reads as follows:

"39. (1) In conferring powers under this Code the State Government may, by order, empower persons specially by name or in virtue of their office, or classes of officials generally by their official titles".

This is an enabling sub-section. It indicates the modes in which the State Government may confer powers under the Code. The modes indicated are two in number. One may be called, the special mode and the second, the general mode, of conferment of power. The special mode is shown as conferment of power on persons "by name or in virtue of their office." The general mode is the conferment of power on classes of officials "by their official titles." Therefore, according to the above sub-section, if power is conferred on a person or persons by name or by virtue of his or their office, then, it is a special conferment of power. If, on the other hand, power is conferred, not on persons or individuals, but, upon classes of officials, then, the power is conferred "by official titles." The first part of the first mode is very simple. Whenever a person is empowered by name, it is a special mode of conferment of power. But whenever power is conferred, not by name, but by virtue of office occupied by a person, then, the conferment would be special or general according as the conferment is on a person by virtue of his office or on a class of officers by official title. It is to be noticed that, in the second part of the first mode, the selection is of a person or individual and the office which he occupies is mentioned but not his name. In the second mode, power is conferred, not on one individual but a class of officials and when power is so conferred, the office which the officials

occupy is not mentioned but the official title. The sub-section contemplates a clear distinction between the office of an official and his title. Broadly speaking, the distinction appears to be that, when a person belonging to a certain class of office occupies a particular office, then, power can be conferred upon him in virtue of the office occupied by him. But, if power is conferred upon the whole class to which the officer belongs, then, it is done by virtue of his official title. Probably, a Sub Divisional Magistrate is an official title. But, if a Sub Divisional Magistrate is posted in a particular Sub Division to discharge the duties of his office, then, though holding the title of a Sub Divisional Magistrate, he would be occupying the office of the Sub Divisional Magistrate at that particular place. Therefore, if power is conferred upon Sub Divisional Magistrates, then, it will be a general power. But, if power is conferred upon a Sub Divisional Magistrate occupying a particular office at any given time and place then, it would be a special conferment of power on him. The distinction between the two modes will still persist. Whether an officer is empowered by name or by virtue of his office, he is all the same a particular officer. If, on the other hand, if an officer alone is not given power but the whole class, of which he is one, then, it will be a general conferment of power. The learned acting Advocate General is right that it is not proper to take the aid of the aforesaid sub-section for the purpose of construing other statutes. It may be that, one may be justified in taking the aid of the aforesaid sub-section when construing statutes in pari materia or statutes dealing with criminal matters. But, at the same time, in our judgment, Courts must remember, whenever they are called upon to interpret an expression of the aforesaid type in a different statute, that, the primary duty is to construe the expression according to the ordinary canons of construction in the context in which the expression is used in that particular statute. But, all the same, in the absence of any indication in the statute to be construed, if the legislative mind is sought to be understood with the aid of the aforesaid sub-section, we do not see any flaw in that approach, although, while taking the aid of the sub-section, one must bear in mind that it cannot be regarded as a definition clause or as conclusive, overriding all other considerations. Approaching sub-section (1) in the above manner, in our judgment, the same result is obtained that we have arrived at originally on a construction of the expression used in section 56 of the Act. In our judgment, the emphasis, in the case of special conferment of power, is on the individual or individuals and, in the case of general conferment, the

emphasis is solely on the class of officers by their official title. Therefore, whenever we get a case where power is conferred on an officer, either by name or ex officio, then, it is a special conferment of power on him, whereas, if power is conferred on a class of officials by official title, then, it is a general conferment of power on the class. In that view of the matter, in our judgment, the conclusion arrived at by the learned Judges of the Madras High Court in Mahomad Kasim's case, AIR 1915 Mad 1159 and the conclusion of the learned Judges of the Sind Court in Udho's case, AIR 1943 Sind 107 except its conclusion about naming the officer, appear to be correct. In Savlaram's case, 49 Bom LR 798=(AIR 1948 Bom 156) the learned Judges of the Bombay High Court appear to have accepted the same view in one part of the judgment which, as two of us have stated in the referring judgment, represents the ratio of the case. The passage which occurs after the quotation of sub-section (1) of S. 39 of the Code which represents the ratio, is as follows, at page 801:

"This throws a flood of light on what is meant by 'specially empowering' persons. It emphasises the distinction between 'specially empowering', and 'generally empowering'. When a class of officials is invested with powers to try certain offences or to do certain functions, it would appear that they are 'generally empowered', but if any persons are so empowered by name or in virtue of their office, they are said to be 'specially empowered'. This distinction was clearly pointed out in AIR 1915 Mad 1159, where S. 3 of the Opium Act, 1878, had to be interpreted."

However, so far as Savlaram's case, 49 Bom LR 798=(AIR 1948 Bom 156) is concerned, although the above passage, in our judgment, clearly represents the law on the subject, the difficulty arises, because the learned Judges did not accept the proposition laid down in Udho's case AIR 1943 Sind 107 wherein the learned Judges emphasise the concept of selection and discrimination in the matter of conferment of power. The second difficulty in Savlaram's case, 49 Bom LR 798=(AIR 1948 Bom 156) arises on account of the actual application of the law on the subject to the notification which their Lordships had to apply on the facts of that case. From the facts narrated in the case it is quite clear that, Mr. Crone who had issued the search warrant in that case, was not the person occupying the position of an Assistant Superintendent at Poona when the notification was issued. The notification was issued as far back as 1928 and the special search warrant was issued in 1944. In spite of this, their Lordships held that, Mr. Crone was specially empowered, and the reason which Lokur J., speaking for the Court,

gives is to be found in the following passage at page 801:

"I respectfully think that when a particular place was selected by Governor, it is conceivable that Government intended to post there only such assistant or Deputy Superintendent as was competent to exercise the power under Sec. 6 of the Act. This would be covered by the words 'in virtue of their office' used in S. 39 of the Criminal Procedure Code."

In support of this conclusion, Lokur J. has relied upon the Madras case of Alaga Pillai v. Emperor, AIR 1924 Mad 256. As we shall presently point out, it is by no means clear that the facts in Alaga Pillai's case, AIR 1924 Mad 256 were on all fours with the facts in Savlaram's case, 49 Bom LR 798=(AIR 1948 Bom 156) but, apart from this, in our judgment, the above reasoning which has been adopted by their Lordships of the Bombay High Court in Savlaram's case, 49 Bom LR 798=(AIR 1948 Bom 156) does not represent correct test. It jettisons the rule which is to be obtained on a proper construction of sub-section (1) of Sec. 39 of the Code. In our judgment, if a notification empowers, not a person holding a particular office at a particular point of time, but, empowers all his successors in office, then, the Government does not select any particular person, an individual or an officer, for the conferment of power, but it selects a place and confers power upon all officers who may happen to be transferred at that place, including an officer who may not have been in service at the time when the notification was issued and about whose capacity or experience the Government may not have the slightest idea at the time when the notification is issued. In our judgment, it is wrong to regard such a notification as a special conferment of power and not general. Therefore, though we accept the ratio as embodied in Savlaram's case, 49 Bom LR 798=(AIR 1948 Bom 156) as having been correctly laid down, we cannot hold that the application of that ratio to the facts of the case which the learned Judges had to deal with is correct. Several of the Judges who have differed from Mohamed Kasim's case, have had occasion to refer to Alaga Pillai's case. Some of the learned Judges have construed the latter case as being inconsistent with the former case and some others have explained the latter case on the basis that the Second Class Magistrates were mentioned in the notification relevant in that case by names. The notification relevant in that case is not to be found in the judgment. Therefore, it is difficult to explain the latter case on one or the other ground. All that one can say is that, their Lordships did not differ from the ratio laid down in Mohamed Kasim's case, but,

on the notification before them, they held that the ratio in that case was satisfied. In our judgment, it will not be proper to hold that the Division Bench in Alaga Pillai's case intended to by-pass Mohamed Kasim's case in reality, though conceding lip sympathy towards it. We are not prepared to hold that Alaga Pillai's case is inconsistent with Mohamed Kasim's case. In our judgment, the Madras view, in view of the special reasoning given in Mohamed Kasim's case, must be taken to be one which we have extracted from the judgment of Spencer, J. and which we have reproduced from the judgment of Seshagiri Aiyar, J.

9. Therefore, on the whole, we have come to the conclusion that, the correct interpretation of the expression which we have to construe is that, in order that there may be a special conferment of power under section 56 aforesaid in regard to a Sub Divisional Magistrate, power must be conferred upon that officer either by his name or by virtue of his office. In either case, Government must have definitely before its mind's eye the particular individual or person who is being selected for the conferment of power. If that is not so, then, the officer is not specially empowered. On the other hand, in our judgment, if power is conferred upon the classes of Sub Divisional Magistrates, which will be the case if more than one particular individual is intended by the Government — and specially so if the Government intends to empower the successors in office of the Sub Divisional Magistrates concerned — then, it is a general conferment of power.

10. Before we part with the above topic, it is necessary to mention one more judgment, in which the same view has been taken, which case was fairly pointed out to us by the learned acting Advocate General, and some other cases in which according to the learned acting Advocate General, a different view has been taken. The same view has been taken by the Saurashtra High Court in Polubha Vajubha v. Tapu Ruda, AIR 1956 Sau 73. The cases which, according to the learned acting Advocate General, take a different view, are the State v. Judhabir Chetri, AIR 1953 Assam 35 (FB), K. N. Vijayan v. The State, AIR 1953 Trav. Co. 402; Public Prosecutor (Andhra Pradesh) v. N. Shriramabhadrayya, AIR 1960 Andh Pra 282, Ashiq Hasan Khan v. Sub Divisional Officer, Sadar Monghyr, AIR 1965 Pat 446; and State of Mysore v. Kashambi, (1963) 2 Cr. LJ 226 (Mys). In view of the strong reliance placed by the learned Acting Advocate General on those cases, it is necessary to consider them now. In all these cases, except (1963) 2 Cr LJ 226 (Mys) the challenge to the notifications was grounded on the fact that the conferment

of power on the officer concerned should have been by name and not by official designation. The challenge so made was negatived. With respect, we agree with this particular view of the interpretation of the expression "specially empowered". But, in negating the above contention, the view taken in Mahomed Kasim's case has been dissented from in the above cases. In so far as the Madras case takes the view that when power is to be conferred by official designation, the power must be conferred on an individual or person and not on a class of officials, Thadani C. J. has differed from it in the State v. Judhabir Chetri. The main reason which the learned Chief Justice has given in support of his conclusion is grounded on a distinction between an officer and an official. According to the learned Chief Justice, a first class Magistrate is not an official, but, an office being synonymous with the Court of the First Class Magistrate. In that case, the learned Chief Justice was concerned with a notification issued under Section 16 of the Assam Opium Prohibition Act, which required special conferment of power under that section. The officer on whom the power was conferred was a First Class Magistrate. The learned Chief Justice did not disagree with the view that, if a class of officials is invested with powers to try offences by their official title, the empowerment is a general empowerment. But, according to the learned Chief Justice, the expression "class of officials" must not be confused with First Class Magistrates who, according to him, are Courts or offices, in the same way as Judges are but are not a class of officials. Now, this distinction has been doubted in State of Mysore v. Koshambi. Hegde J., after referring to the above distinction, has pointed out that he was unable to subscribe to the view expressed by Thadani, C. J. that Magistrates are not a class of officials within the meaning of that expression as used in section 39 of the Criminal Procedure Code. This view has also not been accepted by the Saurashtra High Court in AIR 1956 Sau 73. Shah C. J., after referring to the reasons given by Thadani C. J. for his above view, makes the following observations at page 74 :

"With all respect, we are unable to agree with this view of the Assam High Court. It is true that the heading of Chapter II of the Criminal P. C. is 'The constitution of powers of Criminal Courts and officers' and the word 'office' in the heading means the office of a Judge or a Magistrate. Even so, it does not necessarily exclude the concept of a Judge or a Magistrate being an official; and this view is fortified by the heading of Chapter III of the Code, which is 'Power of Courts'.

Part A of the Chapter speaks of description of offences cognizable by each Court; Part B deals with sentences which may be passed by Courts of various Classes; Part C speaks of Ordinary and Additional Powers; and Part D speaks of conferment, continuance and cancellation of powers. Now these powers are all powers of the Courts and in fact Chapter III deals with that subject itself.

In spite of it, we find in S. 39 of the Code the words 'classes of officials generally by their official titles.' 'Officials' in the sense in which that expression is interpreted by Thadani C. J. in AIR 1953 Assam 35 have really no place in the scheme of Chapter III of the Code, and with all respect to the learned Chief Justice we are unable to agree with that interpretation, which refers to Secretaries, Under Secretaries and Deputy Secretaries to Government or to other Heads of Government Departments.

Chapter III of the Code does not envisage empowering such officials with powers under the Code. Considering that this Chapter is concerned with powers of Courts and that the powers conferred thereby are on the Courts, we think the proper construction of the expression 'officials' in S. 39 would be to equate it with Courts and not to interpret it as meaning officials of Government. 'Officials' should rather be given its normal meaning viz., persons holding an office; and that office here is the office of a Judge or a Magistrate.

The contrast in S. 39 is really between empowering persons on the one hand and empowering classes (of officials) on the other hand, the underlying idea being that it is Courts which are to be empowered. What the section provides is that where persons (that is to say Magistrates or Judges) are to be empowered the empowering shall be by name or in virtue of their office and this empowering will be special, empowering as against general empowering which empowering is to be of the whole class of officials (who would also be Magistrates or Judges) by their official titles."

With great respect, we agree with the above views of Shah C. J. in regard to the observations made by Thadani C. J. in AIR 1953 Assam 35. One of the reasons given by Thadani C. J. for not relying upon Mohamad Kasim's case (AIR 1915 Mad 1159) is the case of Alaga Pillai, AIR 1924 Mad 256, which according to the learned Chief Justice, "sought to reconcile the previous decision of the same court to which I have referred (Mohammad Kasim's case, AIR 1915 Mad 1159), the reconciliation is I think only apparent and not real. In my view it makes no difference that in the notification involved in the later decision of the Madras High Court the names of the

Magistrates were also mentioned". We have already mentioned in this judgment that, the above explanation of Alaga Pillai's case, AIR 1924 Mad 256 is not correct. Moreover, there is no warrant for the observation made by the learned Chief Justice that, in Alaga Pillai's case, AIR 1924 Mad 256 the names of the Magistrates were also mentioned. AIR 1953 Trav. Co. 402 merely follows, AIR 1953 Assam 35 and does not contain any independent reasons in support of its conclusion. Both the Assam High Court and the Travancore Cochin High Court also rely upon the case of Sunderlal v. Emperor, AIR 1933 All 676 in support of their view. That case, however, also does not contain any independent reasoning, but merely follows a previous Allahabad decision which, unfortunately, not being quoted in the judgment, is not available to us. In AIR 1960 Andh Pra 282, the question for consideration was whether Sanitary Inspectors can be appointed by virtue of their office under section 9 of the Prevention of Food Adulteration Act, as Food Inspectors. The question for decision is formulated in paragraph 10 at page 284 of the report as follows:

"The whole contention involves the ascertainment of the power vested by Sec. 20 of the Act. When the legislature authorised a person appointed in that behalf by State Government or Local authority to lodge complaints in respect of prosecution for an offence under the Act, should that person be signified by name or can he be appointed by virtue of his office? It is contended by the learned Advocate for the accused that the appointment does not conform to the rules made under the Act, and that in any case, Sanitary Inspectors as a class were not under the contemplation of the powers vested in Sec. 20 of the Act."

It does not appear from the report that the relevant rule required any special appointment of such Sanitary Inspectors in contradistinction to general appointment. In AIR 1965 Pat 446, Misra J. has construed section 39 of the Code as follows at page 448:

"In my opinion, the Legislature in that section has not used the word 'specially' by itself but in conjunction with the two words, 'by name' so that the legislature contemplated conferment of power upon the official by name or by virtue of the office or classes to which he belonged in general terms. There is no dichotomy between special power and general power, but special power by name and general power by official title. That section cannot be construed to mean that whenever the legislature or, for the matter of that, any rule-making authority has used the expression that certain classes of officials may be empowered that would necessarily cannot be authorisation by name."

Whilst we agree with the conclusion that, when empowerment is by name, it is special empowerment, we cannot agree with Misra J., for the reasons already given, that the word "specially" goes with the words "by name", only and that it does not refer to "in virtue of their office." In (1963) 2 Cri LJ 226 (Mys) Hegde J., (as he then was) who was concerned with a notification issued under the Suppression of Immoral Traffic in Women and Girls Act, 1956, has dealt with the question about the correct interpretation of the expression "specially empowered" more in detail. The learned Judge has agreed with the interpretation of section 39 of the Criminal Procedure Code, as given by Shah C. J. in Polubha Vajubha's case, AIR 1956 Sau 73 upto a certain extent, but, has disagreed with the observations made by Shah C. J. in the following passage at page 228:

"Agreeing with Mahomad Kasim's case, AIR 1915 Mad 1159, therefore, we hold that the powers conferred by the notification in the present case on all Taluka Magistrates does not amount to specially empowering them within the meaning of sec. 39 Cr. P. C. and therefore the Taluka Magistrate of Talaja was not empowered to hold proceedings under section 245 Cr. P. C. and that the order made by him was without jurisdiction."

With respect, the above passage does not constitute the main reason for the conclusion arrived at by Shah C. J. The main reason is to be found in the passage with which Hegde J. has agreed. Another reason which Hegde J. has given is that, in the expression "Magistrates of first Class specially empowered" used in section 2(c) of the Suppression of Immoral Traffic in Women and Girls Act, the word "specially" is an adjective to the word "empowered" and not to the noun "Magistrates." With due respect, the learned Judge is grammatically wrong. As we have pointed out, the word "specially" is an adverb to the verb "empowered" and the whole clause is an adjectival clause qualifying the expression "Magistrates of First Class." For all these reasons, we are unable to see any good reason in any of the decisions on which the learned acting Advocate General relies for taking a different view which, for the reasons already recorded, has appealed to us as the correct view.

11. For the above reasons, we answer the first question formulated by the Division Bench by holding that, the correct interpretation of the expression is that, in order that there may be a special conferment of power under section 56 aforesaid in regard to a Sub Divisional Magistrate, the power must be conferred upon that officer, either by his name or by virtue of his office. In either case, Government must have definitely before its

mind's eye the particular individual or person who is being selected for the conferment of power.

12. That takes us to the second question formulated by the Division Bench. We have already indicated in a previous part of this judgment the interpretation which the learned acting Advocate General places upon the notification in question. In our judgment, that interpretation is the correct interpretation having regard to the provisions contained in sections 15, 16 and 18 of the Clauses Act. In so far as this notification confers power on the officer who actually occupied at the date of its publication the post of a Sub Divisional Magistrate, the notification may be valid. But, in so far as that notification purports to confer powers on the successors of the Sub Divisional Magistrate who may happen to be appointed at some future date, the entrustment of power being general, is invalid. The learned acting Advocate General contends that, such interpretation of the notification is inconsistent with the findings which were given by a Division Bench of this High Court in Special Civil Appln. No. 1475 of 1965 (Guj) and the group of other special civil applications, of which I was one of the Members and in which the question for consideration was whether one Master, a Special Land Acquisition Officer, was specially appointed to perform the functions of a Collector within the meaning of section 3, clause (c) of the Land Acquisition Act. The judgment in those applications was delivered on 15th October 1966. We cannot agree with the submission of the learned acting Advocate General. In that case, the Court had to deal with not one single notification but the combined effect of two notifications. In the first notification, Master was appointed as a Special Land Acquisition Officer by name and in the second notification, all Special Land Acquisition Officers were empowered with the powers of a Collector within the meaning of Section 3, Clause (c) of the Land Acquisition Act. The Division Bench considered the combined effect of the aforesaid two notifications, and came to the conclusion that, the proper interpretation of the two notifications was that Master was specially appointed a Collector within the meaning of Sec. 3, clause (c) of the Land Acquisition Act. We fail to see how that interpretation can help the prosecution in the present case. In the present case, there is one single notification and the Sub Divisional Magistrates who have acted under the notification are not mentioned therein either by name or by virtue of their office in the sense that we have interpreted the clause "specially empowered" in this judgment. In the judgment delivered on 15th October 1966, we do not find anything which militates

against the view which we have taken as to the correct interpretation of the expression "specially empowered."

13. The next argument of the learned acting Advocate General is that, though the impugned notification takes within its purview not only officers who were Sub Divisional Magistrates at the time when the notification was published but all Sub Divisional Magistrates who happen to be appointed in the sub-divisions mentioned in future, the general effect of the above notification is that, at any given time, there would be only one single Sub Divisional Magistrate who will be exercising the power under section 56 and that this would, in law, amount to special empowerment and not general. We cannot agree with this submission. In our judgment, for the purpose of considering the validity of a notification, the test is not whether it confers, at one given time, power on one particular officer, but, the test is as to whether, under that notification, power is conferred on one individual or a class of officials. In the present case, in our judgment, having regard to the submissions made by the learned acting Advocate General based upon sections 15, 16 and 18 of the Clauses Act, the correct interpretation is that, not only the Sub Divisional Magistrate who was working in the respective sub-division at the time when the notification was issued, but, all his successors are also intended to be included. Not only the successors who were holding the offices of Sub Divisional Magistrates in their sub-divisions then, but, also the persons who were not borne in the cadre on the date on which the notification was published. Under the circumstances, in our judgment the proper interpretation of the above notification is that, it confers a general power on the Sub Divisional Magistrates concerned and, as such, does not satisfy the requirement of section 56 of the Act.

14. Therefore, the finding on the second query of the Division Bench will be that, respondent No. 1 is not specially appointed under the impugned notification within the meaning of the expression "specially empowered" used in section 56 of the Act.

15. The case will go back with the aforesaid two findings to the Division Bench concerned for disposal according to law.

... ..

16. The case referred to this Full Bench has been set down today for delivery of judgment. The learned Acting Advocate General today draws our attention to the judgment of their Lordships of the Supreme Court in *Sindhi Lohana Choithram v. State of Gujarat*, Criminal Appeal No. 13 of 1964 = (AIR 1967 Guj

1532), in which, according to the submission of the learned acting Advocate General, the same point which was referred to this Full Bench has been decided. Mr. Thakore, on the other hand, contends that, though the Supreme Court resolves the conflict between the Sind case of Udho, AIR 1943 Sind 107 and the Bombay case of Savlaram, 49 Bom LR 798=(AIR 1948 Bom 156) it does not touch the point which he has raised for the decision of the Full Bench. Now, the question which directly arose for decision before their Lordships of the Supreme Court in the above case was whether, in order that a person may be specially empowered within the meaning of S. 6(1)(i) of the Bombay Prevention of Gambling Act, it is necessary that he should be designated by name only and that a designation by his official title is not sufficient. Now, on that point, their Lordships have definitely held that a person, though he may be appointed by virtue of his office, still, he would be specially empowered within meaning of the aforesaid section 6(1)(i) of the Bombay Prevention of Gambling Act. After referring to the two cases of Udho, AIR 1943 Sind 107 and Savlaram, 49 Bom LR 798=(AIR 1948 Bom 156) their Lordships have expressed their conclusion in the following words:

"We think that where power is conferred on a person by name or by virtue of his office, the individual designated by name or as the holder of the office for the time being is empowered specially. Judged by this test, the notification dated January 22, 1955, specially empowered Shri Pandya as the holder of the office of the Deputy Superintendent of Police, Porbandar, to issue the search warrant under S. 6."

On the one hand, Mr. Thakore emphasises this aspect of the case, namely, that, it is the individual who becomes designated by name or by holding the office, on the other hand, the learned acting Advocate General contends that the above passage does not emphasise the individual to be empowered, but, emphasises that, a holder of an office can be specially empowered without naming him. In support of his submission, the learned acting Advocate General relies specially upon a later passage in the judgment which is as follows:

"For the purpose of this case, it is sufficient to hold that a notification conferring power on the Deputy Superintendent of Police of Porbandar to issue a search warrant specially empowers the holder of that office by virtue of his office to issue the warrant."

Now, so far as their Lordships have laid down that a person can be specially empowered even though he may be

named by his official title, we have not taken a different view. We have agreed with the ratio in Savlaram's case, 49 Bom LR 798=(AIR 1948 Bom 156) and definitely disagreed with the ratio in Udho's case, AIR 1943 Sind 107 on that particular subject. But, in our judgment, the further question as to whether the successor in office of a person designated by his official title, when intended to be included, is specially or generally empowered, their Lordships have not expressed any view in the above case. That question did not directly arise for decision of their Lordships. It was not raised before them, nor do we find anything in the above observations, on which reliance is being placed by the learned acting Advocate General, to justify the submission that the successor in office of an office-holder is also specially empowered when he is intended to be included. In this respect, it is important to notice that the two allied questions which usually arise in connection with a question of this type have been definitely and expressly kept open by their Lordships of the Supreme Court. Their Lordships have definitely stated that they were not called upon to resolve the controversy which has arisen between different High Courts as to whether, when all Magistrates of a certain class are empowered to try certain cases, they can be said to be specially empowered or generally empowered. They have also not expressed any opinion on the question as to whether the office which a Magistrate holds is an office and whether a Magistrate is an official or not. Whereas, these two questions, in our judgment, have no bearing on the above question when the controversy is only as to whether the person should be designated by name or by official title, they have some bearing on the question as to whether a person can be said to be specially empowered when he is not the person on whom power is conferred either by name or by official title but happens to be the successor-in-office of the person on whom the power is so conferred. In our opinion, the judgment, which we are delivering today and which was prepared before Sindhi Lohana Choithram's case, Cri Appeal No. 13 of 1964=(AIR 1967 SC 1532) was decided, is not affected by the latter judgment. It is noteworthy that, the view which we have expressed in this judgment that, a Sub Divisional Magistrate is specially empowered even though the power may have been so conferred on him by virtue of his office, stands confirmed by the decision in Sindhi Lohana Choithram's case, Cri Appeal No. 13 of 1964=(AIR 1967 SC 1532). The learned acting Advocate General states that, as their Lordships of the Supreme Court have, in terms, approved of Savlaram's case, 49 Bom LR 798=(AIR 1948 Bom

156), they must be taken to have also approved of the test of the place which was laid down therein. We cannot agree. In our judgment, the further question about the successor in office of the person being said to be specially empowered was not before their Lordships, nor is there anything in the judgment to show that their Lordships were called upon to decide the correctness of the test of place. In our judgment, the question whether, in order that a person designated by virtue of his office may be said to be specially empowered, the empowering authority must have definitely before its mind's eye the particular individual or person who is being selected for the conferment of power, was not before their Lordships of the Supreme Court and the question is still *res integra* and, therefore, our judgment on the latter question does not militate against the decision in *Sindhi Lohana Choithram's case*, Cri. App. No. 13 of 1964 = (AIR 1967 SC 1532).

17. For the above reasons, we direct that the two points referred to this Full Bench by the Division Bench should be answered as already indicated. The case will go back to the Division Bench for disposal according to law and in the light of this judgment.

SSG/D.V.C.

Answered accordingly.

AIR 1969 GUJARAT 14 (V 56 C 2)

N. G. SHELAT, J.

Sevantilal S. Shah, Petitioner v. State of Gujarat, Opponent.

Criminal Revn. Appln. No. 403 of 1965, D/- 12/16-1-1967, against order of Chief City Magistrate, Ahmedabad, in Cri. Case No. 649 of 1965.

(A) Criminal P. C. (1898), Ss. 20 and 202 — A City Magistrate can exercise jurisdiction in a case within the city — Allotment of areas in the city to different City Magistrates is merely for sake of administrative convenience — This does not bar making or having an inquiry or investigation made by a Police Officer under S. 202 of the Code. (Para 4)

(B) Criminal P. C. (1898), Ss. 4(1)(h), 155(2), 200, 202, 203, 204, 4(1)(e) — Complaint about a non-cognizable offence against persons the complainant cannot trace — Magistrate is bound to cause an enquiry to be made by the Police before he can dismiss the complaint under S. 203 — Otherwise the complainant will be rendered helpless since in such cases the police cannot act without being authorised by a Magistrate. (Trade & Merchandise Marks Act (1958), Ss. 78 & 79).

A fountain pen manufacturer filed a complaint before a City Magistrate that

some persons who could not be traced, were manufacturing fountain pens and passing them off under the registered trade name of the complainant company. The Magistrate dismissed the complaint refusing to order an inquiry into the offences alleged in the complaint on the ground that the culprits not having been named, no purpose would be served by investigating. On revision, it was held that the Magistrate ought to have enquired into or caused an inquiry or investigation made by the Police under S. 202 before he dismissed the complaint under S. 203. (Paras 8 & 10)

Under S. 4(1)(h) of Criminal P. C., which defines 'complaint', a complaint could well be against persons unknown. (Para 8)

The offences under Ss. 78 and 79 of the Trade and Merchandise Marks Act being non-cognizable ones, the Police could not investigate into them without being authorised by a Magistrate. Hence, the Magistrate's action in dismissing the complaint without ordering an investigation by the Police rendered the complainant helpless. Investigations into offences such as the above could not be effectively carried out without the assistance of the Police force. (Paras 5 & 9)

The words "for the purpose of ascertaining the truth or falsehood of the complaint" have a very wide meaning covering all aspects of the complaint and not merely the truthfulness or otherwise of the allegations in relation to an offence only. That purpose includes the ascertainment of a person committing the offences and the manner in which he is committing them. If it is not so construed, a citizen aggrieved under such circumstances would be rendered helpless and that cannot be the intention of the Legislature. Further, the Magistrate is not only empowered to cause an inquiry to be made but he can also order a thorough investigation to enable himself to act either under S. 203 or S. 204 of the Code. (Para 8)

Though, under S. 202 the Magistrate has the discretion either to order an enquiry or not and it is also true that a complainant has no right to insist on an enquiry being made in a non-cognizable case, the Magistrate has, however, got to take into account the nature and character of the offences alleged to have been committed and to see as to whether without police assistance he can inquire into such offences and enable the complainant to bring the offenders to book. AIR 1935 Bom 76, Ref. (Para 9)

Cases Referred: Chronological Paras
(1935) AIR 1935 Bom 76 (V 22) = ILR
59 Bom 171 = 36 Cri LJ 483, Morarji Jivraj v. Bai Panchibai Narsi Sawal

S. M. Shah and J. C. Brahmabhatt, for Petitioner; G. T. Nanavaty, Asst. Govt. Pleader, for Opponent.

ORDER :— This application in revision arises out of an order passed on August 3, 1965 by Mr. D. C. Mehta, Chief City Magistrate, Ahmedabad, in Criminal Case No. 649 of 1965, whereby the complaint came to be dismissed under section 203 of the Criminal Procedure Code.

2. The Gujarat Industries Private Ltd. Bombay having its registered office at Bombay-4, of which the complainant Mr. Sevantilal Shah happens to be the Secretary, has been manufacturing fountain pens and its components of different varieties such as 'Ashok', 'Service', 'Champion' etc. and of those, the most popular fountain pens in demand, are 'Champion' and 'Ashok'. The annual sale of the fountain pens extends over rupees thirty lakhs and out of the same, the sale of 'Champion-555' fountain pens covers a sum of rupees six lakhs or so. The prices of 'Champion' and 'Ashok' fountain pens are about Rs. 18/- and Rs. 7-50 to Rs. 9/- per dozen respectively. The complainant has then alleged that the trade mark on the fountain-pens manufactured by his company are 'Champion' and 'Ashok' and the same are registered in the office of the Trade and Merchandise Mark Registry at Bombay under Trade Mark Nos. 157902 and 157905 respectively. His company has, thus, acquired an exclusive right to use the said Trade Marks in the realm of fountain pen industry and the same has become well known to the trade and the public on account of its extensive use. He has then referred to special marks indicated on those fountain pens manufactured by his Company.

2A. The case of the complainant then is that he has learnt from his agents that some traders whose names and addresses he is not able to know, have been counterfeiting, using and selling such and similar fountain pens and their components bearing the same Trade Marks 'Champion' and 'Ashok' in the City of Ahmedabad within the jurisdiction of the Court. Such fountain pens are being sold at extremely low price in the markets at Ahmedabad and elsewhere. He has also produced along with the complaint the fountain pens manufactured by them as also the fountain pens marked with counterfeit Trade Marks similar to those of his Company for the purpose of comparison etc. Thus, according to the complainant those persons have committed and continued to commit offences punishable under sections 78(b) and 79 of the Trade & Merchandise Marks Act, 1958, hereafter to be referred to as 'the Act'. Towards the end of the complaint, he has requested the learned Magistrate to direct

the Inspector of Police, Crime Branch, Ahmedabad, to make inquiries and find out the persons dealing and manufacturing such counterfeit goods so as to be dealt with in accordance with law.

3. Since the learned Magistrate thought that the complaint was vague, he required the complainant to give the particulars of the place within the jurisdiction of his Court where the offences are being committed. The complainant thereupon gave a statement on July 1, 1965 to the effect that the counterfeit goods in question are being sold on the Gandhi Road, Relief Road etc. in the City of Ahmedabad. After hearing the learned Advocate for the applicant, the learned Magistrate found that since the complainant does not know the particulars about the accused persons as also the particulars about the date or dates or about the place or places of the commission of offences, no useful purpose would be served by making any inquiry in respect of the complaint and since in his view there were no sufficient reasons for proceeding in the matter, he dismissed the complaint under section 203 of the Criminal Procedure Code. Feeling dissatisfied with that order, the complainant has come in revision before this Court.

4. Whenever any complaint is before the Court, what is necessary to know is as to whether the facts averred constitute an offence and see as to whether any such offence is committed within his jurisdiction. It would be further seen whether any action is required to be taken and if so against whom, if the persons are named therein. Now while it is true that the complaint does not disclose the name or names of persons who are said to have committed any of the offences under section 78 and/or section 79 of the Act, the averments made in the complaint along with enclosures filed therewith do prima facie show that the offences in respect of such fountain pens bearing the Trade Mark as referred to hereabove of the complainant-Company are being committed by some persons and again at different places in the City of Ahmedabad. As to the vagueness with regard to the place the offences are said to have taken place in the City of Ahmedabad, the complainant has in his additional statement referred to certain places such as Gandhi Road, Relief Road etc., where such fountain pens are being sold. But having regard to section 20 of the Criminal Procedure Code, every City Magistrate can exercise jurisdiction in all cases within the City of Ahmedabad for which he is appointed and the mere fact that for the sake of administrative convenience, different areas in the city of Ahmedabad have been allotted to different City Magistrates, would not come in the way of making or having an inquiry or investi-

gation made by any police officer under section 202 of the Criminal Procedure Code. So far even the learned Magistrate does not appear to feel any difficulty, and the learned Assistant Government Pleader has gone further in saying and very rightly so, that not only the offences are committed or being committed in Ahmedabad, but that these are such offences which cannot be detected by ordinary laymen except with the assistance of the police investigation — which the learned Magistrate alone can get it done, the offences being not cognizable in character.

5. Thus the short point, that requires to be considered is as to whether a non-cognizable case of the kind referred to above, which does not disclose the name or names of the persons sought to be prosecuted is or is not required to be inquired or investigated into by the Court having regard to the provisions contained in section 202 of the Criminal Procedure Code. Now, the learned Magistrate has taken cognizance of a complaint in respect of offences under sections 78 and 79 of the Trade & Merchandise Marks Act since they are undisputedly non-cognizable offences under section 200 of the Criminal Procedure Code. The "offence" as defined in Section 4(1)(o) means any act or omission made punishable by any law for the time being in force. It can be either a cognizable offence or a non-cognizable one. "Non-cognizable offence means a case in which a police officer, within or without a presidency-town, may not arrest without warrant". Now section 155(2) forbids any police officer from investigating a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial or of a Presidency Magistrate. Then sub-section (3) says that any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case. Thus, it is under the orders of a Magistrate that an investigation in respect of a non-cognizable case can be done by a police officer in the same manner as he would be entitled to do under Chapter XIV of the Criminal Procedure Code in relation to any cognizable case except no doubt that he would not have the power to arrest him without the warrant being issued by a Magistrate. In other words, once the order is made by the Magistrate, the investigation can be done by a police officer in the same manner as he would do in respect of any cognizable case under the provisions of the Code.

6. Section 200 of the Code entitles a Magistrate to take cognizance of an offence on complaint and it further provi-

des for a procedure for him to follow in Chapter XVI of the Code. As required under section 201, the complaint must be to a competent Magistrate to take cognizance of the case and in case it has been made to a Magistrate who is not competent to take cognizance of the case, he shall return the same for presentation to the proper Court with an endorsement to that effect. Then comes section 202 which provides as under :—

"202. (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance, or which has been transferred to him under section 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint:

* * * * *

Then section 203 of the Code entitles any such Magistrate to dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the witnesses and the result of the investigation or inquiry (if any) under section 202, there is in his judgment no sufficient ground for proceeding. In such cases he shall briefly record his reasons for so doing. If, on the other hand, in his opinion, there is sufficient ground for proceeding, he would issue process as contemplated under Section 204 of the Criminal Procedure Code. Thus, the cumulative effect of sections 200 to 203 of the Criminal Procedure Code would be that the City Magistrate, as in the present case, was authorised to take cognizance of a complaint filed by the complainant in respect of the non-cognizable offences punishable under sections 78 and 79 of the Act and before issuing process he would be justified if he thought proper to direct any police officer for making an inquiry or investigation and that would be for the purpose of ascertaining the truth or falsehood of the complaint.

7. What the learned Magistrate, however, felt was that no names of the persons who were sought to be proceeded against are disclosed in the complaint and therefore no useful purpose would be served by having any such inquiry made.

8. In that respect one has to turn to the definition of the term "complaint" as given in section 4(1)(h) of the Code meaning the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has

1969

committed an offence, but it does not include the report of a police officer. The learned Magistrate seems to have lost sight of the definition of the term "complaint". The allegations made in the complaint do disclose about some person or persons having committed offences punishable under Sections 78 and 79 of the Act and they are made in the complaint before the Magistrate with a view to take action against those persons. Now those persons can be both known or unknown. They need not be named, if not known. The complainant has made it clear that it has not been possible for him to trace those people and since the offences were of a non-cognizable character, the police would not take cognizance thereof even if a complaint were lodged before the police. He has been that way to a considerable disadvantage in securing the assistance of the police for investigation of such crimes committed in the City of Ahmedabad. The alternative to the complainant was therefore to go to the Magistrate within whose jurisdiction such offences are said to have taken place and naturally since he was not able to get information about the persons committing the said offences, he has requested the Court to direct the police officer to make an inquiry or investigation in respect of these offences and have those culprits so named and found out so as to enable the Magistrate to proceed against them. The Magistrate is entitled to direct any inquiry or investigation to be made and that again by a police officer for the purpose of ascertaining the truth or falsehood of the complaint. Those words "for the purpose of ascertaining the truth or falsehood of the complaint" have to be given a very wide meaning covering all aspects of the complaint and not merely the truthfulness or otherwise of the allegations in relation to an offence only. That purpose would include the ascertainment of a person committing the offence and that again the manner in which such a person or persons have been committing the offences, and after collecting such evidence as is permissible under the circumstances of the case by making a thorough investigation, he has to submit a report with regard to the truth or falsehood of the complaint so as to enable the Magistrate to consider as to whether he should pass orders under section 203 of the Criminal Procedure Code and that way dismiss the same finding no sufficient ground for proceeding, or under section 204 for proceeding against any such person found out during the course of the investigation made by a police officer or any other person entrusted with an inquiry or investigation as contemplated under section 202 of the Criminal Procedure Code. If that were not the meaning to be given to those words occurring in

Section 202(1), it would be difficult or rather even impossible for the Magistrate to ascertain the truth or falsehood about the commission of offence which may be of a very vital character for the simple reason that they happened to be non-cognizable offences. A citizen aggrieved by any such offences committed by some person or persons cannot be rendered helpless and it can never be the intention of the Legislature to render him so helpless and it is that way that the powers that the Magistrate possesses under section 202 of the Criminal Procedure Code have to be exercised. The term "investigation" has also been defined in Section 4(1)(e) of the Criminal Procedure Code as including all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. Under section 202, the powers of a Magistrate have been to direct not only an inquiry to be made but also an investigation to be made by a police officer and it is that way only that the Magistrate would be able to gather the material after the case is investigated by the police in pursuance of the orders passed by him so as to enable him to consider the effect thereof and pass suitable orders either under section 203 or under section 204 of the Criminal Procedure Code.

9. It was, however, pointed out by Mr. Nanavaty, the learned Assistant Government Pleader, that while it is true that such non-cognizable cases can well be properly investigated by the police, and that the Court can send the case for inquiry or investigation to the police officer under section 202 of the Criminal Procedure Code, but if he does not think it fit to do so, this Court should be reluctant to interfere with the order passed by the learned Magistrate. In support thereof, he referred to a decision in the case of *Morarji Jivraj v. Bai Panchibai Narsi Sawal*, ILR 59 Bom 171 = (AIR 1935 Bom 76). Apart from authority, as I said above, section 202 makes it clear that the words "may, if he thinks fit, for reasons to be recorded in writing," do indicate that it would be within the discretion of the learned Magistrate as to whether he should proceed and send the case for an inquiry or investigation to a police officer or the like. The case relied upon by Mr. Nanavaty also says the same thing viz., that under section 202 it is for the Magistrate himself in his discretion to determine whether to send it for investigation or not. It is equally true, as observed in that very case, that the complainant cannot claim as of right an investigation by the police in respect of any non-cognizable case. But while exercising that discretion, the learned Magistrate has to take into account the nature and charac-

ter of the offences alleged to have been committed and referred to in the complaint and at the same time see as to whether without the assistance of police by suitable investigation such offences can at all become possible to be inquired into by the Magistrate himself and enable the complainant to bring the offenders to book. One of the offences alleged to have been committed is about some person or persons having been applying false trade description to goods and thereby passing off those goods as of the marks of the complainant-Company in the market. Such a manufacture of goods and applying of false trade marks or trade descriptions obviously would be taking place in secret for, if that were being done in a manner which could be easily traced, the complainant would not have found any difficulty in tracing those persons manufacturing such fountain-pens or goods in respect of which the complaint is lodged. These are again the offences in the nature of continuing offences and the collection of evidence in relation thereto can well be had only if suitable investigation by police is made. In my view, therefore, these are such offences which obviously require to be referred to the police agency for making an inquiry or investigation, and not to exercise proper discretion in respect of such offences would be tantamount to negation of justice in finding the crimes and the persons committing the same. The learned Magistrate has, therefore, failed to exercise jurisdiction in not directing a police officer to investigate into the said offences as also the persons who have committed or been committing the same in the City of Ahmedabad. If after a suitable investigation made by the police officer, no such person who could be proceeded against, can be found, it would be perfectly open to the learned Magistrate to dismiss the complaint, but to do so without having any such report from the police officer would be far too premature and would amount to denying the assistance to the complainant through Court in having any such investigation made in respect of the offences alleged in the complaint.

10. I, therefore, set aside the order of the learned Magistrate dismissing the complaint under Sec. 203 of the Criminal Procedure Code and direct the case to go back to the learned Magistrate who shall direct the police officer in the City of Ahmedabad to inquire and investigate into the offences alleged to have been committed under sections 78 and 79 of the Trade & Merchandise Marks Act in the City of Ahmedabad and after obtaining the report, proceed to dispose of the case in accordance with law.

TVN/D. V. C.

Petition allowed.

AIR 1969 GUJARAT 18 (V 56 C 3)

P. N. BHAGWATI, C. J., AND
A. R. BAKSHI, J.

United Industries, a firm and others,
Applicants v. M/s. Dalwadi and Co. a firm
and another, Opponents.

Civil Revn. Appln. No. 256 of 1965, D/-
15-11-1967, against order of City Civil
Court, Ahmedabad, D/- 4-3-1965.

(A) Constitution of India, Arts. 227,
Proviso, 372 — Civil P. C. (1908), S. 122
— There is no inconsistency between
Proviso to Art. 227 and S. 122 — Art. 372
cannot be invoked for the purpose of
coming to the conclusion that S. 122
Civil P. C. ceased to be in force on com-
mencement of Constitution—Applicability
of Art. 372 postulates that there is in-
consistency between S. 122 Civil P. C.
and proviso to Art. 227 of the Constitu-
tion — S. 122 C. P. C. in its entirety
continues in force after commencement
of Constitution and no part of it is uncon-
stitutional or ultra vires — Civil Revn.
Appln. No. 1116 of 1963, D/-23-8-1967
(Guj), Overruled. AIR 1968 Guj 223, Foll.
(Para 3)

(B) Civil P. C. (1908), O. 37 R. 3(2) —
Order granting conditional leave to
defend suit filed under summary proce-
dure need not give reasons in support of
order. AIR 1968 Guj 247, Foll. AIR 1967
SC 1606, Expld. and Distinguished.

(Para 4)

(C) Civil P. C. (1908), S. 115, O. 37,
R. 3 — Order granting leave to defend
subject to condition of depositing certain
sum as security towards plaintiff's claim
— Order cannot be interfered with in
revision.

(Para 5)

Cases Referred: Chronological Paras

(1968) AIR 1968 Guj 223 (V 55) =
Civil Revn. Appln. No. 1089 of 1966,
D/- 2-2-1967, Keshavlal Prabhudas
Chokshi v. Manubhai I. Vyas 2, 3

(1968) AIR 1968 Guj 247 (V 55) =
Civil Revn. Appln. No. 1196 of
1966, D/- 8-2-1967, Vijay Kumar
K. Shah v. Firm of Pari Naresh
Chandra Jayantilal 4

(1967) AIR 1967 SC 1606 (V 54) =
(1967) 3 SCR 302, Bhagat Raja v.
Union of India 4

(1967) Civil Revn. Appln. No. 1116
of 1963, D/- 23-8-1967 (Guj),
Kuthuddin Sarfudin Munshi v.
Nandlal Chunilal Shah 2, 3

S. K. Jhaveri, for Applicants; S. A.
Shah, for S. S. Belsare, for Opponent No. 1;
G. D. Bhatt, for Opponent No. 2. The
Attorney General served.

BHAGWATI C. J. :— This revision ap-
plication is directed against an order
passed by the City Civil Court, Ahmeda-
bad, granting leave to defend the suit on
condition of depositing Rs. 4000 on or

before 25th March, 1965. The suit was filed by the plaintiffs against the defendants to recover a sum of Rs. 6,377.66 p. being the balance of the price in respect of bricks sold and delivered by the plaintiffs to the defendants together with interest at nine per cent per annum. Defendants Nos. 2 to 5 were admittedly partners of the first defendant at the relevant time when the bricks are alleged to have been sold and delivered by the plaintiffs but it was the case of the defendants in the affidavits in reply that the first defendant was dissolved prior to the filing of the suit. The plaintiffs alleged that diverse quantities of bricks were sold and delivered by the plaintiffs to the defendants from time to time between Samvat years 2017 to 2019 and in respect of the said transactions, an account was maintained in the name of the first defendant in the books of account of the plaintiffs. The price in respect of the bricks supplied by the plaintiffs to the defendants was debited in this account and the various amounts paid by the defendants to the plaintiffs in part payment of the price of the bricks were credited in this account. According to the plaintiffs, a sum of Rs. 6,377 was due and payable by the defendants to the plaintiffs at the foot of this account at the date of the filing of the suit and since the defendants failed to pay the said amount, the suit was filed by the plaintiffs to recover the same from the defendants. The plaintiffs filed the suit as a summary suit and after the defendants filed their respective appearances, the plaintiffs took out a summons for judgment for a decree for the amount claimed in the suit. The defendants resisted the summons for judgment by filing two affidavits in reply, one by defendants Nos. 2, 3 & 4 and the other by defendant No. 5. The learned Judge hearing the summons for judgment, after taking into account the plaint and the affidavits, made an order granting conditional leave to the defendants to defend the suit on their depositing a sum of Rs. 4000 on or before 25th March 1965. Defendants nos. 1 to 4 thereupon preferred the present revision application in this Court challenging the validity of the said order.

2. The revision application originally came up for hearing before A. D. Desai J. on 29th September 1967. Before that date a decision was given by Raju J. on 23rd August 1967 in Civil Revn. Appln. No. 1116 of 1963 (Guj) holding that section 122 of the Civil Procedure Code in so far as it empowered the High Court by rules to annul, alter or add to all or any of the rules in the First Schedule was inconsistent with the Proviso to Article 227 and was, therefore, unconstitutional and ultra vires Article 372 of the Constitution. If this decision was correct, rules 142 to

148A of the Ahmedabad City Civil Court Rules would be ultra vires since they were made under section 122 and were admittedly inconsistent with the amended Rules of Order 37 though to a limited extent and it would not be competent to the learned Judge of the City Civil Court to impose a condition while granting leave to the defendants to defend the suit. A. D. Desai J., however, found difficulty in agreeing with the view taken in this decision particularly since, in his opinion, this decision was directly in conflict with a decision given by a Division Bench of this Court on 2nd February 1967 in Civil Revn. Appln. No. 1089 of 1966: AIR 1968 Guj 223). He, therefore, referred the revision application to a Division Bench and that is how the revision application comes before us. It may be pointed out that it does not appear from the record of Civil Revn. Appln. No. 1116 of 1963 (Guj), that notice to the Attorney General was issued by Raju J. before declaring a part of section 122 of the Civil Procedure Code unconstitutional and ultra vires. But since the question of vires of a part of section 122 of the Civil Procedure Code was involved in this revision application, A. D. Desai J. while referring the revision application to a Division Bench, ordered notice to issue to the Attorney General. No one, however, appears on behalf of the Attorney General.

3. The first question which arises for consideration is whether section 122 of the Civil Procedure Code in so far as it empowers the High Court by rules to annul, alter or add to all or any of the rules in the First Schedule is inconsistent with the Proviso to Article 227 and is, therefore, unconstitutional by reason of Article 372. Now Article 372 provides that notwithstanding the repeal by the Constitution of the enactments referred to in Article 395 but subject to the other provisions of the Constitution, all the law in force in the territory of India immediately before the commencement of the Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. It can, therefore, hardly be disputed that if any part of section 122 of the Civil Procedure Code is inconsistent with any provision of the Constitution, it would cease to be in force by virtue of Article 372. The view taken by Raju J. in Civil Revn. Appln. No. 1116 of 1963 (Guj) was —and that is the view relied upon by Mr. S. K. Jhaveri, learned advocate appearing on behalf of defendants nos. 1 to 4 in support of the revision application — that the impugned part of section 122 empowering the High Court to make rules annulling, altering or adding to all or any of the rules in the First Schedule was

inconsistent with the Proviso to Article 227. The learned Judge observed:

"Sec. 122, C. P. C. gives powers to the High Court to make rules. This power is very wide. It gives powers to the High Court to make rules, which have the effect even to amend the Civil Procedure Code, First Schedule of the C. P. Code being part of the Civil Procedure Code. But the power to make rules inconsistent with any law is not given by Art. 227 of the Constitution. In fact, Art. 227 of the Constitution takes away the power to make rules inconsistent with any provision of any law. In other words, section 122, C. P. Code, gives powers to the High Court, which are far wider than those given by Article 227 of the Constitution. To that extent, there is an inconsistency as contemplated in Article 372 of the Constitution."

This view taken by the learned Judge is directly in conflict with what a Division Bench of this Court said in Civil Revn. Appln. No. 1089 of 1966, D/- 2-2-1967=(AIR 1968 Guj 223). That revision application was also directed against a judgment of Raju J. where the learned Judge had held Rr. 142 to 148A ultra vires inter alia on the ground that the proviso to Article 227 prevented the High Court from making any rules under section 122 inconsistent with any law and the High Court had, therefore, no power to make rules 142 to 148A which were inconsistent with the amended rules of Order 37. Overruling this view, a Division Bench of this Court to which I was a party pointed out:

"The proviso to Article 227 declares that any rules made by the High Court in exercise of its rule-making power under Article 227 clause (2) shall not be inconsistent with the provisions of any law for the time being in force. This limitation imposed by the proviso to Article 227 which requires that the rules must not be inconsistent with the provisions of any law for the time being in force is, therefore, by the clear and specific language of the proviso applicable only where rules are made by the High Court in exercise of its rule-making power under Article 227, clause (2) and has no application where rules are made by the High Court in exercise of rule-making power under some other statutory provision. The proviso to Article 227 also does not operate as a limitation on the exercise of the rule-making power belonging to the High Court under section 122 of the Code. Article 227 clause (2) and section 122 of the Code are two distinct and different provisions conferring rule-making power on the High Court and the limitation imposed by the proviso to Article 227 is applicable only to the exercise of the rule-making power conferred under Arti-

cle 227 clause (2) and cannot be imported so as to restrict the scope and ambit of the rule-making power conferred under section 122 of the Code."

We held in so many terms that there was no clash or conflict between the proviso to Article 227 and section 122 and if there is no inconsistency between the Proviso to Article 227 and Section 122, it is difficult to see how Article 372 could be invoked for the purpose of coming to the conclusion that section 122 ceased to be in force on the commencement of the Constitution. The applicability of Article 372 postulates that there is inconsistency between the Proviso to Article 227 and section 122 and though Raju J. held in the earlier case that there was such inconsistency, a Division Bench of this Court pointed out while disposing of the revision application that there was no such inconsistency and in view of that decision of the Division Bench, there was no scope at all for the applicability of Article 372. It does not appear from the judgment of Raju J. in Civil Revn. Appln. No. 1116 of 1963 (Guj) that this decision of the Division Bench was pointed out to him. We have no doubt that if this decision had been pointed out to him, he would not have taken the view which he has taken. With the greatest respect to the learned Judge, we express our disagreement with the view taken by him and hold that section 122 in its entirety continues in force after the commencement of the Constitution and no part of it is unconstitutional or ultra vires.

4. That takes us to the second contention urged by Mr. S. K. Jhaveri on behalf of the petitioners. He contended that the order granting conditional leave to defend the suit was bad inasmuch as it did not disclose reasons on which it was based. The argument was that since the order was a judicial order made by the learned Judge in the exercise of his judicial discretion, it was necessary that it should set out the reasons so that the revisional Court could examine the validity of the reasons which prevailed with the learned Judge in exercising his discretion in the manner he did. But this argument stands concluded by a decision given by a Division Bench of this Court on 8th February 1967 in Civil Revn. Appln. No. 1196 of 1966, Vijay Kumar K. Shah v. Firm of Pari Nareshchandra Jayantilal, (AIR 1968 Guj 247). The Division Bench pointed out in this case that it is not necessary that an order granting or refusing leave to defend the suit filed under the summary procedure must contain reasons in support of the order and the absence of reasons does not vitiate the order. Mr. S. K. Jhaveri, however, pointed out that this decision can no longer be regarded as good law in view of a recent decision of the

Supreme Court in *Bhagat Raja v. Union of India*, AIR 1967 SC 1606. We have carefully gone through this decision of the Supreme Court but we do not think there is anything in it which overrules what the Division Bench said in Civil Revn. Appln. No. 1196 of 1966=(AIR 1968 Guj 247). The decision of the Supreme Court was concerned with a case where the Central Government was functioning as a tribunal hearing a revision application against the order of the State Government rejecting an application for a mining lease under section 19 of the Mines and Minerals (Regulation and Development) Act, 1957 read with the amended rule 55 of the Mineral Concession Rules, 1960 and the question was whether the Central Govt. while making an order rejecting the revision application was bound to give reasons in support of the order. The Supreme Court held that the Central Government ought to have given reasons and since no reasons were given, the order was liable to be quashed and set aside. The decision of the Supreme Court was expressly and in so many terms confined only to tribunals exercising judicial or quasi-judicial powers and reference to Courts of law was deliberately avoided while stating or discussing the principles on which the decision was based. We cannot, therefore, read this decision of the Supreme Court as laying down that wherever an order is made by a Court of law it must necessarily be accompanied by a judgment giving reasons in support of it. The question whether an order made by a Court of law is required to be supported by a judgment setting out reasons would be governed by the Code of Civil Procedure. So far as an order granting or refusing leave to defend in a summary suit is concerned, there is no provision in the Code of Civil Procedure which requires that such an order must contain reasons for the making of the order. As pointed out by the Division Bench of this Court in Civil Revn. Appln. No. 1196 of 1966=(AIR 1968 Guj. 247): "We do not find anything in Rules 142 to 148A which requires that the order must disclose the reasons in support of it or that it must be accompanied by a judgment giving the grounds in support of the order. There is also no provision in the body of the Code or in the rules in the First Schedule either as originally enacted or as amended by the High Court from time to time which requires that an order granting or refusing leave to defend a suit filed under the summary procedure must set out the reasons for the making of the order." We are, therefore, unable to accede to the contention of Mr. S. K. Jhaveri that the decision of this Court in Civil Revn. Appln. No. 1196 of 1966=(AIR 1968 Guj 247) holding that an order granting or refusing leave to defend

a suit filed under the summary procedure does not require to be accompanied by a judgment giving reasons in support of the order is overruled by the decision of the Supreme Court in *Bhagat Raja's case*, AIR 1967 SC 1606 (supra). The validity of the order impugned in the present revision application cannot, therefore, be challenged on this ground.

5. The last contention urged by Mr. S. K. Jhaveri on behalf of defendants Nos. 1 to 4 related to the merits of the order passed by the learned Judge. But so far as the merits are concerned we do not think there is any case made out on behalf of defendants Nos. 1 to 4 for interference under section 115 of the Civil P. C. It appears clearly that the learned Judge of the City Civil Court on a consideration of the plaint and the affidavits, was not satisfied that a bona fide triable issue was raised by the affidavits in reply and entertained a doubt as to the genuineness of the defence and he, therefore, did not grant unconditional leave to defend the suit but granted leave to defend subject to the condition of depositing Rs. 4000 as security towards the plaintiffs' claim. This view taken by the learned Judge on a consideration of the plaint and affidavits may be correct or incorrect. It may even be wholly wrong. That is not a matter into which this Court acting in exercise of its revisional jurisdiction can enter, though we may point out that on a consideration of the plaint and the affidavits we are satisfied that the learned Judge was right in granting to the defendants leave to defend the suit on condition of depositing Rs. 4000. This last contention urged on behalf of defendants Nos. 1 to 4 must, therefore, be rejected.

6. These were the only grounds urged in support of the revision application and since there is no substance in them, the revision application fails and the rule is discharged with costs. On an application being made by Mr. S. K. Jhaveri on behalf of defendants Nos. 1 to 4, we extend the time for making the deposit upto 14th December, 1967.
SSG/D.V.C. Applications dismissed.

AIR 1969 GUJARAT 21 (V 56 C 4)*

SHELAT, J.

Yaduray Bansi, Appellant v. Sunderbai, Respondent.

Appeal No. 234 of 1963 from Original Decree, D/- 28-3-67.

(A) Hindu Marriage Act (1955), S. 23 (1)(b) — Relief on ground of cruelty — Cruelty must not have been condoned by petitioner before filing petition — Last

*Only portions approved for reporting by High Court are reported here.

DL/IL/C117/68

acts of cruelty not established — Petitioner cannot fall back on previous instances of similar character. (Para 6)

(B) Hindu Marriage Act (1955), S. 23(1)

(b) — Cruelty — Proof — Testimony of party — Corroboration whether and how far necessary.

Ordinarily as a rule of prudence and practice, though not as a rule of law, in cases of matrimonial causes the Court should always expect to get some corroboration from other evidence or even from circumstances in regard to the material particulars relating to the acts of cruelty alleged by one against the other. It is only in very rare cases where and that too when the evidence of the party to such a cause inspires the confidence and the reliability, in the given circumstances of a particular case, that the Court can act upon the same without any corroboration. While no direct evidence to support a party may be had, there must be some reliable circumstances which tend to support the testimony of the petitioner. AIR 1934 Pat 475 and AIR 1949 Assam 14 and AIR 1933 All. 634, Ref. (Para 7)

Cases Referred: Chronological Paras

(1949) AIR 1949 Assam 14 (V 36)=

53 Cal WN 302, Mirjan Ali v. Mt. Maimuna Bibi

(1948) 1948-1 All ER 435=205 LT

Jo 148, Kafton v. Kafton

(1935) ILR 62 Cal 541, Stones v. Stones

(1934) AIR 1934 Pat 475 (V 21)=

ILR 13 Pat 129, Carroll v. Carroll

(1933) AIR 1933 All 634 (V 20)=

55 All 743, Mt. Anis Begam v. Muhammad Istafa Wali Khan

S. B. Vakil, for Appellant; K. G. Bhatt,

for Respondent.

JUDGMENT : 1-5.

6. Even if, for a moment, we were to take it that she was ill-treated or beaten some time, before she went on the last occasion in March 1960, she can be taken to have duly condoned the same, and more so when she had gone to his place at Umred of her own accord. It was urged that under Section 23(1)(b) of the Hindu Marriage Act, 1955, any act of cruelty committed by her husband would obviously be taken as condoned, and therefore, that ground of cruelty cannot be considered a good ground for claiming any such relief of judicial separation. The relevant part of section 23 of the Act provides as under :—

"(1) In any proceeding under this Act, whether defended or not, if the Court is satisfied that :—

(a)

(b) where the ground of the petition is the ground specified in clause (f) of sub-section (1) of section 10 or in clause (i) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the

act or acts complained of, or where the ground of the petitioner is cruelty the petitioner has not in any manner condoned the cruelty, and

(c)

(d)

(e)

then, and in such a case, but not otherwise, the Court shall decree such relief accordingly."

A plain reading of clause (b) of Section 23(1) of the Act, shows that before the Court is satisfied for granting any such relief, in case of a ground of cruelty — it must not have been condoned by the petitioner — before filing the petition. The present petition is based on a subsequent incident which took place on her third stay at Umred in 1961 and that is not said to have been condoned. But the previous two incidents can easily be taken as her having condoned — if they were to be held as in any way established, and consequently they cannot be ordinarily taken into account. But it was pointed out by Mr. Bhatt, the learned advocate for the respondent, by a reference to a case of *Stones v. Stones*, (1935) ILR 62 Cal 541, where it was held that a matrimonial offence, subsequent to the condonation of a prior matrimonial offence, operates to revive the condoned offence, enabling the aggrieved party to rely thereon as a ground for divorce. That was a case for divorce on the ground of adultery. Another case relied upon by him is one of *Kafton v. Kafton*, (1948) 1 All ER 435, where it was held that "cruelty which has been condoned may be revived as a matrimonial offence by subsequent desertion, and for this purpose desertion for 3 years need not be established." This case was further relied upon by Mr. Bhatt to show that the requirement by the Court of corroboration where cruelty is alleged is merely a matter of practice, and not a rule of law, and it has never been decided that the Court is not entitled in a proper case, where (there?) it is no doubt where the truth lies, to act on the uncorroborated testimony of the petitioner. Leaving aside for the time being as to the requirement of any corroboration to the petitioner's evidence, it can be said that even if any act of cruelty has been condoned by the wife, that could be revived as a ground if she is later on treated with cruelty and/or deserted. But that has to be so only for showing that he was so behaving before, and that he has continued to be of the same type, provided the petitioner is able to establish by reliable and sufficient evidence the acts of cruelty on the part of her husband which obliged her to leave the place and then file the petition for judicial separation. In other words, in order to strengthen or add justification

to her being obliged to live separate from her husband on grounds of cruelty and desertion, previous instances of similar character may well be relevant but it cannot serve as good ground for obtaining judicial separation unless sufficient and reliable evidence with regard to the last acts of ill-treatment and cruelty or/and desertion which led her to file the petition, are established in the case. In the first case, I am not satisfied with her evidence alone in that direction and even if any such acts were committed, they stood condoned by her as soon as she went to her husband's house of her own accord on the last occasion.

7. It is, therefore, necessary for her to establish the matrimonial offence such as that of cruelty on the part of her husband so as to cause reasonable apprehension in her mind that it is harmful and injurious to live with her husband. The onus of proof of any such matrimonial offence is on the person who alleges the same namely the petitioner in the present case. The parties to such a petition are obviously interested in the relief that one claims against the other and each side is likely, therefore, to either exaggerate or even go beyond what might have actually happened, for ordinarily solemn marriage ties cannot easily be disrupted unless, it has become highly unbearable for one to stay with the other. In a case of this character, therefore, while rule of law may not require corroboration in the sense that even the testimony of a single person such as even the party in a proceeding can be acted upon if it inspires confidence and the reliability that it should, but as pointed out from the decision in the case of (1948) 1 All ER 435, as a matter of practice Court would ordinarily require some corroboration. In fact, if we refer to the judgment of Tucker L. J., it has been pointed out that there may be many cases in which it would be unsafe to act upon without corroboration, though no doubt the Court would be entitled to act upon without corroboration in a proper case, where there is no doubt where the truth lies. Then it is observed as under :—

"I do not desire to be understood as saying anything to weaken the requirement that corroboration in these cases is highly desirable, but there may be cases in which the Court feels that it can safely act without corroboration."

It is no doubt true that in cases of this character where cruelty is committed inside the doors of the house, eye witnesses may not be possible to have. In *Carroll v. Carroll*, AIR 1934 Pat 475, it is observed that "in a case of cruelty it is necessary to have corroboration of the evidence of petitioner." In another case of *Mirjanali v. Mt. Maimuna Bibi*, AIR 1949 Assam 14, it is observed that "it is

well-established principle that in matrimonial causes, the uncorroborated testimony of one of the parties to the marriage is not sufficient to prove cruelty. There must be some corroboration of that evidence, though obviously it is not necessary to examine an eye-witness to the alleged acts of cruelty". On the other hand it was pointed out that in case of *Mt. Anis Begum v. Muhammed Istafa Wali Khan*, AIR 1933 All 634, at p. 640, it has been observed that "when the question is of the husband's cruel treatment towards his wife, evidence of a large number of witnesses cannot be expected to be forthcoming, and much will depend on the statement of the wife corroborated by the circumstantial evidence, particularly when the cruelty is alleged to have taken place inside the house of her husband." The effect of all these decisions is that ordinarily as a rule of prudence and practice, though not as a rule of law, in cases of matrimonial causes the Court should always expect to get some corroboration from other evidence or even from circumstances in regard to the material particulars relating to the acts of cruelty alleged by one against the other. It is only in very rare cases where and that too when the evidence of the party to such a cause inspires the confidence and the reliability, in the given circumstances of a particular case, that the Court can act upon the same without any corroboration. While no direct evidence to support a party may be had, there must be some reliable circumstances which tend to support the testimony of a petitioner and it is in that light that we have to consider the effect of the evidence led in the case. In the present case, however, it is difficult to put implicit reliance on the evidence either of the petitioner or the opponent. Each side has not chosen to tell the truth, and while one has tried to exaggerate to the highest extent, the other has tried to minimise his attitude and acts with regard to the relations existing between them. Apart from that position, this is a case in which some corroboration appears to be available with regard to the acts of cruelty alleged against the husband and yet none is brought on record.

8-11.

RSK/D.V.C.

Appeal allowed.

AIR 1969 GUJARAT 23 (V 56 C 5)*

J. B. MEHTA, J.

Shri Laxmidas Damodardas, Applicant
v. L. Chandrabhan and another, Opponents.

Civil Revn. Application No. 788 of
1964, D/- 13-9-1967.

*Only portions approved for reporting
by High Court are reported here.

EL/HL/C186/68

Civil P. C. (1908), Ss. 13, 45 — Ex parte decree passed by Court at Agra against resident of Junagadh territory — Decree is nullity — Decree transferred to Junagadh Court in 1958 — Decree not executable. AIR 1951 Bom 125 (FB) and AIR 1951 Bom 190 held impliedly overruled by AIR 1962 SC 1737.

A judgment in personam pronounced in absentem by a foreign Court against a person who has not submitted himself to the jurisdiction of that Court and which is incapable of execution outside the territorial limits of that Court, is a nullity, and if, at the time it is passed, it has no validity as a foreign judgment, it would not acquire new force but continue to be inexecutable even after the advent of the Constitution. AIR 1951 Bom 125 (FB) and AIR 1951 Bom 190 held impliedly overruled in AIR 1962 SC 1737. Case law discussed. (Para 4)

The crucial date for determining the validity or enforceability of an order or a decree is the date when it is made. Therefore, if a decree is unenforceable in a particular Court the time when it is passed, it would not become enforceable and valid simply because of the political changes that take place unless there is a specific provision to the contrary. AIR 1956 Raj 81 (FB), Foll. (Para 3)

Thus the ex parte decree passed by a British Indian Court at Agra against the defendant, a non-resident foreigner, in the Junagadh territory is a nullity and not executable. (Para 4)

Cases Referred: Chronological Paras

- (1962) AIR 1962 SC 1737 (V 49)=
 (1963) 2 SCR 577, Moloji Nar Singh Rao v. Shankar Saran. 3, 4
 (1962) AIR 1962 Andh Pra 400 (V 49)=
 ILR (1962) Andh Pra 781 (FB), Krishna Murthy v. Venkat Rao. 4
 (1956) AIR 1956 Punj 193 (V 43)=
 ILR (1956) Punj 434 (FB), Radhe Sham Roshan Lal v. Kundan Lal Mohan Lal. 3
 (1956) AIR 1956 Raj 81 (V 43)=ILR (1956) 6 Raj 236 (FB), Laxmi Chand v. Mst. Tripuri. 3, 4
 (1955) AIR 1955 Nag 103 (V 42)=
 ILR (1955) Nag 194, Ramkisan Janakilal v. Harmukharai Lachminarayan. 3
 (1954) AIR 1954 Cal 67 (V 41)=92 Cal LJ 24, Shah Kantilal v. Dominion of India. 3
 (1954) AIR 1954 Sau 123 (V 41) (FB), Gokaldas Naranji v. Dwarkadas. 4
 (1953) AIR 1953 SC 441 (V 40)=
 1953 Cri LJ 1923, Kishorilal v. Shanti Devi. 3, 4
 (1951) AIR 1951 Bom 125 (V 38)=
 53 Bom LR 398 (FB), Bhagwan Shankar v. Rajaram Bapu Vithal. 2, 3

(1951) AIR 1951 Bom 190 (V 38)=
 ILR (1950) Bom 640, Chunnilal Kastur Chand v. Dundappa Damappa. 2, 3
 (1894) 21 Ind App 171=ILR 22 Cal 222 (PC), Sirdar Gurudayal Singh v. Rajah of Faridkote. 3
 P. V. Hathi for V. G. Hathi, for Applicant; Opponents served.

ORDER :— This revision application raises an interesting question as to whether an ex parte decree passed by a Court in British India could be executed by the Courts in the territory in the Indian States which at the time of execution have merged in the territories of India. This application was originally filed as a second appeal as the appeal against the trial Court's order rejecting the contention of the judgment-debtor that such a decree was a nullity was summarily dismissed by the first appellate Court.

2. The short facts which have given rise to this application are as under :—

The decree-holder, Suresh Bangles Store through the partner L. Chandrabhan had obtained a decree in the Small Cause Court at Agra, against the two judgment-debtors Laxmandas Damodardas and Laxmidas Damodardas, in Civil Suit No. 488 of 1949. The decree was kept alive and the last execution was applied and disposed of on 27-6-58. The decree-holder thereafter sought execution of the said decree after getting the same transferred to the Court of the Civil Judge (S. D.) at Junagadh by making an Execution Petition No. 183 of 1958 dated 17-9-58. The judgment-debtor No. 2, who is the present petitioner, had in the said execution deposited decretal amount under the protest and had contended that the ex parte decree passed against him on 11-8-49 by the Court at Agra in British India was a decree of a foreign Court and it being an absolute nullity, it could not be executed against the said judgment-debtor, after the formation of the Union of India on the footing that at the time of the present execution Junagadh territory had formed part of the Indian Union. The trial Court negatived the said contention relying upon a Full Bench decision of the Bombay High Court in Bhagwan Shankar v. Rajaram Bapu Vithal, AIR 1951 Bom 125, approving the earlier decision in Chunnilal Kasturchand v. Dundappa Damappa, AIR 1951 Bom 190. The trial Court, therefore, held that even though at the date of the decree viz. 11-8-49 the Agra Court was a foreign Court vis-a-vis the State of Saurashtra in which this Junagadh Court was situate at the time of applying for execution of the said decree, the said Junagadh Court had ceased to be a foreign Court and so it had jurisdiction to execute the decree. The trial Court, therefore, negatived all

the claims and ordered execution of the decree even against the judgment-debtor No. 2. Against the said decision the appeal of the petitioner-judgment-debtor was summarily dismissed by the District Judge at Junagadh. The second appeal was also summarily dismissed but as the certificate was granted for Letters Patent Appeal, the said appeal was filed. In the said Letters Patent Appeal, the Division Bench consisting of Bhagwati J. (as he then was) and myself allowed the appeal and the matter has been remanded with a direction that the said second appeal which was incompetent should be regarded as a revision application and should be disposed of as such. Accordingly, the said second appeal was converted into a Civil Revision Application and it has now come up before me for disposal.

3. Mr. Hathi contends that the aforesaid Full Bench decision of the Bombay High Court must be considered as impliedly overruled by the decision of the Supreme Court and, therefore, this revision application ought to be allowed. The said two Bombay decisions arose in connection with similar ex parte decrees of British Indian Courts. In the decision in AIR 1951 Bom 190, the Division Bench was concerned with the question of executability of an ex parte decree of the Court of Belgaum in the territory of Jamkhandi State after the said Indian State had merged in the Bombay Province. In the Full Bench decision in AIR 1951 Bom 125, however, the ex parte decree was of the Court at Sholapur in British India and was sought to be executed against a non-resident foreigner who was in the foreign territory at Akalkot, which was also a native State area which merged with the Indian Union. In both these decisions the Bombay High Court had interpreted the rule of international law laid down in *Sirdar Gurudayal Singh v. Rajah of Faridkote*, 21 Ind App 171, at page 185 where Earl of Selborne speaking for the Judicial Committee laid down the following rule:

"In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced."

These are doctrines laid down by all the leading authorities on international law; and no exception is made to them in favour of the exercise of jurisdiction against a defendant not otherwise subject to it, by the Courts of the country

in which the cause of action arose, or in cases of contract by the Courts of locus solutionis. In those cases, as well as all others, when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice." In the aforesaid two Bombay decisions, the aforesaid rule was interpreted to mean as observed by Chagla C. J. speaking for the Full Bench in AIR 1951 Bom 125 at p.127, that such an ex parte decree of a foreign Court was not an absolute nullity, but merely there was an impediment in the way of its being executed because such a decree could be enforced in the forum by which it was passed, provided special local legislation authorised that forum. If, therefore, sec. 20 of the Civil Procedure Code authorised the Court to exercise jurisdiction against a non-resident foreigner on the ground that the cause of action arose within the jurisdiction of that Court the decree when passed was a competent decree. Their Lordships further considered that the material time to consider jurisdiction of the Court in passing the decree was the date when the suit was instituted and so section 20 having empowered the British Indian Courts to pass decree, the decree was not an absolute nullity. If, therefore, at the material date of execution the Indian State in which it was sought to be executed had merged in the Bombay Province and had ceased to be a foreign territory, the judgment-debtor had ceased to be a foreigner and the Court in that Indian State area had ceased to be a foreign Court vis-a-vis British Indian Court as both the Courts were subject to the same common municipal law viz. the Indian Civil Procedure Code. On that basis it was held that the decree could be executed and the question of private international law did not arise at all. It was further held that there was no question of the taking away of any vested right as prejudice has been caused by the Act of the State which altered the status of the Indian State territory and also altered the status of the defendant and made the Court in that Indian State the Municipal Court and made the defendant also a citizen. Even though at the time of the decree, the defendant and the Court concerned were a foreigner and a foreign Court. It is clear from these conclusions reached by the Bombay High Court that the said decisions proceeded on the following premises:—

(1) That the ex parte decree obtained in the British Indian Court against the non-resident foreigner was not an absolute nullity, but it had merely an impediment in the way of its being executed in the foreign territory.

(2) That the material date to be considered was not the date of the decree but

the date when the execution was sought and if on that date impediment in the way of its execution was removed by reason of certain political changes which added the said Indian State territory into the territory of the Union of India, the said decree could be executed.

(3) That there was no question of giving retrospective effect as whatever prejudice has been caused was only by an Act of the State which altered the status both of the foreigner and of the foreign Court and so at the date of the execution. When the impediment in the way of execution disappeared by the merger which was the Act of the State, the decree became capable of execution as at that relevant date of execution the defendant had ceased to be a foreigner and the Foreign Court had ceased to be a foreign Court and both the Courts had become subject to the common municipal law viz. the Civil Procedure Code.

Now, all these premises no longer hold good after the decision of their Lordships of the Supreme Court in *Moleji Narasingh Rao v. Shankar Saran*, AIR 1962 SC 1737. That was a case where an ex parte decree of the Gwalior Court passed on 18-9-48 when Gwalior was an Indian State was transferred by the Gwalior Court by the order dated 14-9-51 for execution to the Court at Allahabad in U. P. Their Lordships of the Supreme Court held that at the time of passing of the decree in November 1948 the Gwalior Court was a Foreign Court within the meaning of the Indian Civil P. C. as it was a Court situated beyond the limits of the provinces which meant the provinces what was the British India and which had no authority in the provinces of British India and was not established or continued by the Central Government. Thereafter their Lordships considered at page 1743 the aforesaid rule laid down by the Privy Council in *Gurudayal's case*, (1894) 21 Ind App. 171 and held that the respondent not having submitted to the Gwalior Court's jurisdiction the decree was a nullity outside the territory of the State in which the Court passing the decree was situate and, therefore, on the basis of such a decree no action could be brought in what was British India, the decree being of a Court in an Indian State. At page 1744 their Lordships further observed that the effect of their Lordships' decision in *Kishorilal's case* (AIR 1953 SC 441) was that the effect of the judgment obtained before the constitutional changes did not change unless there was a specific provision to that effect. Following the aforesaid decision, *Wanchoo C. J.* (as he then was) in *Laxmidas v. Mst. Tripuri*, AIR 1956 Raj 81 (FB) held that the crucial date for determining the validity or enforceability of

an order or a decree was the date when it was made. Therefore, if a decree was unenforceable in a particular Court at the time when it was passed, it would not become enforceable and valid simply because of the political changes that took place unless there was a specific provision to the contrary. The Calcutta High Court in *Shah Kantilal v. Dominion of India*, AIR 1954 Cal 67, also held that there was no retrospective effect of the Constitution including its definition of the words, "Territory of India" which had the effect of converting what was a foreign judgment before the Constitution of India to a domestic judgment after the Constitution. The argument raised against the decree of the Gwalior Court being a nullity and not remaining so after the Constitution must therefore fail. In the next paragraph their Lordships have considered the question as to whether the decree in question which was a valid decree under the Madhya Bharat Code of Civil Procedure had only an impediment to its executability which was removed as a consequence of the constitutional changes and the subsequent amendments of the Indian Code. Repelling this argument their Lordships stated as under :—

"The decree was in the international sense a nullity outside Madhya Bharat even though according to the law in that State it was not so. We have already held that the decree was foreign when it was born in Gwalior and it continued to be so as there was no process or procedure for its becoming a naturalised Indian decree. The decree being a nullity outside the Courts of the United States (Madhya Bharat), in the absence of any specific provision it could not be enforced in the United State (Madhya Bharat). It will not be correct to say that the decree which was a nullity before the Constitution came into force suffered only from the defect of enforceability by execution. Section 13 creates substantive rights and is not merely procedural and therefore defences which were open to the respondents were not taken away by any constitutional changes in the absence of a specific provision to the contrary. It is erroneous to say, therefore, that the decree of the Gwalior Court was unenforceable when passed because of some impediment which the subsequent constitutional changes had removed; but that decree suffered from a more fundamental defect of being a nullity and the rights and liabilities created under it remained unaffected by subsequent changes. That, in our opinion, is the effect of the judgment of this Court in *Kishorilal's case*, AIR 1953 SC 441. See also, *Radhesham Roshan Lal v. Kundan Lal Mohanlal*, AIR 1956 Punjab 193 (FB), where it was held that the right of the

judgment debtor to plead that the decree is a nullity, is not a procedural matter but is a vested right in the judgment-debtor and it cannot be taken away by the provision of law which is not retrospective. The Nagpur High Court in *Ramkishan Janakilal v. Harmukhrai Lachminarayan*, AIR 1955 Nag 103 also held that a decree by the Indore High Court prior to the Constitution was of a Court without jurisdiction and merely because Indore became a part of the "Territory of India" after the Constitution did not retrospectively clothe the Court at Indore with jurisdiction in order to make the decree which was a nullity, into a valid decree."

This reasoning of their Lordships in terms overrules all the premises which were assumed in the aforesaid two decisions by the Bombay High Court. It is settled after these two decisions of their Lordships of the Supreme Court that the material date in such cases is the date of the passing of the decree. In order to determine the nationality of the decree, the date of the passing of the decree would be material. The second point is settled by their Lordships is that the constitutional changes by which the foreign territory was added in the Indian territory would not have the effect of removing any impediment in the way of execution because the decree when passed being a foreign decree was an absolute nullity before the Constitution and the Constitution having no retrospective operation the nullity remained a nullity and there was no question of removal of any impediment in the way of its execution.

4. It may also be noted that no distinction could be made on the ground that their Lordships of the Supreme Court had to deal with the case of the Gwalior Court which was clearly a decree of a foreign Court as per the definition of the foreign Court in our Indian Code itself. Their Lordships had in fact based their decision in AIR 1962 SC 1737 on the basis of the earlier decision in *Kishori Lal's case*, AIR 1953 SC 441, which was exactly the reverse case and which had evolved the test that the nationality of the decree must be judged by taking the material date as the date of the passing of the decree and if the decree was unenforceable in the particular foreign Court at the time when it was passed, it would not be enforceable simply because of the political changes that took place unless there was specific provision to the contrary. In their Lordships' view there was no such provision to the contrary either in our Constitution which was never given any retrospective effect including even the definition of the expression 'territory of India' in Article 1(3) of the Constitution or in the various amendments in the Code. At page 1747

their Lordships had also considered this question from the point of view of sections 38, 43 and 44 of the Code. At page 1746 their Lordships held that the Gwalior Court which made the order of transfer in September 1951, when it was governed by the Indian Code was a different Court from what it was at the time it passed the decree when functioning under a different Code of Civil Procedure. The Court which made the order of transfer in September 1951, was thus not the Court which passed the decree within the meaning of section 39. On a parity of reasoning it was the British Indian Court at Agra which passed the decree against a non-resident foreigner in the Junagadh territory and the then existing Junagadh Court at the time of passing decree was clearly a foreign Court which could not execute the said decree under the Code, then existing if any in the Junagadh territory. As the Constitutional provisions had no retrospective effect the Court in Junagadh territory existing on the date of the transfer in 1958 could not, therefore, execute the said decree as it was not a Court to which the Agra Court, could have transferred its decree for its execution at the time when the decree was made. Their Lordships have also at p. 1748 considered the question of applicability of sections 43 and 44, which could hardly have any application to the facts of such cases, because section 43 only applied to those decrees which were passed by the Civil Courts established in parts of India to which the provisions of the Indian Code did not extend, meaning those areas which were set out in section 1(3) of the Indian Code, while S. 44 as it stood at the Court of execution did not apply to decrees of Civil Courts. Therefore, ultimately, their Lordships came to the conclusion at page 1749 that the decree of the Gwalior Court sought to be executed was a decree of a foreign Court which did not change its nationality in spite of subsequent constitutional changes or amendments in the Code. The Gwalior Court could not transfer the decree for execution to the Court at Allahabad under sections 38 and 39 nor could the Court of Allahabad execute the decree without such transfer. The provisions of sections 43 and 44 of the Code also were not applicable to the case. The said decision would completely apply to the facts of the present case as well. Mr. Hathi had pointed out that in *Gokaldas Naranji v. Dwarkadas*, AIR 1954 Sau. 123, the Full Bench of the Saurashtra High Court also considered the aforesaid Bombay decision not to be good law. On the same reasoning that the constitutional provisions had no retrospective effect and the British Indian Court's decree could not be treated as a decree passed by the Civil Court in the territory

of India within the meaning of Article 1(3). Finally, Mr. Hathi had relied upon a very well considered judgment of the Full Bench of the Andhra Pradesh High Court in Krishna Murthy v. Venkat Rao, AIR 1962 Andh Pra 400, which has also followed the ratio of Wanchoo C. J. (as he then was) in the aforesaid Full Bench decision of the Rajasthan High Court in AIR 1956 Raj 81 which was approved by their Lordships of the Supreme Court. In this decision at page 406 the Full Bench had also considered the question whether it would make any difference if the decree passed was not of the foreign Court but of the British Indian Court and their Lordships observed that if the basis of the non-executability of the decree was its character as on the date on which it was passed, if such a decree was non est and could not become 'positive, effective and legal entity,' at a later stage, the same logic should apply to judgments of Courts in British India. There can be no essential difference in the nature of both the judgments. Their Lordships referred to sec. 3(45) of the General Clauses Act and held that it could not alter the situation as it only said that a decree passed by a Court to which the C. P. Code applied could be executed throughout the territory of British India or provinces defined in Section 3(45) of the General Clauses Act or Part A States as defined in the Constitution. That would not take in native States which came to be termed as Part B States after the Constitution. In both the cases, the nature of the judgment was that of a foreign judgment and if they suffered from some defect as want of jurisdiction or otherwise, at a particular time they continued to be subject to that defect. In the aforesaid decision, various decisions have been referred to and it is observed that the weight of judicial opinion was in favour of the view which their Lordships had taken that a judgment in personam pronounced in absentem by a foreign Court against a person who had not submitted himself to the jurisdiction of that Court and which was incapable of execution outside the territorial limits of that Court, was a nullity and if, at the time it was passed, it had no validity as a foreign judgment, it would not acquire new force but continued to be inexecutable even after the advent of the Constitution. Therefore, in view of the aforesaid Supreme Court decision, I am bound to hold that the aforesaid Full Bench decision of the Bombay High Court is no longer good law and as the trial Court has held the decree to be executable following the said decision, the decree of the trial Court ought to be set aside as it has sought to execute a decree which is non est and an absolute nullity in the international sense.

5. In the result, this Civil Revision Application is allowed and the decree of the lower Court is set aside and the execution application of the judgment-holder is dismissed with costs. Rule accordingly made absolute. There shall, however, be no order as to costs of this Civil Revision Application.

MOVJ/D.V.C.

Application allowed.

AIR 1969 GUJARAT 28 (V 56 C 6)

A. R. BAKSHI AND V. R. SHAH, JJ.

Hiralal Hargovindas, Appellant v. Popatlal Sankalchand Patel and another, Respondents.

Letters Patent Appeal No. 42 of 1964, D/- 2-8-1967, against order of Divan, J. in A. F. O. No. 100 of 1964, D/- 8-10-1964.

Civil P. C. (1908), O. 39, Rr. 1 and 2(3), O. 21, R. 32, Ss. 36 and 94 — Injunction under O. 39, R. 1 — Breach thereof is punishable under O. 39, R. 2(3) — O. 21, R. 32 and S. 36 not meant for empowering Court to punish party. AIR 1945 Nag 134 and AIR 1941 All 140, Diss. from.

A combined reading of Section 94 and O. 39 Rr. 1 and 2, leads to the conclusion that the punishment prescribed by sub-rule (3) of R. 2 applies to an injunction issued under Order 39 and S. 94 C. P. C. It may be that sub-rule (3) was drafted somewhat inartistically but the intention of the legislature appears to be clear, namely, to punish persons guilty of violation of injunctions issued under either of the two rules. Order 21, Rule 32 read with sec. 36 C. P. C. is not intended to apply to temporary injunctions issued under Order 39. Order 21, Rule 32 read with Section 36 C. P. C. deals with execution of orders. The remedy provided under Order 21, Rule 32 and Sec. 36 could be availed of only by parties to a proceeding and it does not empower a Court suo motu to punish a person for breach of an injunction. These provisions are meant to enable a party to enforce the injunctions contained in the decrees or orders but not for the purpose of empowering a Court to punish a party guilty of disobedience. AIR 1926 Mad 574, AIR 1946 Pat 47 and AIR 1936 Pat 23 and AIR 1963 Andh Pra 136, Rel. on. AIR 1945 Nag 134 & AIR 1941 All 140, Dissented from. (Paras 8 and 9)

Cases Referred: Chronological Paras
(1963) AIR 1963 Andh Pra 136 (V 50)=

(1962) 2 Andh LT 389, T. K.

Nagaiah v. D. Sambaiah 6, 11

(1946) AIR 1946 Pat 47 (V 33)=ILR

24 Pat 606, Sitaram v. Lachmi-narain 6, 10

(1945) AIR 1945 Nag 134 (V 32)=

ILR (1945) Nag 336, Pannalal Bose

v. Shreeram Daluram 5, 7, 11

1969

- (1941) AIR 1941 All 140 (V 28)=ILR (1941) All 295, Janak Nandini v. Kedar Narain 5, 7
 (1936) AIR 1936 Pat 23 (V 23)=ILR 15 Pat 320, Jang Bahadur Singh v. Chhabila Koiri 5, 6, 10
 (1926) AIR 1926 Mad 574 (V 13)=50 Mad LJ 401, Adaikkala Thevan v. Imperial Bank, Madura Branch 6, 10, 11
 (1919) AIR 1919 All 20 (V 6)=ILR 42 All 98, Ramprasad Singh v. Benaras Bank Ltd. 6
 (1918) AIR 1918 Mad 340 (V 5)=7 Mad LW 328, Krishnapur Mutt by Vidyapurna Thirthaswami v. Vicar of Suratkal Church 6, 10
 S. N. Shelat, for Appellant; G. N. Desai, for Respondent No. 1; J. V. Desai, for K. C. Shah, for Respondent No. 2.

BAKSHI J. :— This Letters Patent Appeal arises out of proceedings for contempt taken out against the appellant for breach of an ad interim injunction granted in Insolvency Petition No. 24 of 1961. In these proceedings, there were two chamber summons one in respect of the transfer of rickshaw bearing No. BYD. 9602 (New No. GJD 1890) and the other in respect of transfer of rickshaw bearing No. BYD 9410 by the appellant in contravention of the order of injunction passed by the Court on 21st March 1960 restraining the appellant and respondent No. 2 from disposing of their property. The injunction was served on the appellant on 22nd March 1960 when an inventory of the property was taken. These two rickshaws were shown as properties belonging to the appellant in Schedule 'A' which was annexed to the main petition and the inventory that was taken in the presence of the first opponent referred to a permit in the name of one Haji Nurmahmad in respect of rickshaw No. 9410 and the name of Jairam Dunger in respect of rickshaw No. 9602. It was the case of the petitioning creditor that rickshaw No. 9602 was transferred on 29th April 1960 and rickshaw No. 9410 was transferred at a date subsequent to the order of injunction and that the appellant had parted with possession of the two rickshaws. The defence of the appellant was that the rickshaws did not belong to him and that he had not committed any breach of the order of injunction. These two applications in respect of the two rickshaws were heard together and the learned Judge of the City Civil Court held that it was established that the two rickshaws belonged to the appellant and the appellant had disobeyed the injunction order issued on 21st March 1960 and ordered the appellant to be committed to civil prison for one day in respect of each of the breach of injunction and further ordered both the punishments to run concurrently. Against this order, the appellant preferred Appeal No. 100 of 1964 in

the High Court which was dismissed summarily by Divan J. on 8th October 1964. It is against that order of dismissal that the present Letters Patent Appeal has been preferred by the appellant.

2. As regards the question of ownership of the two rickshaws, the finding of the learned Judge of the City Civil Court that the two rickshaws belonged to the appellant has not been seriously challenged by Mr. S. N. Shelat appearing on behalf of the appellant. There is sufficient material on the record to support this finding of the learned Judge. In the first place, the two rickshaws were shown in the list of properties annexed to the petition as belonging to the appellant. When an inventory was taken on 22nd March 1960 in the presence of the appellant, two permits in the names of Haji Nurmahmad and Jairam Dunger in respect of the two rickshaws were found. The appellant filed his reply to the main petition as, also to the application for injunction and nowhere in that reply has he denied that the two rickshaws mentioned in the schedule were not of his ownership. Besides this, there are sufficient facts and circumstances which establish beyond doubt the fact that the two rickshaws were of the ownership of the appellant. The evidence discloses that the appellant was in possession of the two rickshaws that the appellant got the two rickshaws plied on hire and collected the income out of such hire; that the appellant maintained day to day accounts of the earnings of these two rickshaws by crediting the earnings and treating them as his own and utilized the same for expenses incurred in connection with the said rickshaws as also for his household and personal expenses. The appellant did not examine the permit holders or the drivers plying the rickshaws to prove his version that the accounts in respect of the two rickshaws were merely maintained on behalf of the drivers and that he had nothing to do with the same.

3. The appellant, stated in his evidence that he had maintained accounts in respect of the rickshaws; that he had given bonus to the rickshaw drivers; that he had given moneys by way of permit charges to the persons, in whose names the permits of the two rickshaws stood and that he had treated the earnings as his own by crediting them on the credit side and then appropriating them towards not only the expenses incurred in respect of the rickshaws but also towards his household expenses. There is no note that has been maintained by the appellant which would show that he was getting a remuneration of Rs. 15 per month in respect of each of the rickshaws. The earnings of these two rickshaws appear to have been credited from day to day and a diary has been maintained in the form

of a cash-book where there are corresponding debit entries showing as to how these earnings were appropriated. The learned trial Judge has referred to the accounts and the entries in detail and the learned advocate for the appellant has not advanced any argument to show that the several entries and the documents referred to by the learned trial Judge were false or that the learned trial Judge had, in any manner, erred in the appreciation of evidence on the basis of which he had come to the conclusion as regards the ownership of the two rickshaws. It must therefore, be held that the two rickshaws were of the ownership of the appellant.

4. It has not been disputed before us that the two rickshaws were transferred subsequent to the order of injunction. The main question that has been canvassed by Mr. Shelat was as regards the legality of the punishment passed by the learned trial Judge against the appellant. Mr. Shelat contended that the order of injunction was passed by the learned trial Judge under clause (b) of Rule 1 of Order XXXIX of the Code of Civil Procedure and that there was no provision in Rule 1 of Order XXXIX or in any other rule of that order empowering the Court to impose any penalty for breach of an injunction granted under Order XXXIX, Rule 1(b). In sub-clause (3) of Rule 2 of Order XXXIX, there is a provision for the imposition of penalty in case of disobedience of the terms of an injunction, but Mr. Shelat contended that sub-clause (3) of R. 2 provided for the breach of the terms of an injunction granted under Rule 2 and not Rule 1 of Order XXXIX. It was contended by Mr. Shelat that a provision for imposing penalty for disobedience of an injunction similar to clause (3) of Rule 2 does not appear below Rule 1 of Order XXXIX and that therefore, the Legislature never intended that a breach of an order for injunction issued under Rule 1 should be punished. On the basis of this argument, Mr. Shelat contended that the learned trial Judge had no power to punish the appellant for breach of the order of injunction passed against him.

5. The exercise of the power to punish for breach of an injunction has been justified by courts in India on two grounds, firstly on the basis of Section 36 read with Order 21, rule 32 of the Civil Procedure Code and secondly on the basis of section 94 read with clause (3) of Rule 2 of Order XXXIX. The Nagpur High Court in the case of Pannalal Bose v. Shreeram Daluram, AIR 1945 Nag 134, has taken the view that disobedience of an injunction issued under Order 39, Rule 1 is not punishable under Order 39, Rule 2(3) but can be dealt with under Order 21, Rule 32 read with Sections 36 and 58, Civil Procedure Code. In that case

at page 136 of the report, it has been observed that —

"The further argument on behalf of the appellant was that the Court below was wrong in its decision that disobedience of an order passed under O. 39, R. 1 Civil P. C. was punishable under O. 39, R. 2(3). It was contended that no penalty is attached for disobedience of an order passed under O. 39, R. 1, Civil P. C., and that therefore the lower Court's order was one without jurisdiction and was illegal. The lower Court relied on ILR 15 Pat 320 = (AIR 1936 Pat 23) wherein the Patna High Court, after reviewing several authorities on the question, came to the conclusion that the penalty provided for by sub-rule (3) of R. 2 of O. 39, Civil P. C., applied also to disobedience of orders passed under R. 1 of the same Order. The appellant's counsel argued that the decision in ILR 15 Pat 320 = (AIR 1936 Pat 23) was wrong and should not be followed. A later decision, reported in ILR (1941) All 295 = (AIR 1941 All 140) was brought to our notice and it was argued that it should be held that O. 39, R. 2(3), Civil P. C., was applicable, not to injunctions issued under R. 1, but only to those issued under Rule 2 of the Order. The entire case law has been reviewed in ILR (1941) All 295 = (AIR 1941 All 140). The Patna decision, ILR 15 Pat 320 = (AIR 1936 Pat 23) is based on a comparison of Rr. 1 and 2 of O. 39, Civil P. C., with Ss. 491 and 493, Civil P. C., 1882. It is, however, admitted by the Judges who decided that case that the construction they were placing on the rules as they stood was by declaring that the drafting was not lucid and that it was desirable for the Legislature to re-draft R. 2, perhaps by replacing R. 2(3), with such modifications as may be required, by a new rule 2A. The very decision therefore, indicates that the construction that the Judges wanted to put on the two rules of O. 39, Civil P. C., viz. Rr. 1 and 2, and in particular R. 2(3), was not logical one but a strained one. They had to state that the drafting was defective, but they thought that the intention was to punish disobedience of injunctions where the injunction was issued under R. 1 or R. 2 of O. 39. This again, was based on the fact that the Legislature was not likely to omit the provision of a penalty for breach of an injunction under O. 39, R. 1, Civil P. C. As the rules stand, no penalty has been prescribed for breach of a temporary injunction granted under O. 39, R. 1. ** **"

Inasmuch as R. 2 refers to a temporary injunction granted in a suit for restraining the defendant from committing a breach of contract or other injury of any kind, sub-rule (3) provides that the Court may attach his property or put him in the civil prison in case of disobedience.

1969

Inasmuch as sub-rule (3) is a part of main R. 2 the necessary inference is that it provides a penalty only for the disobedience of an injunction issued in the special circumstances mentioned in R. 2. This appears to be the reasonable construction that can be placed on Rr. 1 and 2 of O. 39. The Allahabad High Court in ILR (1941) All 295 at p. 300=(AIR 1941 All 140 at p.142) has pointed out that the interpretation put by the Patna High Court was not a natural one, and that it was not necessary to strain the meaning of O. 39, R. 2(3), as it was possible to enforce the injunction issued under R. 1 under the provisions of S. 36 and O. 21, R. 32 Civil P. C. The Allahabad High Court has thus pointed out that the Legislature has not omitted to provide a penalty for disobedience of an injunction issued under O. 39, R. 1. The difficulty therefore expressed by the Patna High Court vanishes if the argument of the Allahabad High Court be correct. Section 36, Civil P. C. lays down that—

"the provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders."

Under O. 21, R. 32 injunctions contained in decrees can be enforced in certain ways, and by the application of S. 36 an order under O. 39, R. 1, Civil P. C. can be enforced by imposing a penalty such as is provided for in O. 21, R. 32. Order 21, R. 32 lays down:

"(1) Where the party against whom a decree . . . for an injunction has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree . . . for an injunction by his detention in the civil prison, or by the attachment of his property or by both.

This is a penalty that is almost the same as the one contained in O. 39, R. 2 (3). The period of detention in the civil prison will, however, be regulated by the provisions of S. 58, Civil P. C. Agreeing with the Allahabad High Court we respectfully dissent from the view taken in ILR 15 Pat 320=(AIR 1936 Pat 23) and hold that disobedience of an injunction issued under O. 39, R. 1, Civil P. C., is not punishable under O. 39, R. 2(3), but can be dealt with under O. 21, R. 32, read with Ss. 36 and 58, Civil P. C."

In this case, the Nagpur High Court followed a similar view that was taken by the Allahabad High Court in the case of Janak Nandini v. Kedar Narain Singh, AIR 1941 All 140.

6. The other view that sub-clause (3) of Rule 2 of Order XXXIX applies to cases of disobedience of all injunctions issued under section 94 of the Civil Procedure Code was taken by the Madras

High Court in *Adaikkala Thevan v. Imperial Bank, Madura Branch*, AIR 1926 Mad 574. At p. 574, the relevant observations are as follows:—

"Under S. 94, Civil Procedure Code, the Court is empowered to commit a person guilty of disobedience of an injunction to the civil prison and to direct that his property shall be attached and sold. O. 39, R. 2(3) prescribes the punishment and under it, the person in default may be detained in the civil prison for a term not exceeding six months, and his property may be attached. The drafting of this rule, as has been pointed out in *Ramprasad Singh v. Benaras Bank Ltd.*, ILR 42 All 98=(AIR 1919 All 20) is somewhat martistic, but there is no doubt that it applies to disobedience generally of an injunction granted by the Court. O. 39, R. 2(3) applies not only to disobedience of an order issued under Clauses (1) and (2) of that rule but has a more general application, it applies alike to disobedience of all injunctions issued under S. 94. See also *Krishnapur Mutt by Vidyapurna Thirthaswami v. Vicar of Suritkal Church*, AIR 1918 Mad 340."

In *T. K. Nagaiah v. D. Sambaiiah*, AIR 1963 Andh Pra 136, it was held that a combined reading of S. 94 and O. 39, Rr. 1 and 2 would lead to the conclusion that the punishment prescribed by sub-rule (3) of R. 2 applies to an injunction issued under O. 39 and S. 94. In that decision, the decisions of the Madras High Court in AIR 1926 Mad 574 referred to above and AIR 1936 Pat 23 and AIR 1946 Pat 47 were relied upon. It was observed at page 137 that—

"A perusal of Sec. 94 C. P. C. clearly indicates that it is intended to take in breaches of all injunctions, that section being couched in general terms. We are not persuaded that the generality and scope of relevant statutory provisions should be confined to breach of injunctions issued under R. 2 of Order 39, C. P. C. It is true that the provision containing the punishment for disobedience of injunctions is included as part of rule 2 but that is not decisive of the matter. Order 39 C. P. C. has to be read in the light of Sec. 94 C. P. C. In our considered judgment, this was intended by the legislature to be applied to all breaches of injunctions issued under Order 39 and Sec. 94 C. P. C. It cannot be postulated that the legislature did not provide for penalty through some inadvertence in Order 39, Rule 1 C. P. C. for punishing persons guilty of disobedience of orders of Courts.

7. It is argued for the appellant on the basis of ILR (1941) All 295=AIR 1941 All 140 and AIR 1945 Nag 134 that the legislature had not omitted to provide a penalty for breach of injunction issued under Order 39, Rule 1, C. P. C. in that the injunctions contained in Orders could

be enforced under Order 21, Rule 32 read with Section 36 C. P. C. and that it would not be natural to interpret Order 39, Rule 2, sub-rule (3) as covering orders under Order 39, Rule 1. We are unable to assent to the principles enunciated in the two cases cited above.

8. We are not satisfied that Order 21, Rule 32 read with sec. 36 C. P. C. is intended to apply to temporary injunctions issued under Order 39. Order 21, Rule 32 read with section 36 C. P. C. deals with execution of orders. The remedy provided under Order 21, Rule 32 and Sec. 36 could be availed of only by parties to a proceeding and it does not empower a Court suo motu to punish a person for breach of an injunction. These provisions are meant to enable a party to enforce the injunctions contained in the decrees or orders but not for the purpose of empowering a Court to punish a party guilty of disobedience. That being the object of Order 21, Rule 32 read with Sec. 36 C. P. C. resort cannot be had to those provisions for the purpose of punishing a person for breach of an injunction.

9. In our opinion, a combined reading of Section 94 and O. 39, Rr. 1 and 2, C. P. C. leads to the conclusion that the punishment prescribed by sub-rule (3) applies to an injunction issued under Order 39 and S. 94 C. P. C. It may be that sub-rule (3) was drafted somewhat inartistically but the intendment of the legislature appears to be clear, namely to punish persons guilty of violation of injunctions issued under either of the two rules.

10. We are fortified in this opinion of ours by the judgment of a Division Bench of the Madras High Court in 50 Mad LJ 401=AIR 1926 Mad 574. Venkata Subba Rao and Madhavan Nair JJ., laid down in that case that sub-rule (3) of rule 2 applies not only to disobedience of orders issued under clauses 1 and 2 of that rule, but it applies equally to disobedience of an injunction issued under Section 94 of the Code. The learned Judges referred with approval to the judgment of Kumaraswamy Sastri J.; in 7 Mad LW 328: AIR 1918 Mad 340. The view taken by the Patna High Court in Jang Bahadur Singh v. Chabila Koiri, ILR 15 Pat 320=AIR 1936 Pat 23 and Sitaram v. Lachminarain, ILR 24 Pat 606=AIR 1946 Pat 47 is in accord with this doctrine. We are not satisfied that the law stated in 50 Mad LJ 401=AIR 1926 Mad 574 is wrong and that it requires reconsideration, as suggested by the learned counsel for the appellant. We feel that it brings out clearly the spirit of Sec. 94 and Order 39 C. P. C.

11. It would be convenient here to quote the provisions of Order XXXIX, Rules 1 and 2:

"Where in any suit it is proved by affidavit or otherwise —

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree,

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.

2(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto."

It is, no doubt, true that the provision for penalty for breach of an injunction is not contained as a separate clause in Rule 1 and it is equally true that it is sub-rule (3) of Rule 2 which provides for the disobedience or breach of the terms of an injunction. But that could not be considered to be conclusive of the matter. It appears that by some deficient or inartistic drafting, the provision for imposing the penalty for disobedience of an injunction has been included in sub-rule (2), but the intendment of the Legislature

THE All India Reporter 1969

Jammu & Kashmir High Court

AIR 1969 JAMMU AND KASHMIR 1
(V 56 C 1)

FULL BENCH

S. MURTAZA FAZL ALI C. J., JASWANT
SINGH AND R. N. GURTU JJ.

Bakru and others, Appellants v. Badarudin, Respondent.

Civil Misc. Appeals Nos. 8 of 1965 and 86 of 1966, D/-17-4-1968, against order of Custodian General, Srinagar D/-25-3-1965.

(A) Jammu and Kashmir Evacuees' (Administration of Property) Act (6 of 2006), Ss. 30 (1) (b) and (c), 8, 14 and 25—Area of jurisdiction exercised by Custodian-General in revision — For all practical purposes same as appellate jurisdiction.

A comparative study of Clauses (b) and (c) of Sub-section (1) of S. 30 of the Act would show that, whereas Cl. (b) allows an appeal only from the original or appellate order passed by the Custodian, an Additional Custodian or an authorised Deputy Custodian, no such restriction is imposed by Cl. (c) which is couched in very wide terms. The intention of the Legislature obviously was to confer on the High Court the power to entertain and hear appeals from all orders passed by the Custodian-General, whether on his appellate or revisional side. It would be pertinent in this connection to observe that the area of jurisdiction exercised by the Custodian-General is very wide and is for all practical purposes the same as the area of appellate jurisdiction. Therefore, an appeal lies to the High Court from an order passed by the Custodian-General in revision against an order made by the Custodian, an additional Custodian or an authorised Deputy Custodian under Ss. 8, 14 or 25 of the Act. AIR 1956 SC 77 Foll.; AIR 1957 Madh Pra 32, Rel. on. (Para 7)

(B) Jammu and Kashmir Evacuees' (Administration of Property) Act (6 of 2006) S. 30 (c) — Word "the" occurring in Cl. (c) does not oust High Court's jurisdiction to hear appeal from Custodian-General's order.

As Cl. (c) of S. 30 is couched in words of wide amplitude and the Legislature has not limited the right of appeal to the High Court from an order of the Custodian-General by providing that appeal would lie only against appellate orders of the Custodian-General and as the area of two jurisdictions — appeal and revision — is indistinguishable and, in fact, co-extensive, the use of the word "the" should not deter the High Court from holding that the jurisdiction of High Court to entertain appeal against an order of the Custodian-General is comprehensive so as to include within its sweep the order passed by the Custodian-General in exercise of his appellate as well as revisional powers. Any other construction would lead to absurd results and leave the door open to any litigant to oust the jurisdiction of the High Court by styling his remedy before the Custodian-General as a revision instead of an appeal. Grammatical niceties should not be resorted to without necessity and rules of grammar may be departed from and construction in conformity with the main object and intention of the statute may be put. AIR 1934 All 388, Rel. on. (Para 8)

Cases	Referred:	Chronological	Paras
(1957) AIR 1957 Madh Pra 32	(V 44) = 1957 Jab LJ 210, Badrul Sharma v. Custodian of Evacuee Property		7
(1956) AIR 1956 SC 77 (V 43) = (1955) 2 SCR 1117, Indira Sohanlal v. Custodian of Evacuee Property			7
(1934) AIR 1934 All 388 (V 21) = ILR 56 All 781, Mt. Mewa Kunwar v. Bourey			8

Amar Chand and J. N. Bhan, for Appellants; A. K. Malik and B. L. Suri, for Respondent.

JASWANT SINGH J.: The short question that has been referred for decision to the Full Bench by a Division Bench of this Court in Civil Miscellaneous Appeals Nos. 8 of 1965 and 86 of 1966 is whether an appeal lies to the High Court from an order of the Custodian-General passed by him in revision against an order made by the Custodian, an Additional Custodian or an authorised Deputy Custodian under Sec. 8, Section 14 or Section 25 of the Evacuees' (Administration of Property) Act, 2006, hereinafter referred to as 'the Act'.

2. At the hearing of the reference, the learned counsel for the appellants have urged that a comparison of Clause (c) with Clauses (a) and (b) of sub-section (1) of Section 30 of the Act would show that under Clause (c) it is not necessary for an appeal to lie to the High Court that the order appealed against should have been passed by the Custodian-General in exercise of his appellate powers. They submit that the qualifications attached to the orders by Clauses (a) and (b) being absent in Cl. (c) of Section 30 (1) of the Act, the High Court's jurisdiction to entertain appeals against the orders passed by the Custodian-General in revision is not barred.

3. They have further contended that the only restriction against an appeal to the High Court from the order of the Custodian-General is that contained in the proviso to Clause (c) which lays down that no appeal shall lie to the High Court against concurrent finding of the Custodian, and the Custodian-General.

4. The learned counsel have further urged that the area of jurisdiction exercised by the High Court in appeal and revision is the same, and a person cannot oust the jurisdiction of the High Court by filing a revision instead of an appeal before the Custodian-General. They have strenuously argued that such a construction should be put on Clause (c) of Section 30 (1) of the Act as would suppress the mischief and advance the remedy.

5. Mr. Malik, on the other hand, has submitted that the use of the word "the" in Clause (c) of sub-section (1) of Sec. 30 of the Act is very significant. He submits that the word "the" particularises the order passed by the Custodian-General and refers only to the order passed by him on the appellate side and not on the revisional side. According to Mr. Malik, it is only the appellate order made by the Custodian-General that is made appealable to the High Court.

6. We have heard the learned counsel for the parties at length and have given our anxious consideration to the point involved in this reference. For the purpose of this reference we consider it unnecessary to set out the facts of the aforementioned appeals.

7. To appreciate the question that has been referred to us and to give a satisfactory answer thereto, it would be necessary to consider the scope of Section 30 of the Act which reads as under:—

"Any person aggrieved by an order made under Section 8, Section 14 or Section 25 may prefer an appeal—

(a) to the Custodian, where the original order has been passed by a Deputy or an Assistant Custodian;

(b) to (the Custodian-General) where the original (or appellate) order has been passed by the Custodian, an additional Custodian, or an authorised Deputy Custodian;

(c) to the High Court against the order of the Custodian-General:

Provided that no appeal shall lie to the High Court against concurrent finding of the Custodian and the Custodian-General.

2. The appeal shall be presented in such manner and within such time as may be prescribed.

3. The Custodian to whom the appeal is preferred under Clause (a) of sub-section (1) may dispose of it, himself or may make it over for disposal to an Additional Custodian or to a Deputy Custodian authorised by the Custodian in writing in this behalf (in this section referred to as 'the authorised Deputy Custodian'):

Provided that no appeal from an order of a Deputy Custodian shall be made over for disposal to the authorised Deputy Custodian.

4. The (Custodian-General), Custodian, Additional Custodian or authorised Custodian may at any time, either on his own motion or on application made to him in this behalf call for the record of any proceeding under this Act which is pending before or has been disposed of by an officer subordinate to him for the purpose of satisfying himself as to the legality or propriety of any order passed in the said proceeding and may pass such order in relation thereto as he thinks fit. Provided that the (Custodian-General), the Additional Custodian or the authorised Deputy Custodian shall not, under this sub-section, pass an order revising or modifying any order affecting any person without giving such person (a reasonable) opportunity of being heard:

Provided further that if one of the officers aforesaid takes action under this sub-section, it shall not be competent for any other officer to do so.

5. The (Custodian-General), Custodian, Additional Custodian or authorised Deputy Custodian but not a Deputy or an Assistant Custodian may, after giving notice to the parties concerned, review his own order.

6. Subject to the foregoing provisions of this section, any order made by the (Custodian-General), Custodian, Additional Custodian, authorised Deputy Custodian, Deputy Custodian or Assistant Custodian shall be final and shall not be called in question in any Court by way of appeal or revision or

in any original suit, application or execution proceeding."

A comparative study of Clauses (b) and (c) of sub-sec. (1) of Sec. 30 of the Act would show that whereas Clause (b) allows an appeal only from the "original" or "appellate" order passed by the Custodian, an Additional Custodian or an authorised Deputy Custodian, no such restriction is imposed by Clause (c) which is couched in very wide terms. The intention of the Legislature obviously was to confer on the High Court the power to entertain and hear appeals from all orders passed by the Custodian-General, whether on his appellate or revisional side. It would be pertinent in this connection to observe that the area of jurisdiction exercised by the Custodian-General in revision is very wide and is for all practical purposes the same as the area of appellate jurisdiction. In *Indira Sohanlal v. Custodian of Evacuee Property*, reported in AIR 1956 SC 77, their Lordships of the Supreme Court who had occasion to examine the scope of Section 27 of the Administration of Evacuee Property Act which is *pari materia* with Section 30 of our Act, observed as follows:—

"It is next contended that the revisional power cannot be exercised when there was an appeal provided but no appeal was filed, that it was open to the Assistant Custodian who appeared before the Custodian-General in support of the notice for revision or to the allottees of the property in whose interest the revisional order appears to have been passed, to file an appeal under the Act as persons aggrieved.

Section 27, however, is very wide in its terms and it cannot be construed as being subject to any such limitations. Nor can the scope of revisional powers be confined only to matters of jurisdiction or illegality as is contended because under Section 27 the Custodian-General can exercise revisional powers for the purpose of satisfying himself as to the legality or propriety of any order of the Custodian."

Again in *Badrul Sharma v. Custodian of Evacuee Property*, AIR 1957 Madh Pra 32, it has been held that the revisional powers of the Custodian-General are very wide and for all practical purposes indistinguishable from his appellate powers. From the aforesaid authorities, it is clear that the Custodian-General exercises unfettered powers while hearing a revision and can pass any order that he may deem to be proper and warranted by the facts and circumstances of a case. We are, therefore, unable to accede to the contention of Mr. Malik that an appeal, from an order passed by the Custodian-General in revision against an order made by the Custodian, an Additional Custodian or an authorised Deputy Custodian under Section 8, Section 14 or Section 25 of the Act, is not maintainable.

8. The contention of Mr. Malik with respect to the use of the word "the" occurring in Clause (c) of Section 30 also appears to

us to be unsustainable. As Clause (c) is couched in words of wide amplitude and the Legislature has not limited the right of appeal to the High Court from an order of the Custodian-General by providing that an appeal would lie only against appellate orders of the Custodian-General and as the area of two jurisdictions, appeal and revision, is indistinguishable and in fact co-extensive, we think that the use of the word "the" should not deter us from holding that the jurisdiction of the High Court to entertain an appeal against an order of the Custodian-General is comprehensive so as to include within its sweep the order passed by the Custodian-General in exercise of his appellate as well as revisional powers. Any other construction, in our opinion, would lead to absurd results and leave the door open to any litigant to oust the jurisdiction of the High Court by styling his remedy before the Custodian-General as a revision instead of an appeal. The use of the word "the" instead of the word "an" cannot, therefore, alter the construction that is to be put on Clause (c) of Section 30 of the Act. It would be advantageous in this connection to state that John Bouvier, a celebrated author, while defining the word "the" in his work entitled "Bouvier's Law Dictionary and Concise Encyclopaedia" has observed as follows:—

"Grammatical niceties should not be resorted to without necessity."

Reference in this connection may also be made to another authority reported in AIR 1934 All 388, where it was held that the rules of grammar may be departed from and construction in conformity with the main object and intention of the statute may be put.

9. The legislative history of the law relating to evacuee property also seems to lend support to our opinion. We have had so far two principal Acts relating to this subject in our State, the first being the Jammu and Kashmir Evacuees' (Administration of Property) Act, 2005 (Act No. 10 of 2005) and the second being the Jammu and Kashmir Evacuees' (Administration of Property) Act, 2005 (Act No. 6 of 2006) which repealed the earlier Act of 2005. Section 7 of the Act No. 10 of 2005 conferred only a limited right of appeal. It entitled only a person aggrieved by an original order of an Assistant or Deputy Custodian of an evacuee property passed under Sec. 6 of the Act (i.e., an order passed on an application seeking confirmation of a sale, mortgage, pledge, lease, or other transfer of any interest or right in or over any property made by an evacuee or an intending evacuee) to go up in appeal within sixty days from the date of the order to the Custodian of Evacuee Property. Sec. 30 of the latter Act as originally enacted and as it stood before the 1st of Phagan 2007, (Bikrami) ran as under:—

"Appeal, review or revision: 30. Any person aggrieved by an order made under

Section 8, Section 14, or Section 25 may prefer an appeal—

(a) to the Custodian where the original order has been passed by a Deputy or an Assistant Custodian;

(b) to the High Court where the original order has been passed by the Custodian, an Additional Custodian or an authorised Deputy Custodian.

2. The appeal shall be presented in such manner and within such time as may be prescribed.

3. The Custodian to whom the appeal is preferred under Clause (a) of sub-section (1) may dispose of it himself or may make it over for disposal to an Additional Custodian or to a Deputy Custodian authorised by the Custodian in writing in this behalf (in this section referred to as the authorised Deputy Custodian): Provided that no appeal from an order of a Deputy Custodian shall be made over for disposal to the authorised Deputy Custodian.

4. The Custodian, Additional Custodian or authorised Deputy Custodian may, at any time, either on his own motion or on application made to him in this behalf, call for the record of any proceeding under this Act, which is pending before or has been disposed of by an officer subordinate to him for the purpose of satisfying himself as to the legality or propriety of any order passed in the said proceeding and may pass such order in relation thereto as he thinks fit:

Provided that the Custodian, the Additional Custodian or the authorised Deputy Custodian shall not, under this sub-section, pass an order revising or modifying any order affecting any person without giving such person an opportunity of being heard:

Provided further that, if one of the officers aforesaid takes action under this sub-section, it shall not be competent for any other officer to do so.

5. The Custodian, Additional Custodian or authorised Deputy Custodian but not a Deputy or an Assistant Custodian may, after giving notice to the parties concerned, review his own order.

6. Subject to the foregoing provisions of this section, any order made by the Custodian, Additional Custodian, Deputy Custodian, or Assistant Custodian, shall be final and shall not be called in question in any Court by way of appeal or revision or in any original suit, application or execution proceeding”.

It will be noticed that Section 30 of the Act, as it stood before the 1st Phagan 2007, provided that any person aggrieved by an order made under Section 8 (i.e., an order made on a claim preferred by any person in respect of any right to or interest in any property which is notified under S. 6 as evacuee property or in respect of which a demand regarding surrender of possession is made by the Custodian), Section 14 (i.e.,

an order made on an application by an evacuee or an heir of an evacuee for restoration of an evacuee property) or Section 25 (i.e., an order made on an application seeking confirmation of the Custodian to a transfer of a right or interest in any evacuee property by an evacuee or any person on his behalf) could prefer an appeal (a) to the Custodian when the original order was made by a Deputy or an Assistant Custodian, and (b) to the High Court when the original order was passed by the Custodian, an Additional Custodian or an authorised Deputy Custodian. Both under Act 10 of 2005 and Act 6 of 2006, as it stood before 1st Phagan 2007, the Custodian-General did not figure in the hierarchy of officers which were to be appointed by the Government for the performance of the duties under the Act. It was only by the Amending Act No. 23 of 2007, that a new functionary by the name of the Custodian-General was created for the first time in our State and Section 30 of the principal Act 6 of 2006 was substituted by a new section which has been reproduced at the beginning of this opinion. It is manifest that whereas under Section 30, as it originally stood, the right of appeal to the High Court was limited to the original order made under Section 8, Section 14 or Section 25 by the Custodian, Additional Custodian or authorised Deputy Custodian, by Section 30 (1) (c) as amended by the amending Act 23 of 2007, not only wide powers of appeal and revision were conferred on the Custodian but trammels on the appellate jurisdiction of the High Court were removed to a large extent and any order passed by the Custodian-General in appeal or revision from the order made by the Custodian, an Additional Custodian or an authorised Deputy Custodian under Section 8, Section 14 or Section 25 of the Act, was made amenable to the appellate jurisdiction of the High Court with one condition only that the order of the Custodian-General should not have affirmed the findings of the Custodian.

10. We are, therefore, clearly of the opinion that on a true interpretation of Section 30 of the Act, an appeal from an order of the kind aforesaid passed by the Custodian-General on revisional side is maintainable and would lie to the High Court provided the findings of the Custodian and the Custodian-General are not concurrent.

11. The reference is answered accordingly.

The files shall go back to the Bench concerned for decision of the appeals on merits.

12. S. M. FAZL ALI, C. J.: I agree.

13. GURTU J.: I agree.

DGB/D.V.C.

Order accordingly.

AIR 1969 JAMMU AND KASHMIR 5
(V 56 C 2)

FULL BENCH

S. MURTAZA FAZL ALI, C. J., J. N. BHAT AND ANANT SINGH, JJ.

Rattan Lal, Petitioner v. State, Respondent.

Criminal Revn. No. 69 of 1968, D/-18-7-1968, from order of S. J., Jammu, D/-17-1-1968.

Jammu and Kashmir Constitution Act (14 of 1996), Ss. 5 and 38 — Jammu and Kashmir Essential Supplies (Temporary Powers) Ordinance, 2003 — Difference between Ordinance issued under S. 5 and one issued under S. 38 — Former has a force of law and no Court can challenge its legality — The latter, however, will be a law for six months — Essential Supplies (Temporary Powers) Ordinance, having been issued under S. 5 has force of law — Prosecution under it is not barred, AIR 1964 SC 381 and AIR 1966 Raj 247, Rel. on.

(Paras 4, 5 and 6)

Cases Referred: Chronological Paras

(1966) AIR 1966 Raj 247 (V 53)=
1966 Cri LJ 1338, Ghasi Ram v.
State

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(1964) AIR 1964 SC 381 (V 51)=
(1964) 1 Cri LJ 269, Makhan
Singh v. State of Punjab

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(1954) AIR 1954 SC 683 (V 41)=
1954 Cri LJ 1736, State of Uttar
Pradesh v. Seth Jagamander Das

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(1951) AIR 1951 All 703 (V 38)=
52 Cri LJ 1094, Jugmendar Das v.
State

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I. D. Grover, for Petitioner; Amar Chand,
Addl. Advocate-General, for Respondent.

BHAT J.: The petitioner was prosecuted under Section 3/7 of the Essential Supplies (Temporary Powers) Ordinance, 2003 before the Sub-Registrar, Magistrate, Jammu. An objection was raised on behalf of the petitioner before the learned Sub-Registrar that the prosecution was not maintainable. The Sub-Registrar-Magistrate rejected this contention of the petitioner on 11-7-1967 against which a revision petition was preferred before the learned Sessions Judge, Jammu, who also by means of his order dated 17th January 1968, rejected the revision petition. A further revision has been presented in this Court against the order of the two Courts below.

2. We have heard the learned counsel for the petitioner as well as the Additional Advocate-General.

3. The argument of Mr. Inderdass Grover is that the Essential Supplies (Temporary Powers) Ordinance, 2003, was promulgated by His Highness for a limited period. It was during the war that the promulgation of this Ordinance to control the import, export, production, supply and distribution of and trade and commerce in

IL/IL/D793/68

food-stuffs, etc., became necessary. The war came to a close in the year 1946. As the Preamble of the Ordinance indicated, it was for a limited period, the Ordinance came to a close since the war was over. Therefore, the Ordinance having spent its force, no prosecution could be launched under it.

An alternative argument was advanced by Mr. Grover to the effect that even if the Ordinance was promulgated by His Highness under the Constitution Act of 1996, under Section 38 of the same, it could last only for six months and the Jammu and Kashmir Defence Act, 1996 (Act No. 21 of 1996) could remain in force during the continuance of the last war and for a period of six months thereafter. His further argument was that under Part XVIII of the Constitution of India, the power to declare an emergency vested in the President only. This Part XVIII of the Constitution of India was made applicable to the State of Jammu and Kashmir, excepting Articles 358, 357 and 360. There was a proviso added to Article 352 which shall be mentioned hereafter. Therefore, according to the learned counsel for the petitioner, after the 14th day of May 1954, the power of emergency legislation vested in the President of India and will be deemed to have been taken away from the State Legislature or any other authority who could, before the introduction of the Constitution into the State of Jammu and Kashmir, promulgate such Ordinance.

4. We shall examine these arguments separately. The Essential Supplies (Temporary Powers) Ordinance, 2003, was promulgated by His Highness under Sec. 5 of the Jammu and Kashmir Constitution Act, 1996 (Act No. 14 of 1996), and came into force from the 15th day of Assuj 2003. The Preamble of this Ordinance says:

"Whereas an emergency has arisen which makes it necessary to provide for the continuance during a limited period of powers of control, the import, export, production, supply and distribution of, Now, therefore, in exercise of the powers reserved under Section 5 of the Jammu and Kashmir Constitution Act, 1996, His Highness is pleased to make and issue the following Ordinance."

The emphasis of the argument of Mr. Grover is that admittedly this Ordinance was enforced or promulgated for a "limited period", the limited period began from 15th Assuj 2003, which is equivalent to 1946 A.D. At the worst, the Ordinance could be held to be alive during the war or in the words of Jammu and Kashmir Defence Act, 1996, for six months after the war. The war came to an end in the year 1946 and therefore any prosecution under this Ordinance in the year 1966 would be meaningless because the Ordinance would have had spent its force. The introduction of Jammu and Defence Act, 1996, or Defence Rules in this argument is not at all

warranted or called for. The prosecution is not launched under the Defence of Jammu and Kashmir Act or the Defence Rules of the State. This is a separate piece of legislation in the shape of an Ordinance promulgated by the erstwhile Ruler. While discussing this aspect of the case, the argument of Mr. Inderdass Grover was that under Section 38 of the Jammu and Kashmir State Constitution Act of 1996, the life of an Ordinance would be only six months from the date of its promulgation. Therefore, he argued, this Ordinance was no longer law; but the learned counsel's argument fails to see the force of an Ordinance issued by His Highness u/s 5 of the J. & K. Constitution Act of 1996 and issued under Section 38 of the same under Section 5 of the Jammu and Kashmir Constitution Act "all powers, legislative, executive and judicial, in relation to the State and its government are hereby declared to be and to have always been inherent in and possessed and retained by His Highness and nothing contained in this or any other Act shall affect or be deemed to have affected the right and prerogative of His Highness to make laws, and issue proclamations, orders and ordinances by virtue of his inherent authority".

If His Highness issued any ordinance, it had the force of law as if it had been passed by the Legislature of the State and no Court or authority could question its legality or validity.

The Ordinance contemplated under Section 38 lays down that the Council may, in case of emergency or where immediate legislation is required in any matter affecting the peace and good government of the State submit to His Highness an Ordinance and such Ordinance on being assented to by His Highness shall have the force of law for a period not exceeding six months from the date of its promulgation. The plain reading of this section would make it clear that an ordinance issued under that section would be issued (1) on the recommendation of the Council; (2) when immediate legislation was required; (3) it must be pertaining to the peace and good government of the State; (4) after receiving the assent of His Highness it would be law for six months. But the Essential Supplies (Temporary Powers) Ordinance, 2003, was promulgated by His Highness under his inherent authority as contained in Section 5 and therefore it had the force of law, unless repealed by any competent authority which would be either His Highness himself or the State Legislature under the new Constitution of the State.

5. Then again we take up the words "a limited period" so much emphasised upon by Mr. Inderdass Grover. His argument was that the Ordinance was promulgated for a limited period, which according to him should be construed as the period of war or at the most six months thereafter, which means that after October 1946 when the war came to an end, six months there-

after the Ordinance would be deemed to have spent its force. In support of this contention he cited two authorities: AIR 1951 All 703 and AIR 1954 SC 683. In fact the same case which was decided by the Allahabad High Court and reported as AIR 1951 All 703, went in appeal to the Supreme Court and its decision was reported in AIR 1954 SC 683. The relevant portion of that decision lays down that:—

"When a statute is repealed or comes to an automatic end by efflux of time, no prosecution for acts done during the continuance of the repealed or expired Act can be commenced after the date of its repeal or expiry because that would amount to enforcement of a repealed or a dead Act. In cases of repeal of statutes this rule stands modified by Section 6 of the General Clauses Act. An expiring Act, however, is not governed by the rule enunciated in that section."

So far as this proposition of law is concerned, there can be no dispute about it. When a certain piece of legislation has ceased to exist, any prosecution under the same would be making a dead horse gallop. When there is no life in the horse, how can it gallop? Therefore, any prosecution launched under a repealed Act or Ordinance is meaningless and cannot be maintained. What is the crux of the matter is that who can decide whether the limited period for which this Essential Supplies (Temporary Powers) Ordinance, 2003, was promulgated, has expired or not. In our opinion it is not the Courts which can say that a particular emergency has either arisen or has come to an end. It is for the authority in whom the power to declare the emergency is vested, to declare by any subsequent declaration that the emergency has ceased. The Courts cannot substitute their opinion when the emergency should be deemed to have come to an end. In this view we are supported by the following authorities: AIR 1964 SC 381 and AIR 1966 Raj 247. In the Supreme Court authority it has been held:

"...The fact that emergency may last for a long period and as a consequence citizens may be precluded from enforcing fundamental rights under Articles 14, 21 and 22 during the period of the order has no bearing on the validity of detention. How long the Proclamation of Emergency should continue and what restrictions should be imposed on the fundamental rights of citizens during the pendency of the emergency, are matters which must inevitably be left to the executive because the executive knows the requirements of the situation and the effect of compulsive factors which operate during the periods of grave crisis".

In the Rajasthan authority it has been laid down that—

"It cannot be said that there was no justification for the continuance of the procla-

mation of emergency at the date of the petitioner's detention in 1964 when the proclamation was made at the time of the Chinese aggression in September 1962; because the question whether the proclamation of emergency should have been allowed to continue or remain in force has by the Constitution, been left exclusively to the discretion and judgment of the President or in the last resort, of the Parliament; these organs know the requirements of the situation and it is not for the Courts to interpose themselves in such matter."

Therefore, when once a legislation has been passed by a competent authority on the basis of an emergency, how long that emergency should continue is a matter entirely within the discretion of that authority. The Courts cannot place their own interpretation or judge the matter independently. Unless the emergency or, as in this case, the short period is expressly stated to have been over, the Ordinance will continue to be in force. It is for the executive or for the State Legislature to examine the local conditions, the conditions relating to the control, the import, export, production, etc., of food-grains in order to make and keep the effective supply of the same for the public at large; they have the power under this Act to control these factors. Therefore, this argument of Mr. Inderdass is of no avail to him. The State has two Houses of Legislature. If the Legislature feels that there is no necessity for continuing this power of control over the food-grains, it can very easily repeal this Ordinance by means of proper legislation. Till that is done, this Ordinance which was issued under the inherent powers of the erstwhile Ruler shall have the force of law and shall continue to remain on the statute book of the State.

6. The other argument under Part XVIII of the Constitution of India is also not well founded. This chapter of emergency was introduced in the Constitution of India to safeguard against the emergencies which arise on account of three factors, namely, (1) an emergency due to external aggression and internal disturbance; (2) an emergency due to failure of constitutional machinery in States; and (3) financial emergency. Under Article 352 of the Constitution, a proclamation of emergency may be made by the President when he is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance. Under Article 356 a proclamation of emergency may be issued on account of failure of constitutional machinery in any State. The President is empowered to make a proclamation under this article whenever he is satisfied that the Government of the State cannot be carried on in accordance with the provisions of the Constitution either on the report of the Governor of the State or otherwise. Under Article 360 a proclamation of financial emergency can be made by the

President whenever he is satisfied that the financial stability or credit of India or of any part of the territory thereof is threatened. Articles 356 and 360 of the Constitution of India are not applicable to the State of Jammu and Kashmir. Under Article 352 there is a proviso which is in the shape of a new Clause (4) added in the case of State of Jammu and Kashmir and it reads as under:—

"No Proclamation of Emergency made on grounds only of internal disturbance or imminent danger thereof shall have effect in relation to the State of Jammu and Kashmir (except as respects Article 354) unless it is made at the request or with the concurrence of the Government of that State."

As would be clear from reciting the above Articles, this Essential Supplies (Temporary Powers) Ordinance, 2003 (Ordinance No. 1 of 2003), was not issued under any of the powers vested in the President under Part XVIII of the Constitution. In fact, when this Ordinance was promulgated, the Constitution of India was not enforced and even after the enforcement of the Constitution of India and its limited application to the State of Jammu and Kashmir from 14th of May 1954, the matter covered by the Essential Supplies (Temporary Powers) Ordinance, 2003, is quite foreign to and is not within the purview of Part XVIII of the Constitution of India. Under Article 372 of the Constitution of India all laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. In the application of this Article to the State of Jammu and Kashmir a reference to the laws in force in the territory of India shall include reference of 'Hidayats', 'Ailans, Ishti-hars, Circulars, Robkars, Irshads, Yadashts, State Council Resolutions, Resolutions of the Constituent Assembly and other instruments having the force of law in the territory of the State of Jammu and Kashmir.

The Essential Supplies (Temporary Powers) Ordinance, 2003, was law in force at the time of application of the Constitution of India to the State. This Ordinance has not up to the time of this decision been repealed by His Highness who promulgated it or after him by his successors, the State Legislature. Therefore, its operation is saved. Under the Constitution of Jammu and Kashmir, Sec. 157 after the repeal of the Jammu and Kashmir Constitution Act, 1996 (14 of 1996), all laws in force in the State immediately before the commencement of this Constitution shall continue in force until altered or repealed or amended by competent authority. Nothing of the sort has been done so far and therefore, the Essential Supplies (Temporary Powers) Ordinance, 2003, continues to be the law in force in the State and any person who con-

travenes any of its provisions can be properly and legally prosecuted under this Ordinance.

7. Therefore, there is no force in this revision petition, which is dismissed.

8. S. MURTAZA FAZL ALI C.J.: I agree.

9. ANANT SINGH J.: I agree.
GGM/D.V.C. Petition dismissed.

AIR 1969 JAMMU AND KASHMIR 8
(V 56 C 3)

JASWANT SINGH, J.

Subhash Chander, Petitioner v. Shri Bodh Raj and another, Respondents.

Civil Revn. No. 202 of 1967, D/-3-5-1968.

Civil P. C. (1908), Ss. 144, 151 — Abuse of process of Court — Restitution — Court has inherent power to grant — (Maxim — Actus Curiae Neminem Gravabit).

The Court has inherent power to rectify its own mistake or mistakes of its officer and to redress the wrong which may have resulted from an abuse of the process of the Court and to order restitution where the ends of justice may so require. Section 151, Civil P. C., which is based on the principle Actus Curiae Neminem Gravabit, an act of the Court shall prejudice no person, covers all such cases. (Paras 7, 8)

Cases Referred: Chronological Paras

(1964) AIR 1964 Mad 404 (V 51) =

ILR (1964) 1 Mad 923, Chokalingam

Asari v. N. S. Krishna Iyer 7

(1959) AIR 1959 Ker 401 (V 46) =

1958 Ker LT 331, Padmanabha

Pillai Govinda Pillai v. Padmanabha

Pillai Raman Pillai 7

(1937) AIR 1937 Mad 694 (V 24) =

1937 Mad WN 342, Radha Bai

Maharanee v. Jagannadha Naidu 7

(1870) 3 PC 465 = 7 Moo PC (NS)

314, Rodger v. Comptoir D'Escompte

De Paris 7

Ishwar Singh, for Petitioner; V. S. Malhotra, for Respondents.

ORDER: This is an application to revise the order dated 31st December, 1966 of the Munsiff, Jammu, holding the application, made before him under Section 151, Civil P. C. by Vinod Kumar respondent No. 2 herein, for restoration of possession of the shop mentioned in the application (on the ground that it was not the shop for which the decree for ejectment against respondent No. 1 had been passed) to be maintainable.

2. The facts relevant for the purpose of this petition are:—

On the 28th April, 1966, an ex parte decree for ejectment from a shop situate on B. C. Road, Jammu, was passed in favour of the petitioner against Bodh Raj respon-

dent No. 1. On the execution of this decree being taken out, a warrant for eviction of the judgment-debtor and delivery to the decree-holder of the possession of the shop for which decree had been passed was issued and the Nazir of the Court was deputed by the Munsiff to deliver possession of the said shop to the decree-holder. On the Nazir making a report that possession of the shop was duly delivered on 2-8-1966, on the Nishandehi of Charanjit Lal, the father of the petitioner decree-holder, the execution application was consigned to the records in full satisfaction of the decree. On the 27th September 1966, the respondent No. 2 made an application before the Munsiff Jammu stating that he had been wrongfully and fraudulently deprived in his absence of possession of the shop which had been got on rent from Rajinder Kumar and in which he was carrying on the business of spare parts, that the shop of which possession had been taken away from him by the Nazir of the Court was not the shop for which decree had been passed and praying that mistake be rectified and possession of the shop be restored to him.

3. The application was resisted by the petitioner-decree-holder contending inter alia that the decree had been satisfied, that the Court had become functus officio, that the application under Section 151, Civil P. C. was not maintainable and that a separate suit ought to have been brought by respondent No. 2 for possession of the shop.

4. The learned Munsiff after considering the objections and hearing the submissions of the learned counsel for the parties held that the application was maintainable and if after summary inquiry it was found that possession of a shop other than the one for which decree had been passed had been delivered action under Section 151, Civil P. C., could be made. With these findings, he called upon the respondent No. 2 to lead evidence in support of his application.

5. Bakshi Ishwar Singh, learned counsel for the petitioner, appearing in support of the revision application has contended that the Munsiff has grossly erred and exceeded his jurisdiction in holding that the application under Section 151, Civil P. C., was maintainable.

6. Mr. V. S. Malhotra, learned counsel for respondent No. 2 has on the other hand, contended that Section 151, Civil P. C. covered the case and no interference was called for with the order of the Munsiff Jammu.

7. After careful consideration of the matter and examination of the law bearing on the matter, I am of opinion that Section 151, Civil P. C., which is based on the principle Actus Curiae Neminem Gravabit—an act of the Court shall prejudice no person, covers all such cases where the act of the Court or any of its officers has resulted in some injury to a party or where there has been an abuse of the process of the Court.

I am fortified in this view by a judgment of Privy Council in *Rodger v. Comptoir d'Escompte De Paris*, (1870) 3 PC 465 = 7 Moo PC (NS) 314, where it was held that it is the duty of the Court to take care that no act of the Court in the course of whole proceedings does an injury to the suitors in the Court. Further support for this view is also available from another authority reported in AIR 1937 Mad 694, where it was held that Section 151, Civil P. C. could be utilized where through a mistake or a material irregularity of the Court, the property has been sold such as when one property has been attached and another has been sold. Again in AIR 1959 Ker 401, it was held that petition under Section 151, Civil P. C. is maintainable where the executing Court acts without jurisdiction and commits a mistake in directing delivery of a specific plot of land contrary to the terms of the decree. Reference may also be made with advantage to AIR 1964 Mad 404, where it was held that Sec. 144, Civil P. C. was not exhaustive of the powers of the Court to order restitution and in suitable and appropriate cases, where ends of justice require, restitution can be ordered under the Court's inherent jurisdiction under Sec. 151, Civil P. C.

8. Keeping in view the aforesaid authorities, I hold that the Court has inherent power to rectify its own mistake or mistakes of its officer and to redress the wrong which may have resulted from an abuse of the process of the Court and to order restitution where the ends of justice may so require. The learned Munsiff was, therefore, right in holding that the application filed by respondent No. 2 herein for restitution was maintainable.

9. For the foregoing reasons, I find no force in this revision which was dismissed with costs.

HGP/D.V.C. Revision dismissed.

AIR 1969 JAMMU AND KASHMIR 9 (V 56 C 4)

FULL BENCH

S. MURTAZA FAZL ALI, C. J., J. N. BHAT AND ANANT SINGH, JJ.

Nasib Singh, Appellant v. Bajo Ram, Respondent.

Second Appeal No. 59 of 1966, D/-29-4-1968, from order of Dist. and S. J., Udhampur, D/-25-6-1966.

(A) Tenancy Laws — Jammu and Kashmir Tenancy Act (2 of 1923) (as amended by Act 12 of 1955), Ss. 85, 2 (5) and 56 (1) — Disposition of tenant by landlord — Remedies for tenant — Civil suit maintainable — No alternative right to proceed in Revenue Court (Per majority) — (Civil P. C. (1908), S. 9) — (Specific Relief Act (1877), S. 9).

(Per Ali, C. J., and Bhat J., Anant Singh J. Contra):

Section 85 as amended in 1955 does not contain any provision giving a tenant, after he is wrongfully dispossessed by the landlord, an alternative right to recover possession by taking proceedings in Revenue Court. Once a tenant is dispossessed he ceases to be a tenant as defined in the Tenancy Act. He has, therefore, no right to be reinstated under the Act. However, he has a possessory title, which is a good title in a person to be granted a decree for possession under S. 9, Specific Relief Act. Such a tenant therefore gets a right to recover possession under the general law by instituting a suit in a Civil Court and not by proceeding in a Revenue Court. AIR 1965 J and K 56, Approved; AIR 1942 Lah 217 (FB) and AIR 1962 SC 547, Rel. on; AIR 1965 Punj 321 (FB), Disting. (Para 20)

(Per Anant Singh, J. Contra): A dispossessed occupancy tenant has two remedies open to him. One is the cheap and shorter one to make an application before the Revenue Court within six months for re-instatement, as provided in Sec. 56 of the Tenancy Act. The second is the usual remedy in the Civil Court within the prescribed period of limitation. (Para 10)

(B) Civil P. C. (1908), Preamble and S. 9 — Provision regarding bar of jurisdiction — Rule as to — (Interpretation of Statutes — Bar of jurisdiction).

Unless there is a specific provision barring the jurisdiction of the civil Court, the Courts cannot spell out a bar of the jurisdiction of the civil Court by a process of implied reasoning. Whenever a statute contains a provision barring the jurisdiction of a civil Court, it must be strictly construed and confined only to the four corners of the bar contained in the said statute. (Para 17)

(C) Civil P. C. (1908), Preamble — Repealing provision — Presumption as to — (Evidence Act (1872), S. 114) — (General Clauses Act (1897), S. 6).

Whenever a legislature repeals a particular provision the natural presumption is that such a repeal must have been with a particular intention. (Para 17)

Cases Referred: Chronological Paras
(1965) AIR 1965 J and K 56 (V 52) =

1964 Kash LJ 234, Smt. Lakhi v. Sohan Lal 11, 15, 17

(1965) AIR 1965 Punj 321 (V 52) =

ILR (1965) 1 Punj 382 (FB), Bhag Singh v. Jawahar Singh 13, 15

(1962) AIR 1962 SC 547 (V 49) =

(1962) 3 SCR 673, Magiti Sasamal v. Pandab Bisoi 15

(1942) AIR 1942 Lah 217 (V 29) =

ILR (1943) Lah 191 (FB), Baru v. Niadar 15, 17

I. D. Grover, for Appellant; R. C. Nanda, for Respondent.

ANANT SINGH J.: The only question for consideration in this second appeal is whether the suit by the plaintiff-respondent,

a protected tenant, in the Civil Court was competent or barred under Section 85 of the Jammu and Kashmir Tenancy Act.

2. The plaintiff-respondent filed his suit on 17-4-62 alleging forcible dispossession from the suit land on 2-4-60 by his landlord, appellant Nasib Singh.

3. The appellant admitted the respondent to have been his tenant, but pleaded oral surrender of the holding by him. He also questioned the jurisdiction of the Civil Court to try this suit.

4. The trial Court and the Court of appeal below being the District Judge, Udhampur, did not accept the appellant's case of oral surrender, and held that Civil Court was competent to try this suit, and accepting the respondent's case of illegal dispossession by the appellant, decreed the suit.

5. The appellant has since filed this appeal. The point urged on his behalf is that in view of the provisions of Section 56 (1) of the Tenancy Act, the only remedy available to the respondent was to make an application to the Revenue Court for re-instatement to the land from which he had been wrongly dispossessed, otherwise, than in due course of law. It is said that the respondent having failed to avail himself of the said provision, could not go to the Civil Court to seek his possession, since such a suit would be barred under Section 85 of the Tenancy Act.

6. The learned District Judge in his well considered judgment, has quite ably disposed of this issue in respondent's favour, and I think, for quite good reasons. Section 85, sub-clause (3) is as follows:—

"The following suits shall be instituted in, and heard and determined by, Revenue Courts, and no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted".

7. The class of dispute or matters which have been excluded from the jurisdiction of other Court than the Revenue Court, have been enumerated in the two groups thereunder. It would be noticed that these two groups refer to so many kinds of cases, but do not include a suit by a tenant for recovery of possession in case of dispossession by his landlord. It is, therefore, clear that a suit for possession by a tenant in case of dispossession by the landlord has not been included under Section 85 of the Tenancy Act.

8. It may be mentioned, as the learned District Judge, has also pointed out that prior to the amendment of the Tenancy Act in 1955 Section 85 had a sub-clause (2) which read:

"A tenant who has been dispossessed and who has not instituted a suit under sub-section (1) within the period prescribed, shall not be entitled thereafter to institute a suit in any Court, for the recovery of possession of the tenancy or for other relief for such dispossession or ejectment".

9. By the amending Act 12 of 1955, the aforesaid sub-section was altogether omitted, and the omission must have been with the purpose of removing the bar of the jurisdiction of the Civil Court, so that, the tenant could seek his redress in the Civil Court also, for recovery of possession over the land from the landlord.

10. It would appear that the bar of Section 85 of the Tenancy Act has not been extended to a suit for possession by a tenant and the bar that had been kept under Section 56 sub-clause (2) prior to amendment, has deliberately been deleted. The law as it stands now, is that a dispossessed occupancy tenant has two remedies open to him. One is the cheap and shorter one to make an application before the Revenue Court within six months for re-instatement, as provided in Section 56 of the Tenancy Act. The second remedy is the usual remedy in the Civil Court within the prescribed period of limitation.

11. The learned District Judge has also referred to a judgment of a Single Judge of this Court, Bhat J., our esteemed brother, in AIR 1965 J. and K 56, where he has held that once the tenant is dispossessed, he ceases to be a tenant, and, therefore, cannot bring a suit for recovery of possession in a Revenue Court; but that in such a case, his remedy lies in the Civil Court, and I am in agreement with him, with the second part, though, not the first.

12. It was, however, argued by the learned counsel of the appellant that even in the Civil Court, the tenant-respondent had claimed possession by virtue of his having been a tenant before and, therefore, his only remedy was before the Revenue Court. But I have shown above that a suit for recovery of possession by a dispossessed tenant is not covered by Section 85 of the Tenancy Act, and the provision barring such a suit under the old Section 56 (2) of the Act has been deleted.

13. The Punjab case in AIR 1965 Punj 321 (FB), relied on behalf of the appellant has no application, in that, the provisions of the Punjab Tenancy Act in this regard are quite different from those of the Jammu and Kashmir Tenancy Act. The learned District Judge has noticed the difference by quoting the appropriate provisions of the Punjab Tenancy Act. These provisions are contained in Sections 50 (a) and 51 of the Punjab Tenancy Act. It is hardly necessary to refer to them, when I have mentioned above that our provisions of the Tenancy Act are quite different.

14. In conclusion, I held that the suit in the Civil Court was quite competent. There is no merit in this appeal. It is, therefore, dismissed with cost.

15. BHAT, J.: I have already held in the case referred to by A. Singh J., AIR 1965 J and K 56, that the remedy of a dispossessed tenant is by way of a civil suit. That view of mine was based mainly on a Full

Bench authority of the Lahore High Court reported as AIR 1942 Lah 217 (FB) and a Supreme Court authority reported as AIR 1962 SC 547. I need not enter into a controversy on the point where my learned brother Judge Anant Singh has differed from me. But the part of my finding from which he has differed is a finding based on the Lahore and Supreme Court authorities above referred to. After my last judgment mentioned above, the only judgment that has been brought to our notice, taking a different view is AIR 1965 Punj 321 (FB). There also one of the learned Judges, Dua J. has differed from the other learned Judges constituting the Bench. But after reading that judgment, one can easily feel that that case is clearly distinguishable from the present case. There the remedy of a dispossessed tenant was to file a suit for recovery of possession before the Revenue Court within one year. But here no such provision exists. Therefore that authority cannot be construed as barring a suit in a civil Court under the Tenancy Act of our State.

The only point that can be argued in favour of the other side is that the suit may be covered under Section 85, first group, (g) 'any other suit between landlord and tenant arising out of the lease or conditions on which a tenancy is held'. But the proper interpretation to be placed on this part of the section would be that the suit should arise out of the lease. That means some recital of the lease deed or terms of the lease deed must be the subject matter of the dispute or there must be some dispute about any of the conditions governing that tenancy. Once a tenant is dispossessed, the suit for recovery of possession does not arise out of the lease. It is a right, which is vested in the tenant as a person in possession of property, who has been wrongfully dispossessed. On the ground of mere possession, whatever be the nature of the possession, once a person is dispossessed he can file a suit in a Civil Court. Therefore even this provision will not oust the jurisdiction of the Civil Court. I need not add anything further and I agree that this appeal should be dismissed.

16. **ALI C. J.:** I agree with the judgment proposed by my learned brothers, Bhat and Anant Singh JJ., that the appeal should be dismissed with costs, but I would like to add a few lines of my own on the points involved in this appeal.

17. The admitted facts in the case are that the respondent was a tenant of the appellant landlord and that he was forcibly dispossessed by the landlord without having recourse to the provisions of the Tenancy Act. The tenant brought a suit in the civil Court with the prayer that he may be put in possession of the land as he was dispossessed against the procedure established by law. Both the Courts have found that as the question of title was involved, the suit was maintainable and was not barred by S. 85 of the Tenancy Act, nor under any other

provision of the Act. As pointed out by my learned brother Bhat J., an identical question was decided by him in a case reported in AIR 1965 J and K 56, relying upon a Full Bench authority of the Lahore High Court in AIR 1942 Lah 217 (FB). I find myself in complete agreement with the reasoning given by their Lordships in the Lahore case (supra). It is well settled that whenever a statute contains a provision barring the jurisdiction of a civil Court, it must be strictly construed and confined only to the four corners of the bar contained in the said statute. Unless there is a specific provision barring the jurisdiction of the civil Court, the Courts cannot spell out a bar of the jurisdiction of the civil Court by a process of implied reasoning. Anant Singh J., has rightly pointed out that in the previous Tenancy Act there was a specific provision in S. 85 (2) for ejectment of a dispossessed tenant which was subsequently repealed by amending Act 12 of 1955. Whenever a legislature repeals a particular provision the natural presumption is that such a repeal must have been with a particular intention, and the intention in the instant case was that the legislature did not intend to bar a suit by a dispossessed tenant in the civil Court.

18. Reading the various clauses of Section 85 of the Tenancy Act, it seems to me that before any case can fall within the purview of this section, the relationship of landlord and tenant must necessarily exist at the time when the proceeding is instituted. Section 2 (5) of the Act defines a tenant as under:—

“‘Tenant’ means a person who holds land, under the State, or under another person, and is, or but for a special contract in that behalf would be, liable to pay rent for that land, to the State or to that person....” An analysis of this definition manifestly shows that before a person can be a tenant under the Tenancy Act, he must be holding the land under the State or some other person. The moment a tenant is dispossessed either under the provisions of the Tenancy Act or by force or otherwise, he ceases to be a tenant and therefore no proceeding as contemplated by Sec. 85 can be launched either by or against the said tenant. The learned counsel for the appellant, however, submitted that if this be the position, then the tenant would have no right to file a suit for possession. This argument, however, can be answered in the following manner.

19. It is well settled that possessory title is a good title in a person to be granted a decree for possession under Sec. 9 of the Specific Relief Act. Under the provisions of the Tenancy Act a tenant has a statutory right to be ejected only in accordance with the manner laid down in and the conditions prescribed by the Act, and no other. If, therefore, a landlord chooses to dispossess a tenant by show of force and contrary to the procedure prescribed by the Tenancy

Act, while for purposes of the Tenancy Act the tenant ceases to occupy the land, yet for purposes of general law he has an undoubted right to be in possession and to tell the landlord that he should be evicted in due course of law and not otherwise — such a right which in this case is a possessory right can certainly be adjudicated in a civil Court.

20. I regret I am unable to agree with my learned brother Anant Singh J. on the question that a dispossessed tenant has an alternative right to be put in possession by taking proceedings in a revenue Court within six months of the date of his dispossession, because Sec. 85 of the Tenancy Act does not contain any such clause. Furthermore, as I have already mentioned above, a dispossessed tenant ceases to be a tenant as defined in the Tenancy Act and has therefore no right to be re-instated under the Act. That is why such a tenant gets a right to be reinstated under the general law, that is to say by instituting a suit in a civil Court.

21. For these reasons I agree that the appeal be dismissed with costs.

HGP/D.V.C.

Appeal dismissed.

AIR 1969 JAMMU AND KASHMIR 12
(V 56 C 5)

ANANT SINGH, J.

Ram Dass and another, Petitioners v. Chandu Lal, Respondent.

Election Petn. No. 38 of 1967, D/-26-4-1968.

(A) Constitution of Jammu and Kashmir, 1956, S. 69 — Jammu and Kashmir Representation of the People Act (4 of 1957), Sec. 44 — “Holds any office of profit” — Meaning of — Mere issue of letter of appointment — Not enough — (Words and Phrases — “Holds”) — (Constitution of India Arts. 191, 58).

The word “Holds” in Sec. 69 has been used in the present tense, which, means that at the time of the filing of the nomination papers or at the time of scrutiny a candidate must actually hold an office of profit. The mere issue of any appointment letter is not enough to say that the person concerned holds an office of profit on the date when the appointment letter is actually issued. A person, on securing an appointment letter, may not join the appointment. He will be deemed to be holding the office only when he actually joins it. (Para 17)

(B) Constitution of Jammu and Kashmir, Section 69 — Jammu and Kashmir Representation of the People Act (4 of 1957), Sec. 44 — Objection to validity of nomination paper — Onus to prove disqualification or defect is on party who raises objection — Returning officer cannot ask the candidate to whose nomination objection has

been raised, to prove that he is qualified — (Evidence Act (1872), Ss. 101, 104) — (Constitution of India Arts. 191-192).

(C) Constitution of Jammu and Kashmir, Section 69 — Jammu and Kashmir Representation of the People Act (4 of 1957), Sec. 44 — Jammu and Kashmir Representation of People Rules — Contractual obligation to serve under Government on a future date — No disqualification for being chosen as a member of Legislature — (Constitution of India Art. 191.) (Para 20)

(D) Constitution of Jammu and Kashmir, Section 69 — Jammu and Kashmir Representation of the People Act (4 of 1957), Sec. 44 — Subsequent disqualification cannot be taken into account for validity of nomination paper on the date of scrutiny — (Constitution of India Art. 191.) (Para 21)

(E) Constitution of Jammu and Kashmir, Section 69 — Jammu and Kashmir Representation of the People Act (4 of 1957), Section 24 (d) — “Any services” — Meaning of — (Words and Phrases — “Any services”). The words “any services” have been used in Sec. 24 (d) in commercial sense. The provision means that, in case where the Government has undertaken to render any service to any concern or any person and if any person has entered into an agreement with the Government for the performance of any service undertaken by it such person is not disqualified under this section. Indebtedness of an individual to the State Government, unless he is a member of a Gram Panchayat is no disqualification. Any contractual obligation to serve the State Government on a future date is also no disqualification nor its breach. AIR 1960 Mad 201, Rel. on. (Para 23)

Thus entering into an agreement with the Government for taking loan to defray educational expenses and to agree to serve Government for a certain period is no disqualification for being chosen as a member of Legislative Assembly. (Para 25)

(F) Constitution of Jammu and Kashmir, Section 69 — Jammu and Kashmir Representation of the People Act (4 of 1957), Sec. 44 — Improper rejection of nomination papers — Presumption — (Evidence Act (1872), S. 114).

In case of improper rejection of nomination paper, there is a very strong presumption, almost un rebuttable, that the result of election has been materially affected. It remains only in the realm of speculation, and the effect of improper rejection of a nomination paper cannot be decided on mere speculation. (Para 26)

(Need for some provision for creating second forum to test propriety of rejection or acceptance of nomination papers urged.) (Para 29)

Cases Referred: Chronological Paras
(1960) AIR 1960 Mad 201 (V 47) =
21 Ele LR 338, Velusami Thevar
v. G. Raja Nainar

R. H. Bhalgotra, for Appellant; D. D. Thakur, for Respondent.

ORDER: In a straight contest for a seat to the Jammu and Kashmir Legislative Assembly from Ramnagar Scheduled Caste Constituency, the petitioner No. 1, lost to the respondent, who was declared elected on 27-2-67.

2. The petitioners filed this Election Petition before the Election Commission of India, New Delhi, on 10-4-67, challenging the validity of the election on the sole ground that the nomination papers of one another candidate from the same Constituency, Chhajo Ram Saloch referred to hereafter, sometimes only as Saloch, was wrongly rejected by the Returning Officer on 24-1-67 after the necessary scrutiny, which was held on 23-1-67, with a finding that Saloch held, under the State Government, an office of profit, which has a disqualification under Section 69 of the Constitution of Jammu and Kashmir. It is said that he did not hold any such office at the relevant time.

3. The Election Petition was sent to the Election Tribunal, being the District Judge of Udhampur. The respondent filed before the Tribunal, his written statement, supporting the rejection of the nomination papers of Saloch on two more grounds apart from the one taken before the Returning Officer. These, two new grounds are that (1) Saloch was below the prescribed age of 25 years on 29-1-67 when he filed his nomination papers and (2) he had not complied with the provisions of Sections 44 and 45 of the Jammu and Kashmir Representation of the People Act, 1955 (1957?) referred to hereafter as the Act. The Election Tribunal struck on p. 7 of his order sheet, the following issues:

1. Whether the nomination paper of Sh. Chajju Ram was improperly rejected by the Returning Officer. If so, with what effect.

2. Whether Shri Chajju Ram had entered into an agreement with the Government of Jammu and Kashmir to serve it, and the contract subsisted on 23rd and 24th January 67, and still subsists, if so with what effect.

3. Whether Shri Chajju Ram did not possess age qualification as required under the Constitution on the date when the nomination paper was scrutinised and rejected.

4. Whether Chajju Ram's nomination paper did not comply with the provisions of Sections 44 and 45 of the Jammu and Kashmir Representation of the People Act, 1957, inasmuch as his nomination paper did not contain the declaration by him specifying particular scheduled caste of the State of which he is a member and also the deposit was not made according to law. If so, with what effect.

4. The petitioners examined before the Election Tribunal, two witnesses, one is and Saloch (sic?), but on the abolition of the Election Tribunal, the election petition was sent to this Court on 15-9-67 and, thereafter, it came to me on 19-12-67 for disposal. The

petitioners did not examine any more witnesses. The respondent examined R. Ws. 1 to 6 and two official witnesses R.Ws. 7 and 8. He also brought on the record certain documentary evidence.

5. The issues remained the same as had been framed by the Election Tribunal.

6. In regard to issue No. 3 relating to the age of Saloch, the six private witnesses, all spoke to the age of Saloch, saying, that he was born 2 to 3 years before the disturbance of 1947; and thereby, would fix his age below 25 years on the date of filing his nomination papers. Saloch, in his evidence before the Election Tribunal, deposed that he was born on 12-4-1948 and had produced his Matriculation certificate in support of it. The evidence of R. Ws. Nos. 1 to 6 is not at all specific. They had no occasion to know the date or month of birth of Saloch. The learned counsel, Mr. D. D. Thakur, appearing for the respondent, frankly conceded that the evidence with regard to the age of Saloch is not sufficient to hold that he was below the prescribed age of 25 years at the time he had filed his nomination papers. He therefore, did not press this issue.

7. The learned counsel did not press also issue No. 4, regarding the non-compliance of the provisions of Secs. 44 and 45 of the Act. It may be mentioned that, in the written statement, no specific allegation was made as to why and how the provision of Sections 44 and 45 of the Act were not complied with, though, on this issue, some details have been given. I am not able to understand, how and where those details came from. This issue, therefore, has rightly been not pressed by the learned counsel for the respondent.

8. Issues Nos. 3 and 4 are decided in favour of the petitioner.

9. The real issues which, require to be carefully considered, are issues Nos. 1 and 2, which I would put in the following words. (See Para 3).

10. I would consider both these questions together and, their effect, on the election.

11. The respondent has filed an agreement Exhibit R. W. 7/1 dated 12-10-1962 executed by Chajju Ram in favour of the Government of Jammu and Kashmir. This was an agreement for taking a loan to enable him to defray his expenses for B. Sc., Agriculture at Ranchi. The amount of loan sanctioned under this agreement was upto Rs. 6,000. One of the conditions, being No. 4 of the agreement, was that on the completion of his B. Sc., training in Agriculture, the Government was under no obligation to appoint Chajju Ram in any Government Service, but it was made "obligatory on the loan Scholar (i. e. Chajju Ram) to serve the Jammu and Kashmir Government if called upon to do so, for a period of at least seven years after completion of the training or studies on such emoluments and terms and in such capacity as Government may deter-

mine from time to time". In the event of default to serve the Government for the full period of seven years, he was bound down to refund the loan and, in addition, to pay a penalty, upto Rs. 5,000.

12. The respondent has also brought on the record a copy of the appointment letter of Chajju Ram Exhibit R. W. 8/2. A copy of this letter had been filed before the Returning Officer and the Copy was exhibited as P. W. 2, before the Election Tribunal. The appointment order is dated 19th January, 1967, and was issued under the Signature of the Director of Agriculture, Camp Jammu. It was to the following effect:—

"Agricultural order No. 20/E dated Jammu 19th January 67, Shri Chajju Ram Saloch B. Sc., Agriculture son of Shri Avtar Chand R/O Basant Garh Tehsil and post office Ram Nagar is hereby appointed temporary as Agricultural Assistant in the grade of 250—500 and posted at Government Agriculture Farm Talab Tiloo Jammu. He should report immediately to the undersigned.

Sd/-(B. S. Hog)
Director Agriculture
Camp, Jammu.

13. Saloch, in his evidence, has admitted, having taken a loan of Rs. 5337 under the agreement, and the amount is still due to the State Government. He also admitted that having completed his training he applied for appointment to the Secretary to the Government General Department (Training Section), being a loanee of Government. He has further said, that he received no appointment order from the Agricultural Department uptill the date of the scrutiny of his nomination papers, but he got an appointment letter, thereafter, and, he joined his appointment on 3-2-67.

14. His evidence was brought on behalf of the respondent when in fact, Chajju Ram had received his appointment letter. It may, however, be presumed that the appointment letter of Chajju Ram issued on 19-1-67 and it should have reached him in due course; at least he was made aware of it at the time of the scrutiny by the Returning Officer.

15. Chajju Ram, however, filed his sworn affidavit before the Returning Officer at the time of the scrutiny, Exhibit P-12. In this affidavit, Chajju Ram has stated that he had not joined any Government Service, and that he was not performing any Government duty, and that he had not received any appointment order. It also appears from the evidence of the Returning Officer P. W. 8 as also from the copy of the relevant order, rejecting the nomination paper... of Chajju Ram Exhibit R. W. 8/1, that he was allowed 24 hours time to produce his certificate from the Agriculture Department that he had not joined any service, but he failed to produce any certificate within the time allowed, whereafter he rejected his nomination paper on 24-1-67.

16. The question that falls for consideration is, whether on the basis of the appointment letter of Chajju Ram, it can be held that he was holding any office of profit within the meaning of Section 69 of the Jammu and Kashmir Constitution. It is admitted that in pursuance to the said appointment letter, Saloch had not joined his appointment nor had he received any emoluments or had earned before 3-2-67 when he actually joined his appointment in the Agricultural Department.

17. Section 69 of the State Constitution disqualifies a person "if he holds any office of profit... under the State Government.. The word "Holds" has been used in the present tense, which, means that at the time of the filing of the nomination papers or at the time of scrutiny a candidate must actually hold any office of profit. The mere issue of any appointment letter is not enough to say that the person concerned, holds an office of profit on the date, when an appointment letter is actually issued. A person, on securing an appointment letter, may not join the appointment. He will be deemed to be holding the office only when he actually joins it. It is from the date of joining such appointment, that he will start earning his salary or any other emoluments fixed for the post. There is nothing to show, as I have already indicated, that Saloch had joined his appointment and started doing any work in response of it, any time before or uptill the date of the scrutiny on 24-2-67. It has, therefore, to be held that Chajju Ram did not hold any office of profit upto the date of the scrutiny.

18. The Returning Officer in finding, in his order Exhibit R. W. 8/1, rejecting the nomination paper of Saloch that he had then held an office of profit under the State Government, was clearly wrong, and the learned Returning Officer only put the cart before the horse in asking Saloch to bring a certificate from the Agricultural Department to show that he had not joined his appointment. It was for the respondent, who had raised the objection, to the validity of the nomination papers of Saloch to have shown from any reliable material that Chajju Ram had actually joined his appointment and was holding an office of profit at that time. He failed to discharge his onus. There is nothing to show that Saloch had joined his appointment and was actually holding an office of profit under the Government upto the date of the scrutiny except that an appointment order had been issued to him, but as I have indicated, this was not enough.

19. Chajju Ram, of course under a contractual obligation to have served the Government for a term of at least seven years after he had finished his training, for which he had been granted a loan by the State and after finishing his training he did not join his appointment till the date of the scrutiny on 23-1-67 and 24-1-67, although, a letter of appointment had been issued to him on

19-1-67. This fact is also admitted by Saloch that he joined his appointment on 3-2-67.

20. It may be mentioned that neither the Constitution nor the State Representation of the People Act nor under any of the rules made thereunder, there is any provision that a contractual obligation by any candidate to serve under Government in a future date, is a disqualification for being chosen as a member of the Legislature. Thus under the agreement aforesaid, Chajju Ram was not disqualified to have sought an election to the legislative Assembly at the time when he filed the nomination papers as also at the time when his nomination papers came up for scrutiny.

21. It is true that he incurred a disqualification to be chosen as a member of the Legislative Assembly having joined his appointment on 3-2-67, but his subsequent disqualification cannot be taken into account for the validity of his nomination paper on the date of the scrutiny. This is because the Constitution or the Representation of the People Act or even the rules made thereunder have made no provisions for the rejection of a candidature of any candidate for incurring subsequent disqualification after the date fixed for the scrutiny. Under S. 106 of the Act, of course, a provision has made for dismembering a returned candidate for his incurring any disqualification subsequent to his election. This question does not arise since Chajju Ram was not a returned candidate. As I have said, he could not have been disqualified on the date of the scrutiny for having earned a subsequent disqualification, even though, it was several days before the date of polling, which had been fixed for 21-2-67.

22. The counsel for the respondent has drawn my attention to Section 24 (D) of the Act which also provides certain disqualifications for being chosen as a member of the Legislative Assembly. Section 24 (D) is to the following effect:—

"If, whether by himself or by any person or body of persons in trust for him or for his benefit or on his account, he had any share or interest in a contract for the supply of goods to or for the execution of any works or the performance of any services undertaken by the Government".

23. Relying on the words "any services" undertaken by the Government, the learned counsel would argue that the Agricultural Department was a department under the Government which has had its obligations to render "services" to the department, and Chajju Ram having entered into an agreement to serve the Agricultural Department for a certain period, had earned the disqualification to be chosen as a member of the Legislative Assembly. I do not at all agree with contention. The said provision refers to a contract for the supply of goods to, or for an execution of any works or performance of any services undertaken by the

Government. The word "Government" qualifies both "exertion of any works" or "any services" undertaken by the Government. By the expression "any services" undertaken by the Government, it is clearly meant that the Government should undertake to render any kind of service to any other person or concern; it does not include any agreement by any individual to render any personal service to any Department under the Government. The words "any services" have been used in commercial sense. In other words, the provision means that, in case where the Government has undertaken to render any service to any concern or any person and if any person has entered into an agreement with the Government for the performance of any service undertaken by it such a person is not disqualified under this section. Since under the agreement, Chajju Ram cannot be said to have been entrusted with the performance of any service undertaken by the Government.

24. A similar view was taken in the case of N. P. Velusami Thevar v. G. Raja Nainar, reported in 21 ELR 338 = (AIR 1960 Mad 201), while interpreting the provision of Section 7 (d) of the Central Representation of People Act, which is exactly the same, as is the provision of S. 24 (d) of the Jammu and Kashmir Representation of the People Act. It is true that, in that case, the teacher concerned had resigned from his service and his stipend had been stopped. There is, however, no difference in the principle that the aforesaid provision can have no application to a contractual obligation of this kind to serve on a future date.

25. Indebtedness of an individual to the State Government, unless he is a member of a Gram Panchayat, is no disqualification. Any contractual obligation to serve the State Government on a future date is also no disqualification nor its breach. Saloch did not hold at the relevant time any office of profit, thus his nomination papers were wrongly rejected by the Returning Officer.

26. Now the question, whether this improper rejection of the nomination papers of Chajju Ram has materially affected the result of the election. The learned counsel for the respondent has contended that it could not be so, for, after all Chajju Ram could not have been in the field, having joined the Government service, several days before the polling but this is not a correct test. It is possible that Chajju Ram might have joined his appointment under the Government, if his nomination papers had not been rejected. Besides, once his nomination papers could have been found valid, as they ought to have been, the electorate could choose him as well, since his ballot papers had to be kept for the poll, and could not be removed, due to his joining Government service at a subsequent date. It is another matter that his election may have been set aside, if he had been finally

chosen. In case of improper rejection of nomination papers, there is a very strong presumption almost un rebuttable, that the result of election has been materially affected. It remains only in the realm of speculation, and the effect of improper rejection of a nomination paper cannot be decided on mere speculation. Now therefore, it must be held that improper rejection of nomination papers of Chajju Ram Saloch has affected materially the result of the election.

27. In the result, the whole election must be found to have been void. The election petition is accordingly allowed. The election of the respondent is declared as void and, therefore, set aside.

28. Since the election petition succeeds on mere technical ground, there will be no order as to cost.

29. Before parting with the case, I may observe that this is an instance in point to give some thought to the Legislature whether there should be some provisions made for creating a second forum to test the propriety of rejection or acceptance of nomination papers by a Returning Officer within a reasonable time of about seven to ten days from the date of the scrutiny, making the decision of such a forum final, at least on facts so as to obviate the possibility of setting aside the whole election after it has been fought, with all the botheration and expenses to all concerned.

30. Let a copy of the judgment be sent to the Election Commission, New Delhi, and another copy to the Speaker of the Assembly.

HGP/D.V.C.

Order accordingly.

AIR 1969 JAMMU AND KASHMIR 16

(V 56 C 6)

ANANT SINGH, J.

Sheikh Abdul Rehman, Petitioner v. Jagat Ram Aryan, Respondent.

Election Petn. No. 33 of 1967, D/-29-4-1968.

(A) Jammu and Kashmir Representation of the People Act (4 of 1957), S. 44(4), Proviso — Nomination paper filed by a candidate — Father's name wrongly printed in electoral roll — Wrong mention held was an error which under the Proviso should be ignored. (Para 17)

(B) Jammu and Kashmir Representation of the People Act (4 of 1957), S. 89—Trial of election petition — Documents not produced before Returning Officer can be produced and new grounds can be taken at the trial — Returning Officer decides only the validity or otherwise of the nomination paper in a summary manner. AIR 1959 SC 422, Foll. (Para 23)

(C) Civil P. C. (1908), Preamble — Precedents — Obiter dicta — Binding nature

AL/FL/C653/68

—Obiter dicta of Supreme Court are binding on High Courts — (Constitution of India, Art. 141). (Para 31)

(D) Jammu and Kashmir State Constitution (1956), S. 51 — Jammu and Kashmir Representation of the People Act (4 of 1957), S. 47 — "On the date fixed for scrutiny" — Meaning of — "Date" means the whole of the day. AIR 1968 Mys 18 and AIR 1966 Madh Pra 255, Diss.

The expression "on the date fixed for scrutiny" means on the whole of the day on which the scrutiny of nomination has to take place. In other words, the qualification must exist from the earliest moment of the day of scrutiny, meaning, from the preceding midnight. Thus, a qualification cannot be acquired or disqualification cured at any time on the date of scrutiny beginning from the preceding and ending with the succeeding midnight. AIR 1968 SC 1064, Rel. on; AIR 1968 Mys 18 and AIR 1966 Madh Pra 255, Diss. (Paras 29, 30)

(E) Jammu and Kashmir State Constitution (1956), S. 51 — Subscription of oath — Essential qualification — Duty of candidate — Rejection of a nomination paper for non-administering of oath not improper — (Jammu and Kashmir Representation of the People Act (4 of 1957), S. 47).

It is true that there is no provision in the Act or the Rules made thereunder that an officer authorised to administer an oath to any candidate should endorse a certificate or grant any receipt to him in token of his having made and subscribed the oath. In the oath form also, there is no column provided for the signatures of the authorised officer before whom an oath has to be made and subscribed like the one in the oath form prescribed under the Central Representation of the People Act for appending the signature of such officer with date below the column "oath sworn solemnly affirmed." (Para 47)

A candidate cannot make out any ground out of such a breach that he failed to make and subscribe the requisite oath or affirmation, because, he was not asked by the authorised officer to do so. The law or the rules made thereunder have imposed no such obligation on the authorised officer. Section 51(a) of the Constitution and also the notification issued by the Election Commission of India, do not cast any such obligation on the officer before whom oath is to be taken. (Para 48)

Thus, it is for the candidate to seek the authorised officer and take the oath before him in the prescribed manner. Therefore, rejection of nomination paper on the ground that the candidate had not been administered the oath is not improper. (Paras 47, 54)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 1064 (V 55),
Pashupati Nath Singh v. Harihar
Prasad
28, 29, 31

THE
All India Reporter
1969

Kerala High Court

AIR 1969 KERALA 1 (V 56 C 1)

FULL BENCH

P. T. RAMAN NAYAR, K. K. MATHEW
AND T. S. KRISHNAMOORTHY IYER, JJ.

A. Balakrishna Menon and another, Petitioners v. Inspecting Asst. Commr. of Agricultural Income-tax and Sales Tax (Spl.), Kozhikode, Respondent.

O. P. No. 2413 of 1965, D/-1-1-1968.

(A) Kerala Agricultural Income-tax Act (17 of 1950), Ss. 24 (2), 23, 3, 17 and 18 — Income of persons on whom property has devolved after death of Sthanamdar — Hindu Succession Act (1956), S. 7.

Per Majority (Mathew J. Contra):—

Where consequent on the Hindu Succession Act, coming into force the Sthanam property has devolved on members other than Sthanamdar, after the death of Sthanamdar, the liability for income-tax under Kerala Agricultural Income-tax Act in respect of income derived by such Sthanamdar is limited to his legal representatives and that too to the estate of Sthanamdar after such devolution. (Paras 11, 22 and 23)

(B) Marumakkatayam Law — Estate of Sthanamdar in Sthanam property prior to Hindu Succession Act — Nature of.

Before the Hindu Succession Act the estate of a Sthanamdar in the Sthanam property was akin to a Hindu widow's estate and whatever might have been his limited powers of disposal during his life time, his estate determined completely with his death and no interest of his survived that event. The property, in the hands of the succeeding Sthanamdar, was no more the estate of the deceased Sthanamdar than property in the hands of remainderman is the estate of the deceased life-estate holder. But, by reason of Section 7 (3) of the Hindu Succession Act, when a Sthanamdar dies after the com-

mencement of that Act, the Sthanam property held by him devolves on the members of the Sthani family and on his own heirs as if the property had been divided per capita immediately before his death among himself and the other members of the Sthani family. In the share falling to him in that notional division, and devolving on his heirs, he must be regarded as having had a full estate and that share, along with any other separate property he might have owned, would constitute his estate in the hands of his legal representatives. But, the shares devolving on the members of the Sthani family, are in no sense the estate of the deceased Sthanamdar. He never at any time had any interest in that that survived his death, and the Hindu Succession Act did not give him any. AIR 1960 SC 1080, Rel. on. (Para 2).

(C) Kerala Agricultural Income-tax Act (17 of 1950), S. 2 (m) — 'Person' — Meaning.

Merely because any individual holding property in any capacity recognised by law is a person within the meaning of the definition, every capacity in which an individual might hold property is a separate person by itself. On a plain reading of the definition it is the individual or association of individuals holding property, not the capacity in which the property is held, that is invested with personality. If each capacity in which an individual holds property were to be a person by itself, the result would be that, in the case of an individual holding property in several capacities, the income derived in the several capacities could not be combined to arrive at his total agricultural income assessable to tax even if he is the beneficial owner of the entire income. (Para 9)

Cases Referred: Chronological Paras
(1967) AIR 1967 Ker 210 (V 54) =
1967 Ker LT 148 (FB), Asst. Controller v. Balakrishna Menon

IL/IL/D961/68

(1965) 57 ITR 168 (SC), First Addl. Income-Tax Officer v. Suseela Sadanandan

(1960) AIR 1960 SC 1080 (V 47) = (1960) 3 SCR 887, Kochuni v. States of Madras and Kerala

(1881) ILR 3 Mad 384 = 8 Ind App 143 (PC), Venkateswara Iyen v. Shekhari Varma

(1833) 2 LJ Ch 167 = 1 My and K 647, Parr v. Parr

K. Kuttikrishna Menon and A. P. Chandrasekharan, for Petitioners; Govt. Pleader, for Respondent.

RAMAN NAYAR, J.: The question is whether the tax due under the provisions of the (Kerala) Agricultural Income-tax Act, 1950 (for short, the Act) in respect of income derived by a sathanamdar from sathanam property is, after his death, leviable from the person or persons on whom the property has devolved. The tax, of nearly Rs. 85,000, assessed in this case was in respect of income derived during the period, 1-11-1956 to 31-3-1958, from the sathanam property of the Zamorin of Calicut by the then Zamorin, Sreemanavikraman Raja. On his death in May 1958, after the Hindu Succession Act came into force, the next Zamorin, Kunhamman Raja, succeeded to the title, but the property devolved on the 692 members of the Zamorin's family and on Sreemanavikraman Raja's heirs in separate shares in accordance with Sec. 7 (3) of the Hindu Succession Act. However, it would appear that, by reason of Sec. 5 (2) of Kerala Act 28 of 1958, Kunhamman Raja, and, after him, the succeeding Zamorins, assumed management of the entire property until the present petitioners took over as receivers of Court appointed in a partition suit between the several sharers. It was Kunhamman Raja that was assessed to the tax—that was done under Sec. 24 (2) of the Act—and he paid a sum of Rs. 18,000 and odd towards the tax while his successor Zamorin, P. C. Cheria Kunhunni Raja, paid Rs. 20,000 and odd. For the balance of the tax, and for a penalty of Rs. 5000 imposed on P. C. Cheria Kunhunni Raja, demands have been made on the petitioners by the Inspecting Assistant Commissioner (the respondent herein) by his orders Exts. P-1, P-3 and P-5, and these orders the petitioners seek to quash.

2. It is important to remember that, before the passing of the Hindu Succession Act, the estate of a sathanamdar in the sathanam property was akin to a Hindu widow's estate—see Kochuni v. States of Madras and Kerala, AIR 1960 SC 1080, and whatever might have been his limited powers of disposal during his lifetime, his estate determined completely with his death and no interest of his survived that event. The property, in the hands of the succeeding sathanamdar, was no more the estate of the deceased sathanamdar than property in the hands of a remainderman is the estate of the

deceased life-estate holder. But, by reason of Section 7 (3) of the Hindu Succession Act, when a sathanamdar dies after the commencement of that Act, the sathanam property held by him devolves on the members of the sthane family and on his own heirs as if the property had been divided per capita immediately before his death among himself and the other members of the sthane family. In the share falling to him in that notional division, and devolving on his heirs, he must be regarded as having had a full estate, and that share, along with any other separate property he might have owned, would constitute his estate in the hands of his legal representatives. But, the shares devolving on the members of the sthane family, are in no sense the estate of the deceased sathanamdar. He never at any time had any interest in that that survived his death, and the Hindu Succession Act did not give him any.

That, as held in Asst. Controller v. Balakrishna Menon, 1967 Ker LT 148 = (AIR 1967 Ker 210) (FB), what passes on the death of a sathanamdar within the meaning of Section 5 of the Estates Duty Act, is the entire property which belonged to the sathanam and not merely the sathanamdar's share in the notional division (Sic) of Sec. 7 (3) of the Hindu Succession Act, is neither here nor there. The decision does not say that the property that so passes remains the estate of the deceased sathanamdar. That estate, as recognised by sub-section (1) of Section 7 of the Estates Duty Act, read with the explanation to sub-section (4) thereof, determines with the death of the sathanamdar, and it is only by reason of sub-section (1) of the section that the property is deemed to have passed on the sathanamdar's death.

3. Under Section 3 read with Secs. 17 and 18 of the Act, the liability to pay the tax assessed is, subject to certain exceptions as in Sections 23 and 24, solely that of the person who derives the income, and there is no provision in the Act which makes the liability a charge on the property from which the income is derived, or provides for recovery of the tax from the property as such, although of course, the defaulter's interest in the property (which interest might range from full ownership to that of a mere licensee or trespasser, or, when the interest has ceased, as on the determination of a lease, to nothing) being part of his property, can be proceeded against. The argument that, because under Section 41 (3) of the Act, an arrear of tax due from an assessee can be recovered as if it were an arrear of land revenue, the provisions of the Revenue Recovery Act making land security for the revenue due on it are attracted so as to make the land, from which agricultural income is derived, security for the tax assessed on such income even if the person liable to pay the tax has no subsisting interest in the land, is so obviously unsustainable that it scarcely needs refutation.

4. The only other provisions of the Act to which reference has been made as authorising the recovery of the tax from the petitioners are Sections 23 and 24. Under Section 23, when a person in receipt of agricultural income from any land in the State has transferred his interest in such land to another person, the tax due can, in certain circumstances, be recovered from the transferee. But this section, it is clear from its very wording, can apply only to transfers by act of parties and not, as in the present case, to a devolution by operation of law.

5. Under sub-section (1) of Section 24, "Where a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person, to the extent to which the estate is capable of meeting the charge the agricultural income-tax assessed as payable by such person or any agricultural income-tax which would have been payable by him under this Act if he had not died."

And, sub-section (2) of the section provides for an assessment being made on the legal representative in respect of income derived by the deceased person. It is, as we have seen, under this sub-section that the assessment was made on Kunhamman Raja. But, the person who derived the income and, in the first place, incurred the liability to pay the tax that might be assessed thereon was Sreemanavikraman Raja; and, as we have seen, so far as the sthanam property was concerned, the only estate he left was 1/693rd share in that property. That, and any other property he might have left, would, no doubt, be his estate in the hands of his legal representatives, and under Section 24 they would, no doubt, be liable to pay the tax which would have been payable by him if he had not died—even so only out of his estate to the extent to which it is capable of meeting the charge.

6. An interesting argument was developed in favour of—it might not be quite correct to say, on behalf of—the respondent in the course of the give-and-take of the hearing. It is this: The sthanam as such, as distinct from the human being who is the sthanamdar, is by itself a juristic person, if not under the general law then at least for the purposes of the Act by reason of the definition of "person" in Section 2 (m) thereof, the sthanamdar being only its visible human form. (To save confusion we shall hereafter refer to the sthanamdar in his personal capacity, in other words, as a human being, as sthani; and in his representative capacity, in other words, as the juristic person of the argument, as sthanam). It was—so the argument runs—the sthanam, not the then sthani, Sreemanavikraman Raja, that derived the income and thereby became liable to be charged with tax, and it was the sthanam, not the succeeding sthani, Kunhamman Raja, that was assessed thereto. When, by sub-section (3) of Section 7 of the Hindu Succession Act, the Legislature made a gift, as it were, of the

entire property of the sthanam to other persons, it could not have intended that those persons should take the property free of the liabilities of the sthanam and that the debts due by the sthanam should remain unpaid and irrecoverable, there being no property out of which they could be recovered.

On the principle underlying Section 128 of the Transfer of Property Act, the Legislature could only have intended that the persons on whom the property devolved should take it subject to the liability to pay all the sthanam debts to the extent of the property. Therefore, the words, "sthnam property" occurring in the sub-section must be read as meaning the assets of the sthanam subject to the liabilities thereof. And, since the sthanam proper is now in the hands of the petitioners on behalf of the persons on whom it has devolved, the petitioners must pay the tax assessed on and due from the sthanam from out of, and to the extent of the property.

7. Alternatively, and somewhat inconsistently, it is suggested that by giving away all the property of the sthanam on the death of Sreemanavikraman Raja, the Legislature killed the sthanam—in law the word "sthnam" means a position of dignity to which certain specific property is attached so that bereft of its property a sthanam ceases to exist in the eye of law although in the popular eye it might continue to exist as a mere title or position of dignity. Therefore, the devolution of the property on the members of the sthani family and on the heirs of Sreemanavikraman Raja was a case of succession to the estate of the sthanam. Kunhamman Raja and the succeeding Zamorins, and the petitioners after them, took charge of the sthanam estate on behalf of all those who had succeeded to it. They are in the position of administrators, and it is as such legal representatives of the deceased sthani that Kunhamman Raja was assessed to tax under sub-section (2) of Section 24, and the petitioners are now called upon to pay the tax so assessed under sub-section (1) of the section.

8. It should perhaps suffice to say that no such case can be founded on the pleadings. What the counter-affidavit filed on behalf of the respondent states is that the income subjected to assessment is the agricultural income from the sthanam properties of the Zamorin Raja for the previous year ending 31-3-1958 and that, during that period Sreemanavikraman Raja was the Zamorin Raja. On Sreemanavikraman Raja's death, Kunhamman Raja assumed management of the sthanam properties under Section 5 (2) of Act 28 of 1958 assuming the title of Zamorin Raja. Thereafter, the assessment was made on the Zamorin Raja (in other words, on Kunhamman Raja) under Section 24 of the Act on the income derived by the deceased sthanamdar (namely, Sreemanavikraman

Raja) from the sthanam property. It is difficult to see how, from these averments, a case can be made out that it was the sthanam as a juristic person that derived the income and was assessed to the tax, or, alternatively, that Kunhamman Raja was assessed to the tax as the legal representative of the deceased sthanam. On the contrary, on their plain language, what these averments mean is that it was the deceased sthani, Sreemanavikraman Raja, that derived the income, and that it was as his legal representative that the succeeding sthani, Kunhamman Raja, was assessed to the tax.

9. We might, however, add that the respondent cannot be blamed for not having pleaded differently, for we do not think that any such case as has developed in the course of the hearing could plausibly have been pleaded. Section 2(m) of the Act defines "person" thus:

"'person' means any individual or association of individuals owning or holding property for himself or for any other, or partly for his own benefit and partly for another, either as owner, trustee, receiver, common manager, administrator, or executor or in any capacity recognised by law, and includes a Hindu undivided family, a firm or a company, an association of individuals, whether incorporated or not, and any institution capable of holding property;"

We do not think that because any individual holding property in any capacity recognised by law is a person within the meaning of the definition, every capacity in which an individual might hold property is a separate person by itself. On a plain reading of the definition (forgetting, for the time being, the inclusive portion thereof) it is the individual or association of individuals holding property, not the capacity in which the property is held, that is invested with personality. If each capacity in which an individual holds property were to be a person by itself, the result would be that, in the case of an individual holding property in several capacities, the income derived in the several capacities could not be combined to arrive at his total agricultural income assessable to tax even if he is the beneficial owner of the entire income. Thus, on the basis of his separate incomes in his several capacities, he might escape assessment altogether although his true total income might be far above the amount exempt from tax. From Section 8 of the Act, it would appear that the scheme of the Act is to regard the beneficial owner of the income as the person deriving the income and therefore the person primarily liable to be assessed to tax, Section 8 being only an enabling provision authorising the levy of the tax also on a person receiving income in which he has no beneficial interest on behalf of the beneficial owner to the same extent to which the beneficial owner would be liable. It is, therefore, not necessary to invest each capa-

city in which a person holds property with a separate personality to prevent income derived by a person in a capacity which denies him all beneficial interest therein being reckoned in arriving at his own total income.

10. We are, however, prepared to assume that a sthanam is a person within the meaning of the Act regarding it as an institution capable of holding property, a sort of corporation sole whether or not that be so under the general law. What follows? It must have derived income before it can be assessed to tax. But, as we have already seen, unlike the manager of a joint family who is only a joint owner of the family property and takes the income of the property for and on behalf of all the members so that the income in his hands is the property of the family, although he might not ordinarily be accountable in respect of it, a sthani is the sole, though a limited, owner of the sthanam property and like a Hindu widow (before the Hindu Succession Act did away with what was known as a widow's estate), takes the income for himself in his own personal right. He does not take the income on behalf of the sthanam, and the sthanam as such gets no income from the sthanam property. All the income from the sthanam property is part of the sthani's personal estate unless he has merged it with the sthanam property and, on his death, devolves on his personal heirs and not on the succeeding sthanamdar as representing the sthanam. It therefore follows that a sthanam as such can have no income so as to make it liable to be assessed to tax.

11. In our view, the person who derived the income and was liable to be assessed to tax was the then sthani, Sreemanavikraman Raja. With regard to his 1/693rd share in what was the sthanam property, we think that the succeeding Zamorins, and now the petitioners, may well be regarded as his legal representatives since admittedly they have been in management of the entire property including Sreemanavikraman Raja's share thereof. They are, therefore, by reason of Section 24 of the Act, liable to pay the tax Sreemanavikraman Raja would have had to pay had he been alive, but that liability is, under the section, limited to the value of Sreemanavikraman Raja's estate, in other words, his 1/693rd share in the property, and, towards that liability, credit must be given to the payments totalling to Rs. 38,000 and odd already made.

12. We give the petitioners a declaration to this effect and quash the demands made on them. We make no order as to costs.

13. We might perhaps mention that it was contended on behalf of the petitioners that the order of this Court made in O.P. No. 768 of 1963 filed by one of the succeeding Zamorins, P. C. Cheria Kunhunni Raja, operates as res judicata and precludes

the respondents from making the impugned demand. But there is no specific plea to this effect; nor is the order in O.P. No. 768 of 1963 or the pleadings therein before us. Therefore, we are unable to consider this contention.

14. MATHEW J.: The charging provision in the Agricultural Income-tax Act, 1950, hereinafter referred to as 'the Act', reads:

"3 (1). Agricultural income-tax at the rate or rates specified in the schedule to this Act shall be charged for each financial year in accordance with and subject to the provisions of this Act, on the total agricultural income of the previous year of every person."

The word 'person' is defined in Section 2 (m) of the Act as follows:—

"'person' means any individual or association of individuals owning or holding property for himself or for any other, or partly for his own benefit and partly for another, either as owner, trustee, receiver, common manager, administrator, or executor or in any capacity recognised by law, and includes a Hindu undivided family, a firm or a company, an association of individuals, whether incorporated or not, and an institution capable of holding property."

15. I think, Sri Manavikraman Raja held the properties from which the income was derived in his capacity as stanomdar and that capacity having been recognised by law, he was a 'person' in that capacity for purpose of the charging section. An individual may hold properties in several capacities recognised by law and he will be a 'person' in each of those capacities for the purpose of the charging section. This does not mean that the various capacities are 'persons'. It only means that the individual is a separate 'person' in each of these capacities for the purpose of the charging section. An individual holding property as trustee and deriving income therefrom, and owning property in his individual capacity and deriving income from it would be two different 'persons' for the purpose of the charging section. The incomes of the two 'persons' cannot be aggregated simply because the individual who receives them is the same. I think, the agricultural income-tax is tax on a 'person' in relation to his total agricultural income. Sub-sec. (1) (a) of Section 8 of the Act says:

"In the case of agricultural income, taxable under this Act which the Court of Wards, Administrator-General or Official trustee or any receiver, administrator, executor, trustee, guardian or manager appointed by or under any law or by an order of Court or by written agreement is entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from the Court of Wards, Administrator-General, Official Trustee, or from such receiver, administrator, executor, trustee, guardian or manager, as the case may be, in like manner and to the same amount, as it would be leviable upon and recoverable from the per-

son on whose behalf such agricultural income is receivable, and all the provisions of this Act shall apply accordingly."

This would highlight the measure of the liability of the trustee or the other persons mentioned in the sub-section and would indicate that the income derived from the trust property cannot be aggregated with the income derived from the property owned by the individual in his individual capacity for the purpose of assessment. Take the case of an individual holding properties in the capacity of guardian for two or more minors, who are co-owners having distinct and separate shares. The guardian will be treated and assessed as a separate 'person' in respect of the share of the income of each of the minors. Suppose the guardian derives income from lands owned by him in his individual capacity, he will be yet another 'person' for the purpose of the charging section. Section 8 (1) (c) gives an option to the department to assess either the trustee or manager or the other persons mentioned in sub-section (a) or the beneficiary. I think, if at all S. 8 (1) (c) shows anything, it shows that the department can assess the trustee or manager or the other persons mentioned and recover the tax from them or assess the beneficiary of the income and recover the tax from him. It will not show that the trustee or the other persons mentioned in the sub-section are not liable to be assessed and the tax recovered from them.

If Sri Manavikraman Raja in his capacity as stanomdar was a 'person' for the purpose of the charging section, and received income from the stanom properties, I think, the liability to pay the tax was of that 'person', and that 'person' could have been assessed and the tax recovered from that 'person' and the properties held by that 'person', namely the stanom properties. The fact that he could have disposed of the income after receiving the same in any way he pleased did not alter the capacity in which he received it, or change, in the eye of agricultural income-tax law, the 'person' who received it. That Sri Manavikraman Raja could have received the income only in his capacity as stanomdar is clear from the fact that but for the fact that he was the stanomdar he could not have received it. Even assuming that a stanom is not a corporation sole and that Mr. Justice Bhashyam Iyengar was wrong in holding that it is a corporation sole, I think, we have to postulate a personality for the stanom as it could own properties and as it was capable, through the stanomdar, of entering into contracts and incurring liabilities binding on the properties. That the stanomdar has a dual capacity under the general law appears to be clear, for otherwise I see no reason why the debts incurred by him in his personal capacity should not bind the stanom and its properties.

16. Exhibit P-5 would show that the department entertained no doubt as to the

'person' who received the income or as to the 'person' who should be assessed in respect of the income received. It says: "Here, the 'person' assessed was the Zamorin Raja of Calicut and that too in respect of the income derived from the stanom properties. Hence, the estate of the 'deceased person' in this case is the estate of Zamorin Raja, i.e., the stanom properties."

I do not think that there is much substance in the contention of the petitioners that there was no case for the department that the income was received by Sri Manavikraman Raja in his capacity as Stani.

17. At the close of the accounting year in question, Sri Manavikraman Raja in his capacity as stanomdar and therefore the stanom incurred the liability to pay the tax to be assessed. The liability arose ex lege on the stanom and the stanom properties passed on the death of Sri Manavikraman Raja to the persons mentioned in Sec. 7 (3) of the Hindu Succession Act subject to that liability. Then, the question for consideration is whether the order of assessment was binding on those persons. On the death of Sri Manavikraman Raja, Kunhamman Raja succeeded to the title of Zamorin Raja. He was one of the persons entitled to a share in the stanom properties under Section 7 (3) of the Hindu Succession Act and was the person in whom the management of the entire stanom properties was vested by virtue of Section 5 (2) of the Kerala Act 28 of 1958. He was, therefore, competent to represent the estate of the deceased 'person'. Legal representative means a person who in law represents the estate of a deceased and would include an inter-meddlor. If an inter-meddlor can be the legal representative of a deceased, I think that a person who was admittedly one of the legal representatives and in whom the entire management of the stanom properties was vested by law was competent to represent the estate of the deceased for the purpose of the assessment proceedings. In other words, Kunhamman Raja being one of the persons entitled to a share in the stanom properties and invested by law with the management of the entire properties was competent to represent the estate of the deceased in the assessment proceedings.

18. In First Addl. Income-tax Officer v. Suseela Sadanandan, (1965) 57 ITR 168 (SC), the Supreme Court had occasion to consider the question whether one of the legal representatives in management of the properties of deceased person could represent the estate of the deceased for the purpose of reassessment proceedings under Section 34 of the Indian Income-tax Act, 1922. The Court said:

"The definition of a legal representative under Section 2 (11) of the Code of Civil Procedure also runs on the same lines: It means a person who in law represents the estate of the deceased person, and includes any person who intermeddles with the estate

of the deceased. It has been held that one who intermeddles with the estate of the deceased person, even though it may be only with a part thereof, is a legal representative within the meaning of Sec. 2(11) of the Code of Civil Procedure and is liable to the extent of the property taken possession of by him. On the same analogy, it may be held that if all the executors or some of them administered the estate of a deceased without obtaining the probate, all of them or some of them who have administered the estate may be held to be the legal representatives of the deceased and liable to the extent of the property taken possession of by them. If it had been established that E. D. Sadanandan had alone been managing the entire estate, the Court could have come to the conclusion that he was the legal representative of the deceased and, therefore, represented the estate in the assessment proceedings. But, unfortunately, as we have already indicated, no serious attempt was made by the parties to establish before the High Court by placing before it the necessary material that all or some of the executors, though they did not obtain probate of the will, had intermeddled with the estate wholly or in part."

It is said that Sri Manavikraman Raja had no estate in the stanom properties after his death and that nothing passed on his death except his share in the properties upon the notional division. I think, the Full Bench decision in 1967 Ker LT 148 = (AIR 1967 Ker 210) (FB) proceeds on the assumption that what passed on the death of the stanomdar was the entire property of the stanom. M. S. Menon, C.J., said:

"Leach, M.P., said in *Parr v. Parr*, (1833) 2 LJCh 167, that the word "devolve" means to pass from a person dying to a person living and that "the etymology of the word shows its meaning". We entertain no doubt that it is in the sense indicated by the Master of the Rolls that the word "devolved" is used in the first portion of sub-sec. (3) of Section 7 when it says that the sthanam property held by a Sthanamdar shall devolve upon the members of the family to which the Sthanamdar belonged and the heirs of the Sthanamdar. In other words, the words "as if the sthanam property had been divided per capita immediately before the death of the sthanamdar" do not attenuate the sthanam property that passes on the death of a sthanamdar to a per capita share therein as contended by the appellant in Writ Appeal No. 276 of 1965 and by the respondents in Writ Appeals Nos. 119, 174, 179 and 338 of 1965."

Quite apart from that, a stanamdar, although a limited owner, can subject the entire property of the stanam to be proceeded against for debts incurred by him and binding on the stanom. I think, to that extent Sri Manavikraman Raja had an estate in the stanom properties which would enure beyond his lifetime. When you talk

of the estate of a deceased person, what is really meant is the bundle of rights, powers, immunities and liabilities which survive the deceased. Suppose a decree had been obtained by a creditor for a debt binding on the stanom during the lifetime of Sri Manavikraman Raja, could he have executed it after his death against the stanom properties in the hands of the persons who took them under Section 7 (3) of Hindu Succession Act? I think he could have; the reason being that Sri Manavikraman Raja had the capacity in law by incurring a binding debt to lay open the entire interest in the stanom property to be taken by the creditor. I do not know how far it is correct to say that Sri Manavikraman Raja had no right to affect the destination of the stanom property beyond his life, as by incurring a binding debt, he could have given power to the creditor to sell the entire interest in the stanom property, even after his death.

19. In *Venkateswara Iyen v. Shekhari Verma*, (1881) ILR 3 Mad 384, the Court said that debts incurred by a stani will be binding on his successor if they are incurred for the benefit or proper expenses of the stanom. I think, the liability here, being one arising *ex lege*, was binding on the stanom and therefore on the successor stani if Section 7 (3) had not been enacted. Just like any other liability binding on the stanom which could have been enforced against the properties of the stanom, the tax liability also could have been enforced.

20. The alternative question which may arise is whether if the stanom continued as a dignity or whatever it be, after the death of Sri Manavikraman Raja and even after the properties devolved under Section 7 (3) of the Hindu Succession Act, the person who took the properties before the order of assessment was passed would be bound by it. In other words, if it is assumed that the stanom continued as a dignity or whatever it be, and that the assessment was on Kunhamman Raja as stanomdar and that the persons who took the properties are in the position of universal donees, would the order of assessment bind those persons as they got the properties before the order of assessment was passed? It was suggested that even if they got the properties subject to the liability to pay the tax to be assessed, that liability cannot be enforced except by means of a separate suit and so the proceedings under the Act would not be available to the department to enforce the liability. If the persons who got the stanom properties are collectively in the position of universal donees, they are personally liable to discharge the debt or liability of the stanom to the extent of the properties got by them.

21. Assuming that they are not assesseees within the meaning of the definition of that term in the Act, I think, standing as they collectively do in a position similar to that of a universal donee, they are liable to pay the amount of the tax assessed to the ex-

tent of the properties received by them. A decree obtained against them would at best establish only an antecedent liability. If a liability exists antecedent to the decree, the passing of a decree would only be a declaration by Court of that liability. If under the general law, it is possible to postulate the liability of the persons who got the properties to pay the amount to be assessed, now that that liability has been quantified by the order of assessment it stands to reason to hold that the petitioners as officers of Court cannot deny the liability and insist upon a suit being filed. The department has only made a demand to pay the tax on the joint receivers. The department has not yet taken any coercive proceedings for the recovery of the tax from them under the Act. I do not think, it is an answer to the demand that though the liability may be there, the department must establish it by a suit and that till it is so established they would not pay the amount. At any rate, I do not think that the petitioners would be entitled to an absolute declaration that the properties in respect of which they are appointed receivers are not liable to be proceeded against at all for the balance of the tax.

22. I have hitherto assumed that the persons now being represented by the petitioners got the properties subject to the liability of being proceeded against for the binding debts of the stanom. The fact that if the persons upon whom the properties devolved had alienated them, the department could not have enforced the liability against the properties in the hands of the purchaser is not relevant as the liability is not being sought to be enforced against any property in the hands of a purchaser. Whether the case here presented is analogous to a succession *inter vivos* as in the case of a universal donee or to a universal succession as on death, I would never presume that the Legislature intended the persons mentioned in Section 7 (3) to take the properties rid of the liability of the stanom, as normally the Legislature would not intend to interfere with the rights of third persons. I think, it would be unjust were it otherwise. The persons who took the properties are not bona fide purchasers for value, and on what principle can they claim to hold the properties without subjecting them to the liability to be proceeded against and which, but for the legislative intervention, would have been subject to that liability.

23. I would dismiss the petition without any order as to costs.

24. By the Court: The petition is allowed in terms of the judgment of the majority.
GGM/D.V.C. Petition allowed.

AIR 1969 KERALA 8 (V 56 C 2)

V. BALAKRISHNA ERADI, J.

State of Kerala, Appellant v. Mahadeva Iyer Venkita Subramania Iyer, Respondent.

A. S. No. 525 of 1963, D/-30-10-1967, against order of Dist. Court, Trivandrum in E. A. No. 381 of 1963.

Civil P. C. (1908), O. 21, R. 1 (2) — Decree awarding interest on decretal amount until payment—Deposit of decretal amount in Court without notice to decree-holder — Interest does not cease to run from date of deposit. AIR 1939 Nag 191, Dissented from.

Where the interest is awarded by the decree on the decretal amount until payment, it does not cease to run merely by reason of the making of the deposit of the decretal amount into Court unless it is followed up by the service of notice as required by Clause (2). It is only when the factum of deposit is brought to the knowledge of the decree-holder by service of such notice that the deposit will amount to payment within the meaning of O. 21, R. 1. AIR 1939 Nag 191, Dissented from; AIR 1919 Mad 445 and AIR 1932 Cal 111 and AIR 1951 Bom 394 and AIR 1952 Trav-Co 236 and AIR 1955 Madh Bha 126 and AIR 1956 Tra-Co. 46, Rel. on. (Para 2)

Cases Referred: Chronological Paras

- (1956) AIR 1956 Tra-Co. 46 (V 43) =
ILR (1955) Tra-Co. 991, Varki
Ouseph v. Narayanan Parameswara
Panicker 2
(1955) AIR 1955 Madh Bha 126
(V 42) = Madh Bha LJ 1954 HCR
826, Vinayak Yeshwant Lad v.
Shrikishan Chandmal Firm 2
(1952) AIR 1952 Trav-Co. 236 (V 39),
Janki Amma Meenakshi Amma v.
Mathiri 2
(1951) AIR 1951 Bom 394 (V 38) =
53 Bom LR 582, Special Land Ac-
quisition Officer Ahmedabad v.
Ambalal Trikamlal 2
(1939) AIR 1939 Nag 191 (V 26) =
1939 Nag LJ 211, Laxminarayan
Ganeshdas v. Ghasiram Dalchand
Paliwal 2
(1932) AIR 1932 Cal 111 (V 19) =
35 Cal WN 544, Rangpur Raiyat
Bank Ltd. v. Hesabuddin 2
(1919) AIR 1919 Mad 445 (V 6) =
ILR 42 Mad 576, Ramaraya Shan-
bogue v. Shorbott Venkatarama-
naya 2

Government Pleader, for State; G. Viswa-
natha Iyer, L. Manoharan and S. Subra-
mania Sarma, for Respondent.

JUDGMENT: This appeal has been pre-
ferred by the State against the order passed
by the lower Court directing it to deposit
the balance amount as per the statement
filed before the lower Court by the respon-
dent-decree-holder. The matter arises in
relation to the execution of the decree pass-

ed in L.A.R. No. 7 of 1959 awarding en-
hanced compensation to the plaintiff-decree-
holder with interest on such amount from
the date of taking possession of the property
till the date of payment. This decree was
passed on 20-3-1959. An execution petition
was filed by the decree-holder on 29-1-1962
seeking to enforce the decree and realise
the amount due to him thereunder. On
30-3-1962 the decree-holder was served with
a memo dated 26-3-1962 filed by the learned
Government Pleader on behalf of the State
wherein it was stated that a sum of
Rs. 11,950.62 had been deposited into the
Court by the State on 12-1-1960 in full dis-
charge of the amount due to the decree-
holder under the decree. It is not disputed
that no notice had been taken out to the
decree-holder intimating him of such depo-
sit as is required under the provisions of
Order 21, Rule 1 (2), C.P.C. The decree-
holder therefore, contended that notwith-
standing the deposit stated to have been so
made, he is entitled to be paid interest till
the date on which he was served with the
memo referred to above, that is, till 30-3-
1962. This contention was upheld by the
Court below and it called upon the State to
deposit the balance amount due to the
decree-holder as per the calculation con-
tained in the statement filed by the decree-
holder. If interest is payable till the date
of the service of the memo, the correctness
of the figure mentioned in the statement
filed by the decree-holder is not disputed by
the State.

2. The only contention raised before me
by the learned Government Pleader is that
on the amount being deposited in Court, the
interest automatically ceased to run, no
matter whether or not notice of the deposit
had been taken out to the decree-holder.
In support of this contention, reliance was
placed before me on a decision of the Nag-
pur High Court reported in Laxminarayan
Ganeshdas v. Ghasiram Dalchand Paliwal,
AIR 1939 Nag 191. This decision does, no
doubt, support the contention of the learned
Government Pleader. But this view of the
Nagpur High Court has not found favour
with the other High Courts in India includ-
ing the Travancore-Cochin High Court.
Vide Ramaraya Shanbogue v. Shorbott Ven-
kataramanaya, ILR 42 Mad 576 = (AIR
1919 Mad 445); Rangpur Raiyat Bank Ltd.
v. Hesabuddin, AIR 1932 Cal 111; Special
Land Acquisition Officer, Ahmedabad v.
Ambalal Trikamlal, AIR 1951 Bom 394;
Janaki Amma Meenakshi Amma v. Mathiri,
AIR 1952 Trav-Co 236, Vinayak Yeshwant
Lad v. Shrikishan Chandmal Firm, AIR 1955
Madh Bha 126; and Varki Ouseph v. Nara-
yanan Parameswara Panicker, AIR 1956
Trav-Co 46. All these rulings have taken
the view that where interest is awarded by
the decree on the decretal amount, the
decree-holder is entitled to such interest
until he receives notice of the payment into
Court as provided in Clause (2) of Rule 1 of
Order 21, Civil P. C. In the face of the

express and mandatory provision contained in Clause (2), I am in respectful agreement with the view that interest will not cease to run merely by reason of the making of the deposit into Court unless it is followed up by the service of notice as required by Clause (2), and that is only when the factum of deposit is brought to the knowledge of the decree-holder by service of such notice that the deposit will amount to payment within the meaning of Order 21, Rule 1. The contrary view taken by the Nagpur High Court cannot, with great respect, be regarded as correct.

3. The view taken by the Court below is perfectly correct and calls for no interference by this Court. The appeal fails and is dismissed with costs.

CWM/D.V.C. Appeal dismissed.

AIR 1969 KERALA 9 (V 56 C 3)

V. BALAKRISHNA ERADI, J.

K. C. Kumaran, Appellant v. Vallabhadas VasANJI and others, Respondents.

Second Appeal No. 556 of 1963, D/-22-11-1967, against the order of District Court, Kozhikode, in A.S. No. 7 of 1960.

(A) Civil P. C. (1908), Ss. 100-101—Concurrent findings of fact — No interference.

The question as to whether or not the accident was caused by negligence on the part of the driver of a motor-car is purely one of fact and a concurrent finding entered thereon by the Courts below is not ordinarily liable to be canvassed before the High Court in second appeal. (Para 5)

(B) Tort — Negligence — Burden of proof — Collision with motor-car — Suit for damages — Onus not discharged by plaintiff — Suit held rightly dismissed.

In a suit for damages for injuries caused by an accident, the initial burden of making out at least a prima facie case of negligence as against the defendant lies heavily on the plaintiff. Once this onus is discharged, it will be for the defendant to prove that the incident was the result of inevitable accident or contributory negligence on the part of the plaintiff. (1857) 11 Moo PC 307, Rel. on. (Paras 8, 13)

Cases Referred: Chronological Paras

- (1966) AIR 1966 Ker 172 (V 53) = 1965 Ker LJ 1112, Veeran v. Krishnamoorthy 12
- (1962) AIR 1962 Madh Pra 23 (V 49) = 1961 Jab LJ 372, Sadaram Kanhaiya v. Sobharam Sadaram Kalar 12
- (1962) AIR 1962 Pat 258 (V 49) = ILR 41 Pat 244, Jang Bahadur Singh v. Sunder Lal Mandal 12
- (1935) 13 Mys LJ 345, Bangalore Printing and Publishing Co. Ltd. v. M. K. Murthy 12

GL/GL/C833/68

(1857) 11 Moo PC 307 = 14 ER 712, Morgan v. Sim 8

K. N. Karunakaran, for Appellant; K. V. Surianarayana Iyer and T. L. Vishwanatha Iyer, for Second Respondent.

JUDGMENT: The plaintiff in O.S. No. 25 of 1959 of the Subordinate Judge's Court, Kozhikode, has preferred this Second Appeal challenging the decision of the Courts below dismissing the suit filed by him for recovery of Rs. 10,000 from the defendants by way of damages.

2. The plaintiff's case was that on the 15th of May, 1958, while he was proceeding on a motor-cycle from west to the east along Gandhi Road in Calicut City, a Hillman car owned by the first defendant and driven by the second defendant dashed against his motor-cycle as a result of which the plaintiff sustained grievous injuries on his right leg necessitating his treatment as an in-patient in the Government Headquarters Hospital for more than six months. It is alleged that the accident was caused on account of negligence on the part of the driver of the car who suddenly reversed the vehicle and later moved southwards without sounding the horn or indicating the direction in which he was trying to proceed.

It is averred in the plaint that the car was driven right across the road at a very high speed so suddenly that the plaintiff could not take any action to avert the collision and that there was no negligence whatever on the part of the plaintiff. It is stated that the plaintiff had been earning about Rs. 1,000 per month as a timber merchant and that on account of the injuries caused by the accident he was totally disabled from attending to his business for over 8 months. The damages caused to him on this account have been estimated in the plaint at Rs. 6,666.60. In addition, the plaintiff has claimed a sum of Rs. 3,000 for the expenses of medical treatment and also a further sum of Rs. 1,000 as compensation for the physical and mental strain caused to him on account of the injuries. The plaint claim in the aggregate has, however, been limited to Rs. 10,000. The third defendant is the insurance company with whom the first defendant's vehicle had been insured.

3. The defendants contended that the accident occurred because of the plaintiff's own rash and negligent handling of the motor-cycle and not on account of any negligence on the part of the driver of the car. They pleaded that the plaintiff had absolutely no cause of action against the defendants and was not entitled to recover any amount from them by way of damages. They also questioned the various items of damages claimed in the plaint and put the plaintiff to strict proof therewith.

4. Both the Courts below have concurrently found that the plaintiff has not satisfactorily proved that the accident was caused as a result of negligence on the part of the driver of the car and that on this

ground the suit for damages had to fail. This concurrent finding has been arrived at by the Courts below mainly on an appreciation of the oral testimony adduced in the case, there being very little documentary evidence relating to this important aspect of the case.

5. The question as to whether or not the accident was caused by negligence on the part of the second defendant is purely one of fact and a concurrent finding entered thereon by the Courts below is not ordinarily liable to be canvassed before this Court in second appeal. The learned counsel for the appellant, however, contended that in arriving at the said finding the Courts below have proceeded on a wrong understanding of the averments contained in the plaint and that there has also not been a proper consideration by them of the oral evidence adduced in the case. It was further urged that the finding entered by the lower Courts is perverse and is liable to be set aside on that ground. In view of these contentions raised by him I permitted counsel to take me through the pleadings and the entire evidence recorded in the case.

6. I am not satisfied that there has been any misreading of the pleadings by the Courts below. The pleadings have been correctly summarised in the judgments of the two Courts. The lower Courts were fully justified in observing that the averments contained in paragraph III (2) of the plaint relating to the manner in which the accident is alleged to have taken place are absolutely vague and wanting in material particulars. I find no substance in the complaint that the approach made by the Courts below to a consideration of issues 3 and 4 has been in any manner vitiated by an erroneous understanding of the averments contained in the plaint.

7. Both the Courts below have fully discussed the oral evidence tendered by P.Ws. 1 to 3 and D.Ws. 1 and 2 and hence it cannot be said that they have omitted to discuss the evidence on record before entering their findings on the concerned issues. Having been taken through the oral evidence I am inclined to agree with the Courts below that the plaintiff has not succeeded in establishing that the accident was caused as a result of negligence on the part of the driver of the motor-car.

8. As observed by Lord Wensleydale in *Morgan v. Sim*, (1857) 11 Moo PC 307, 312:

"the party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales, and does not satisfy the Court that it was occasioned by the negligence or default of the other party, he cannot succeed."

9. Learned counsel for the appellant contended that there is *prima facie* proof of negligence in this case, because according to him, at the time of the collision, the motor-cycle was proceeding towards the east on the northern edge of the road on the metalled portion whereas the car which had been turned towards the west had almost crossed the road and came to the northern side. In other words, the argument was that the motor-cyclist was keeping to the left when he was hit and that inasmuch as he was keeping to the correct side according to the rules of the road and the car had come to the wrong side, negligence on the part of the car driver has to be presumed.

This argument, however, proceeds on certain assumptions of fact which are not entirely borne out by the evidence. As already noticed, the averments in the plaint as to the manner in which the accident took place are hopelessly vague. In Ext. B-8, which is the statement given by the plaintiff to the police very shortly after the accident, he has stated that the accident took place while the car was being reversed. The same version has apparently been stuck to in paragraph III (2) of the plaint also, although the averments are by no means clear. But the plaintiff in his oral testimony has attempted to make out that the collision occurred when after reversing the car the second defendant suddenly drove it across the road in the forward gear in a northerly direction.

I do not find any valid ground to differ from the view expressed concurrently by the Courts below that the statement in Ext. B-8, being the earliest in point of time and, therefore, made at a time when the facts were fresh in the mind of the person concerned, ought to be preferred to the version given by the plaintiff as P.W. 1 after a lapse of about 1½ years. Particulars regarding the direction facing which the car was originally parked, and on which side of the road it had been parked which are most material and necessary for understanding the exact manner in which the accident took place, are significantly omitted to be mentioned in the plaint. The plaintiff has no consistent case in his evidence also on these aspects.

10. The testimony of P.Ws. 2 and 3 has been rightly rejected by the Courts below as unworthy of reliance. Even though the second defendant who has been examined as D.W. 1 has endeavoured to make his testimony helpful to the plaintiff, the Courts below have not chosen to believe his evidence since they were of the view that the witness who had been dismissed from the first defendant's service had every motive to depose against the interest of the first defendant.

11. The mere circumstance that the second defendant had been convicted in C.C. No. 1443 of 1958 for rashness and neg-

ligence in connection with the accident cannot in any way be regarded as constituting even prima facie evidence of negligence in this action against his master, particularly because it is seen from Ex. A-1 that the conviction was based only on the plea of guilty put forward by the accused.

12. The learned counsel for the appellant invited my attention to the decision of the Madhya Pradesh High Court in *Sadaram Kanhaiya v. Sobharam Sadaram Kalar*, AIR 1962 Madh Pra 23, wherein it has been held that though in an action for damages for death due to rash and negligent driving it is for the plaintiff to establish negligence of the defendant in the first instance, direct evidence is not necessary for establishing negligence and it may be inferred from the circumstances of the case. The difficulty for the plaintiff in this case, however, is that there is neither direct nor circumstantial evidence which can legitimately justify the interference that the accident in question was caused on account of the negligence on the part of the second defendant. Counsel sought to rely also on the decisions reported in *Jang Bahadur Singh v. Sunder Lal Mandal*, AIR 1962 Pat 258; *Bangalore Printing and Publishing Co. Ltd. v. M. K. Murthy*, (1935) 13 Mys LJ 345; and *Veeran v. Krishnamoorthy*, 1965 Ker LJ 1112 = (AIR 1966 Ker 172), but they are not also of any greater assistance to the appellant.

13. It cannot be doubted that the initial burden of making out at least a prima facie case of negligence as against the defendant lies heavily on the plaintiff. Once this onus is discharged, it will be for the defendant to prove that the incident was the result of inevitable accident or contributory negligence on the part of the plaintiff. In the present case, it is apparent from the plaintiff's own testimony that the accident took place at a spot where the road is straight and admits of easy distant vision. The plaintiff has deposed that he saw the car parked on the road margin even from a distance of one furlong and that he later noticed that the car was being reversed on the road when he was at a distance of about 60 yards from it. Admittedly, there was little other traffic on the road at that time and the road has a width of about 35 feet. In such circumstances, the motorcyclist having been forewarned about the fact that the motor-car was in the process of being reversed across the road, it is reasonable to infer that with the exercise of due care and caution the collision could have been averted by timely action on the part of the cyclist. It has come out in evidence that the plaintiff was having only a learner's licence for riding motor-cycle and therefore, probably lacked experience. As observed by me earlier, essential details as to how and when exactly the collision took place, viz., whether it was during the backward motion of the car as stated in Ext. B-8 or while it was being driven forward after having been reversed, have not been satis-

factorily proved. In these circumstances, the Courts below were, in my view, justified in holding that the plaintiff has failed to establish a prima facie case that the accident was caused on account of the negligence of the driver of the car.

14. The judgment and decree under appeal do not therefore call for any interference and are confirmed. The second appeal is dismissed, but in the circumstances of the case I make no order as to costs. No leave.

HGP/DVC

Appeal dismissed.

AIR 1969 KERALA 11 (V 56 C 4)

FULL BENCH

M. MADHAVAN NAIR, T. S. KRISHNA-MOORTHY IYER AND V. BALAKRISHNA ERADI, JJ.

Chori Ouso, Petitioner v. Sasoon Helegua and another, Counter-Petitioners.

C. R. P. Nos. 675 to 678, 1174 and 1175 of 1966, and O. P. Nos. 4668 and 4669 of 1966, D/-5-4-1968.

Tenancy Laws — Kerala Land Reforms Act, 1963 (1 of 1964), Ss. 31, 2 (60), 2 (8), 13 (1), 35, 8, 10 (3) — "Varamdar" defined in latter part of Sec. 2 (60) is entitled to apply for fixation of fair rent under S. 31 — Varamdar is "a deemed tenant" and is included in definition of 'tenant' — He has cultivating possession and is lessee — T. P. Act (1882), Sec. 105 — Essentials of lease — Civil P. C. (1908), Preamble — Interpretation of statutes — "Deeming" provisions in definition — Inclusive definition, scope of.

Section 31 of the Kerala Land Reforms Act insists that the determination of fair rent has to be done at the instance of the cultivating tenant or any landlord.

(Para 5)

'Cultivating tenant' defined in Sec. 2 (8) means 'a tenant who is in actual possession of, and is entitled to cultivate, the land comprised in his holding'.

(Para 6)

Under Sec. 2 (45) 'possession' in relation to land includes occupation of land by a person deemed to be a tenant under Ss. 4, 5, 6, 7, 8, 9 or 10.

(Para 17)

A lease is not a mere contract but is a transfer of an interest in immovable property. Section 105, T. P. Act recognises also a lease of immovable property in consideration of a share of crops. The fundamental conception of a lease is that it is the separation of the right of possession from ownership. In every lease there is an implied contract that the lessee will be put in possession of the land by the lessor. The term 'lease' imports a transfer of an interest to enjoy the property. One of the essential conditions of a lease is that the tenant should have the right to the exclusive possession of the land. Ordinarily the test of

exclusive possession determines the character of a lease. The use of the word 'enjoy' instead of 'possess' in S. 105 of the T. P. Act does not mean that no possession to the lessee is necessary to constitute a lease. The term 'enjoyment' in the section is used only for showing that a bare right to the usufruct is not a lease. (Paras 9, 10)

"Varam" is defined by the Act as an arrangement for the cultivation of nilam and sharing the produce made between the owner or other person in lawful possession of the nilam and the person who undertakes cultivation under such arrangement. By the definition of "varam" and "varamdar" in Sec. 2 (60) it has to be held that "varamdar" is not a tenant. (Para 12)

But 'tenant' defined in Section 2 (57) of the Act includes a person who is deemed to be a tenant under Sec. 8 and Sec. 10 (iii). Varamdar is a deemed tenant under Ss. 8 and 10 (iii). Though a varamdar does not satisfy the definition in the body of Sec. 2 (57) as a person allowed to possess and enjoy the land of another he is included in the definition of 'tenant' by the device of an inclusive provision in Sec. 2 (57). (Para 13)

It is a well-known rule of interpretation that the word 'include' or 'includes' is used as a word of enlargement and ordinarily implies that something else has been included which falls outside the general language that precedes it and to add to the general clause a species which does not naturally belong to it. (Para 14)

A person deemed to be a tenant under Sec. 8 or Sec. 10 (iii) of the Act is therefore a tenant under the Act. A "varamdar" is thus a cultivating tenant if the expression 'tenant' in Sec. 2 (8) is understood in the light of the definition clause in Sec. 2 (57) of the Act. (Para 15)

It is true that Sec. 2 (60) of the Act does not contemplate any transfer of possession or right to possession of the nilam in favour of the varamdar. If at all, Sec. 2 (60) of the Act only shows that even after the varam arrangement the varamdar has no legal possession of the land. But the said provision does not indicate that subsequent to the varam arrangement, a varamdar has not even any occupation in the nilam. (Para 18)

A varamdar has to remain in the nilam to carry on the cultivation operations for a substantial period during the season for which he is given the right to cultivate. This is sufficient to establish occupation by the varamdar in the nilam. This occupation is what is recognised as actual possession by the definition of the term 'possession' in the Act itself. It is not accurate to call a varam as a merely naked license. It is something more than a license. It is a license coupled with a grant. (Para 18)

If the word 'tenant' in Sec. 2 (17) is interpreted in the light of the definition of 'tenant' in the Act, the land in respect of which a varam right is given will be a

"holding" under the Act. Further Sec. 2 is only subject to the qualifying clause 'unless the context otherwise requires'. Even if there is any inconsistency because of the definition of 'holding' in Sec. 2 (17) the term 'holding' in Sec. 2 (8) will have to be given a meaning consistent with the context in which the term is used. It therefore follows that a 'varamdar' defined in the latter part of Sec. 2 (60) is a "cultivating tenant" as defined in Sec. 2 (8). (Para 19)

The benefit of Sec. 13 (1) of the Act is available to all tenants including cultivating tenants. In view of the definition of 'tenant' in S. 2 (57), the benefit should be available even to a person who is deemed to be a tenant under Ss. 8 and 10 (iii). The term 'tenant' in Sec. 35 of the Act must include also a person deemed to be a tenant under Sec. 8 or Sec. 10 (iii). Section 13 (1) therefore confers fixity on a varamdar also. If a varamdar is entitled to fixity under S. 13 (1) the owner of the nilam should have a corresponding right to resume the land from the former as provided in Ss. 14 to 22. (Paras 21, 22)

A 'varamdar' defined in the latter part of Sec. 2 (60) is thus a 'cultivating tenant' entitled to file an application for fixation of fair rent under Sec. 31 of the Act. (Para 25)

Cases Referred:	Chronological Paras
(1967) 1967 Ker LT 485 = ILR	
(1967) 2 Ker 235, Mohammed Ali v. Ahammed Sait	7
(1963) 1963 Ker LT 408 = 1963 Ker LJ 289, Dudachan v. Sreenivasa Kini	18
(1960) AIR 1960 Ker 263 (V 47) = (1959) 1959 Ker LT 885 (2) = 1960 Cri LJ 1091, Balan v. State	11
(1958) 1958 Ker LT 359 = 1958 Ker LJ 541, Parameswaran Kartha v. Ouseph	18
(1951) AIR 1951 Trav-Co. 189 (V 38) = (1951) 1951 Ker LT 44, Ouseph v. Kunjathu	11
(1950) AIR 1950 EP 296 (V 37) = 52 Pun LR 107, Governor-General in Council v. Endar Mani	10
(1932) 22 Trav LJ 22	11
(1923) 1923-1 KB 522 = 92 LJKB 363, Mellows v. Low	14
(1922) 31 Mad LT 114, Madras Anjuman Islamia of Kholwad v. Municipal Council of Johanesburg	18
(1920) AIR 1920 Cal 548 (V 7) = 32 Cal LJ 37, Brahmamoyee v. Mansur	11
(1899) 1899 AC 99 = 79 LT 473, Dilworth v. Commr. of Stamps	14
(1899) 2 QB 313 = 68 LJQB 711, Luscombe v. Great Western Rly. Co.	18
(1885) 1 QB 72 = 35 LJMC 74, The Queen v. Spurrell	18
(1882) ILR 8 Cal 534, Nasibun v. Precosunker Ghose	14
(1877) 2 QBD 581 = 46 LJMC 243, R v. Paneras	18

(1872) 8 Ex 8=42 LJ Ex 49, Dawson v. Midland Rly. Co. 18
9 Cochin LR 418, Kunhayyappan v. Chatha 11

In C. R. P. No. 675 of 1966
M. K. Narayana Menon and C. S. Narayanan, for Petitioner; A. S. Krishna Iyer and A. K. Ramaseshadrinathan, for Counter Petitioner.

In C. R. P. No. 676 of 1966
M. K. Narayana Menon and C. S. Narayanan, for Petitioner; S. K. Brahmanandan, for Counter Petitioners.

In C. R. P. No. 677 of 1966
M. K. Narayana Menon and C. S. Narayanan, for Petitioner; A. S. Krishna Iyer and A. K. Ramaseshadrinathan, (for No. 1) and S. K. Brahmanandan (for No. 2), for Counter Petitioners.

In C. R. P. No. 678 of 1966
M. K. Narayana Menon and C. S. Narayanan, for Petitioner; A. S. Krishna Iyer and A. K. Ramaseshadrinathan, for Counter Petitioners Nos. 1 and 2.

In C. R. P. No. 1174 of 1966
P. K. Kesavan Nair and K. N. Narayana Pillai, for Petitioner; M. M. Abdulkhader, for Counter Petitioner.

In C. R. P. No. 1175 of 1966
P. K. Kesavan Nair and K. N. Narayana Pillai, for Petitioner; P. N. Sankaranarayana Pillai, for Counter Petitioner.

In O. P. Nos. 4668 and 4669 of 1966
T. N. Subramania Iyer and T. V. James, for Petitioner; M. K. Narayana Menon, M. P. Menon and C. S. Narayana, for Respondents.

KRISHNAMOORTHY IYER, J.: The common question that arises in all the cases is whether a varamdar defined in the latter portion of Section 2, sub-section (60) of the Kerala Land Reforms Act, 1963 (Act 1 of 1964) has got the right to file an application for the determination of 'fair rent' under Sec. 31 of the said Act. Section 2 (13) of Act 1 of 1964 defines 'fair rent' as meaning 'the rent payable by a cultivating tenant under Section 27 or Section 33' of the Act.

2. In the orders which are the subject-matter of C. R. Ps. 675 to 678 of 1966 the Subordinate Judge took the view that the cultivating tenant has no such right. Though the same question is raised in C. R. Ps. 1174 and 1175 of 1966 the point was not raised before the appellate Judge. In the Original petitions which challenge the orders of the Land Tribunal, Moovattupuzha, the Land Tribunal conceded the right to the 'varamdar'.

3. The latter portion of Section 2 (60) of the Kerala Land Reforms Act, 1963 (Act 1 of 1964), hereinafter referred to as the Act, defines 'varamdar' as meaning, 'the person who undertakes cultivation under a varam arrangement' and according to the earlier part of the same provision 'varam' means 'an arrangement for the cultivation of nilam with paddy and sharing the produce,

made between the owner or other person in lawful possession of the nilam and the person who undertakes cultivation under such arrangement, and includes the arrangements known as 'pathivaram, pankuvaram and pankupattom'. According to Sec. 2 (38) of the Act, nilam means 'land adapted for the cultivation of paddy'.

4. Section 31 (1) of the Act enabling the cultivating tenant or any landlord to apply for determining the fair rent in respect of a holding reads :

"The cultivating tenant or any landlord may apply, in such form as may be prescribed, to the Land Tribunal for determining the fair rent in respect of a holding".

Section 31 (2) of the Act prescribes the procedure for dealing with the application. The determination of fair rent has to be in terms of Sections 27 and 33 of the Act. The said provisions before their amendment by Act 9 of 1967 are in these terms :

Section 27. "Fair rent :— (1) The fair rent in respect of a holding shall be the rent payable by the cultivating tenant to his landlord and it shall be the rent calculated at the rates specified in Schedule III applicable to the class of lands comprised in the holding or the contract rent, whichever is less.

Explanation:— Where the fair rent in respect of a holding has been determined under any law in force immediately before the 21st January, 1961, the fair rent so determined shall be deemed to be the contract rent for the purposes of this sub-section.

(2) Notwithstanding anything contained in sub-section (1), the fair rent in respect of a holding, where the cultivating tenant or an intermediary is holding under a small-holder, shall, at the option of the small-holder, be

(a) the rent calculated at the rates specified in Schedule III applicable to the class of lands comprised in the holding; or

(b) where the fair rent in respect of the holding has been determined under any law in force immediately before the 21st January, 1961, such fair rent, or, where fair rent has not been so determined, 75 per cent of the contract rent;

Provided that the fair rent payable by a cultivating kanamdar or a cultivating customary verumpattamdar shall not exceed the michavaram payable by such kanamdar or the rent payable by such customary varumpattamdar, as the case may be".

Section 33. "Agreement as to fair rent. — Notwithstanding anything contained in the foregoing sections, it shall be competent for the landlord and the tenant to agree as to what shall be the fair rent payable in respect of the holding and, where such an agreement signed by the landlord and the tenant is filed with the Land Tribunal, the Land Tribunal shall pass orders determining such agreed rent as the fair rent in respect of the holding :

Provided that the agreed rent shall not exceed the fair rent under Section 27, in respect of the holding:

Provided further that where there are intermediaries or other persons having an interest in the holding, the land owner, the cultivating tenant and all the intermediaries and other persons interested shall be parties to such an agreement:

Provided also that this section shall not apply to a case where the landlord is a religious, charitable or educational institution of a public nature".

Section 27 (2) of the Act has been deleted by Act 9 of 1967.

5. Section 31 of the Act insists that the determination of fair rent has to be done at the instance of the cultivating tenant or any landlord. It is therefore necessary to find out who is a cultivating tenant for the purpose of Section 31 of the Act.

6. 'Cultivating tenant' defined in Section 2 (8) of the Act means 'a tenant who is in actual possession of, and is entitled to cultivate, the land comprised in his holding'. The words 'tenant', 'possession', 'cultivate' and 'holding' occurring in Section 2 (8) of the Act have also been defined in sub-sections (57), (45), (7) and (17) of Section 2 of the Act.

7. In Mohammed Ali v. Ahammed Sait, 1967 Ker LT 485, a Division Bench of this Court discussed the nature and extent of the rights of a varamdar under the provisions of Act 1 of 1964 in the nilam given to him for cultivation in connection with his right to maintain a complaint for criminal trespass against the owner. The head-note of the decision reads thus:

"A varamdar has been salvaged and brought into the fold of the real tenant by Sec. 10. So the possession in relation to land must enure to his benefit also. It must necessarily follow that the legal incidents which flow from possession in relation to a 'tenant' must enure to the varamdar also, since he too has been brought under the category. It is true that the status of a tenant is conferred on the varamdar by the device of a deeming provision but that does not disqualify him from claiming the benefits, rights and privileges that a normal tenant is entitled to claim under the Act. He is a 'cultivating tenant' and the land held by him is a 'holding' and he can apply to the Land Tribunal for fixation of fair rent and he has also the right under Sec. 53 to purchase the landlord's rights. His rights are also heritable and alienable as is seen from Sec. 50. None of these incidents would attach itself to a licensee. It would, therefore, be improper to equate the varamdar with a licensee".

8. The above decision did not decide the question raised before us but only assumed without expressly deciding that a varamdar is a cultivating tenant and the nilam held by him is a holding.

9. A lease is not a mere contract but is a transfer of an interest in immovable pro-

perty. Section 105 of the Transfer of Property Act defines lease as a transfer of right to enjoy immovable property 'for a certain time' or 'in perpetuity' for consideration. The Section recognises also a lease of immovable property in consideration of a share of crops. There was considerable discussion at the Bar regarding the incidents of a varam transaction and the status of a varamdar under the general law of the State as against the owner of the land which the former is cultivating. The fundamental conception of a lease is that it is the separation of the right of possession from ownership. Salmond in his book on Jurisprudence (eleventh edition by Glanville Williams) observed at page 464:

"A lease, in this generic sense, is that form of encumbrance which consists in a right to the possession and use of property owned by some other person. It is the outcome of the rightful separation of ownership and possession. We have seen that possession is the continuing exercise of a right, and that although a right is normally exercised by the owner of it, it may in special cases be exercised by someone else. This separation of ownership and possession may be either rightful or wrongful, and if rightful it is an encumbrance of the owner's title".

10. In every lease there is an implied contract that the lessee will be put in possession of the land by the lessor. The term 'lease' imports a transfer of an interest to enjoy the property. One of the essential conditions of a lease is that the tenant should have the right to the exclusive possession of the land. Ordinarily the test of exclusive possession determines the character of a lease. The use of the word 'enjoy' instead of 'possess' in Section 105 of the Transfer of Property Act does not mean that no possession to the lessee is necessary to constitute a lease. The term 'enjoyment' in the Section is used only for showing that a bare right to the usufruct is not a lease. Sec. 108(a) of the Transfer of Property Act which deals with the duty of the lessor to put the lessee in possession of the property is however subject to the opening words of the section under which the parties can exclude the operation of that clause. But that does not mean that the parties can agree that the lessee can have no right of possession. If the parties so agree, then the transaction will not be a lease. In Governor-General in Council v. Indar Mani, AIR 1950 EP 296, a Division Bench of the East Punjab High Court said:

"Now, from the definition of 'lease' in Sec. 105, T. P. Act, 1882, it is clear that the essential feature of a lease is that it is a transfer of a right to enjoy immovable property for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised. Indeed, the fundamental conception of a lease is that it is the separation of the right of possession from ownership and though the section uses the word

'enjoy' instead of the word 'possess' there is no authority for holding that it contemplates the exclusion of possession when it refers to enjoyment. The word 'enjoy' must therefore, be taken to include possession. No doubt, Sec. 108 (b) which deals with the lessor's duty to put the lessee in possession of the property, is subject to the opening words of the section under which the parties can exclude the operation of any particular clause by express contract. But this only means that lessor's duty of putting the lessee in possession can be excluded by express contract. It does not mean that the parties can agree that the lessee is to have no right of possession. If they do so, then the transaction would not be a lease'.

11. There cannot therefore be any doubt regarding the essential characteristics of a lease. The learned counsel opposing the claim of the varamdars relied on some decisions to establish the legal incidents of varam transaction, that the interest of the varamdar is only to cultivate the land and share the produce, a varamdar has no possession or control of the land and that there is no transfer of any interest in the land in his favour. In Criminal Revn. Petn. 245 of 1104 = 22 Trav LJ 22, a Division Bench of the Travancore High Court took the view that a landlord who has let his land on pathivaram is in joint possession of the standing crop with the lessee. In Kunhayyappan v. Chatha, 9 Cochin LR 418, the view was taken by the Chief Court of Cochin that a pankuvaramdar has no possession of the land which he cultivates and that his true legal character is of a licensee. The decision in 9 Cochin LR 418, was cited with approval by Raman Nayar, J., in Balan v. State, 1959 Ker LT 885 (2) = (AIR 1960 Ker 263). In Ouseph v. Kunjathu, 1951 Ker LT 44 = (AIR 1951 Trav-Co. 189), a Division Bench of the Travancore-Cochin High Court held that—

"an agreement for the cultivation of land under which a person is to cultivate another's land and the two are to share the produce in certain proportions may be in lease if there is an intention to transfer an interest in the property; but if there is no such intention such agreement cannot create a lease and the matter is as held in Brahmamoyee v. Munsur, AIR 1920 Cal 548, one purely of construction in each case". In AIR 1920 Cal 548, it was decided that the contract between the parties was not a lease because of the absence of a covenant in the contract to pay rent and the absence of a clause creating an interest in the land in favour of the defendant. The contract was held to be only a profit sharing arrangement by which the defendant who cultivated the land undertook to give a share of the profits to the owner and keep the remainder as his remuneration. These decisions do not lay down that all varam transactions are only licences and not leases. The question must depend upon the construction of the contract between the parties.

12. But here we are only concerned with the rights of a varamdar as defined in Section 2 (60) of the Act. It was pointed out that because of Section 2 (60), Section 8, and Sec. 10 (iii) of the Act a varamdar is a person having only a right to cultivate the land and that these provisions do not recognise any possession or right to possession of the land in the varamdar. In view of this, the submission was that a varamdar is not a tenant and therefore not a cultivating tenant entitled to apply for fixing fair rent. Varam as already noticed is defined by the Act as an arrangement for the cultivation of nilam and sharing the produce made between the owner or other person in lawful possession of the nilam and the person who undertakes cultivation under such arrangement. It was pointed out on behalf of the varamdar that it is not correct to say that the definition does not recognise any possession in the varamdar on the basis of the arrangement since Section 2 (60) contemplates only the state of things at the time of entering into the arrangement. Under the definition clause no transfer of possession or no right of possession to the varamdar is necessary for the creation of a varam arrangement. By the definitions of varam and varamdar in Section 2 (60) of the Act, it has to be held that varamdar is not a tenant.

13. But 'tenant' defined in Section 2 (57) of the Act includes a person who is deemed to be a tenant under Section 8 and Sec. 10 (iii) of the Act. It is therefore necessary to reproduce those provisions:

Section 2 (57). "tenant" means any person who has paid or has agreed to pay rent or other consideration, for his being allowed by another to possess and to enjoy the land of the latter, and includes—

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)
- (g)
- (h)
- (i)

(j) a person who is deemed to be a tenant under Section 4, Section 5, Section 6, Section 7, Section 8, Section 9 or Section 10".

Section 8. "Certain persons who were cultivating land on varam arrangement to be deemed tenants. Notwithstanding anything to the contrary contained in any law, or in any contract, custom or usage, or in any judgment, decree or order of Court, any person who, by virtue of the provisions of Section 6 of the Kerala Stay of Eviction Proceedings Act, 1957, was entitled to cultivate any nilam after the 11th day of April, 1957, and was cultivating the nilam at the commencement of this Act, shall be deemed to be a tenant, notwithstanding the expiry of the term fixed under the varam arrangement".

Section 10. "Certain other persons to be deemed tenants. — Notwithstanding any—

thing to the contrary contained in any law, or in any contract, custom or usage, or in any judgment, decree or order of Court, the following classes of persons shall be deemed to be tenants :—

- (i)
- (ii)
- (iii) a varamdar;
- (iv)
- (v)

A varamdar does not satisfy the definition in the body of Section 2 (57) as a person allowed to possess and enjoy the land of another. But he is included in the definition of 'tenant' by the device of an inclusive provision in Section 2 (57) of the Act.

14. It is a well-known rule of interpretation that the word 'include' or 'includes' is used as a word of enlargement and ordinarily implies that something else has been included which falls outside the general language that precedes it and to add to the general clause a species which does not naturally belong to it. In Craies on Statute Law (Sixth Edition), page 212, it is observed thus :

"There are two forms of interpretation clause. In one, where the word defined is declared to 'mean' so and so, the definition is explanatory and prima facie restrictive. In the other, where the word defined is declared to 'include' so and so, the definition is extensive".

In the matter of the Petition of Nasibun, (1882) ILR 8 Cal 534, the Court observed:

"The word 'includes' has an extending force, and does not limit the meaning of the term to the substance of the definition". The Privy Council in *Dilworth v. Commr., of Stamps*, 1899 AC 99 at p. 105, said:

"The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions".

In *Mellows v. Low*, (1923) 1 KB 522 at p. 526, Mc Cardie, J. observed:

"In any view the word 'includes' as used in Para (g) is not a term of limitation or precise definition; it means what it says—that it includes the matters thereafter mentioned; in other words, it is a word of enlargement rather than of restriction".

15. A person deemed to be a tenant under Section 8 or Section 10 (iii) of the Act is therefore a tenant under the Act. A varamdar is thus a cultivating tenant if the expression 'tenant' in Section 2 (8) is understood in the light of the definition clause in Section 2 (57) of the Act.

16. But the learned counsel opposing the claim of the varamdar submitted that in view of the qualifying words with which Section 2 of the Act opens, a strict adherence to the definition clause in Section 2 (57) of the Act to interpret the word 'tenant' in Section 2 (8) will lead to repugnance. To substantiate their contention it was pointed out that the two essential requisites emphasised by Section 2 (8) of the Act, namely 'actual possession' and 'holding' are absent in the case of varam agreement and a varamdar cannot therefore be considered a cultivating tenant for the purpose of making an application for fixation of fair rent. The submission was a varamdar defined in Section 2 (60) has no 'actual possession' of any land and the land he cultivates is not a 'holding' and Section 2 (8) of the Act is therefore not attracted.

17. Section 2 (45) of the Act which defines the term 'possession' reads thus:

"'possession' in relation to land includes occupation of land by a person deemed to be a tenant under Section 4, Section 5, Section 6, Section 7, Section 8, Section 9 or Section 10".

18. It was contended on behalf of the varamdar that since Sec. 2 (45) of the Act itself postulates occupation of land in the varamdar mentioned in Section 8 or Sec. 10 (iii) of the Act, such occupation is actual possession of the land he is cultivating for the purpose of Section 2 (8) of the Act. The counsel contending against the varamdar submitted that conferment of possession or right to possession of the nilam to the varamdar is not necessary for a varam agreement referred to in the Act and any occupation of the nilam by a varamdar cannot be inferred merely by the implications contained in Section 2 (45) of the Act. It is true that Section 2 (60) of the Act does not contemplate any transfer of possession or right to possession of the nilam in favour of the varamdar. If at all, Section 2 (60) of the Act only shows that even after the varam arrangement the varamdar has no legal possession of the land. But the said provision does not indicate that subsequent to the varam arrangement, a varamdar has not even any occupation in the nilam. The decision in *Parameswaran Kartha v. Ouseph*, 1958 Ker LT 359, relied on by the learned counsel for the owners only shows that a varamdar has no legal possession of the land he cultivates, that no interest in the land is created in his favour and that the varam arrangement does not amount to a lease under Section 105 of the Transfer of Property Act. *Raman Nayar, J. in Dudachan v. Sreenivasa Kini*, 1963 Ker LT 408, while

considering the definition of 'possession' under Section 2 (40) of Act IV of 1961 which is almost similar to Section 2 (45) of the Act pointed out that the said provision makes it clear "that a varamdar like any other licensee has only a right of occupation which is not possession in the legal sense of that word although it is called possession for the purposes of the Act". In Ramanatha Aiyar's Law Lexicon of British India, the meaning of the term 'occupation and possession' is stated thus:

"Occupation includes possession as its primary element, but it also includes something more. Legal possession does not, of itself constitute an occupation. The owner of vacant house is in possession, and may maintain trespass against any one who invades it; but as long as he leaves it vacant he is not in occupation; nor is he an occupier: per Lush J., *R. v. St. Paneras*, (1877) 2 QBD 581. There is a distinction between 'occupation' and 'possession', because there may be a legal or constructive possession where there is no actual occupation".

In *Madras Anjuman Islamia of Kholwad v. Municipal Council of Johanesburg*, (1922) 31 Mad LT 114, their Lordships of the Judicial Committee said:

"The word 'occupy' is a word of uncertain meaning. Sometimes it denotes legal possession, in the technical sense, as when occupation is made the test of rateability; and it is in this sense that it is said in the rating cases that the occupation of premises by a servant, if such occupation is subservient and necessary to the service, is the occupation of his master: *The Queen v. Spurrell*, (1865) 1 QB 72. At other times 'occupation' denotes nothing more than physical presence in a place for a substantial period of time, as where a person is said to occupy a seat or how or where a person who allows his horses or cattle to be in a field or to pass along a highway is said to be the occupier of the field or highway for the purpose of S. 68 of the Railway Clauses Act, 1845: *Dawson v. Midland Rly. Co.*, (1872) 8 Ex 8, and *Luscombe v. Great Western Rly. Co.*, (1899) 2 QB 313. Its precise meaning in any particular statute or document must depend on the purpose for which, and the context in which, it is used".

A varamdar has to remain in the nilam to carry on the cultivation operations for a substantial period during the season for which he is given the right to cultivate. This is sufficient to establish occupation by the varamdar in the nilam. This occupation is what is recognised as actual possession by the definition of the term 'possession' in the Act itself. It is not accurate to call a varam as a merely naked license. It is something more than a license. It is a license coupled with a grant.

19. It was also contended that if the term 'holding' in Section 2 (8) is construed in the light of the definition of that expression in Section 2 (17) of the Act a varamdar cannot be included in the term 'cultivating

tenant' as the land he is cultivating is not a holding. It was pointed out that to constitute 'holding' under Section 2 (17) of the Act there should be a demise and in the case of varam there is no demise. Section 2 (17) of the Act which defines 'holding' reads:

"'holding' means a parcel or parcels of land held under a single demise by a tenant from a landlord and shall include any portion of a holding as above defined which the landlord and the tenant have agreed or are bound under Section 48 or otherwise to treat as a separate holding".

The word 'demise' is not defined in the Act. No doubt, it is used commonly in India to denote a transfer by lease. But if the word 'tenant' in Section 2 (17) is interpreted in the light of the definition of 'tenant' in the Act, the land in respect of which a varam right is given will be a holding under the Act. Further Section 2 of the Act is only subject to the qualifying clause 'unless the context otherwise requires'. Even if there is any inconsistency because of the definition of 'holding' in Section 2 (17) of the Act, the term 'holding' in Section 2 (8) of the Act will have to be given a meaning consistent with the context in which the term is used. It therefore follows that a 'varamdar' defined in the latter part of Section 2 (60) of the Act is a cultivating tenant as defined in Section 2 (8) of the Act.

20. The view we have taken gains support from the rates prescribed in Schedule III of the Act for fixing the fair rent in accordance with the terms of Section 27 (1) of the Act. Item 1 (viii) in Schedule III deals with nilam where fishing is carried on for part of the year by a varamdar and the rate of fair rent provided in column (3) of Schedule III for this class of land is aggregate of rent fixed as for nilam and 1/8th of the gross annual income derived from fishing in such manner as may be prescribed. The rate of fair rent for the different classes of nilam is stated in Items 1 (i) to (ix) in Schedule III of the Act. Section 27 read with Schedule III of the Act envisages the determination of fair rent for the nilam cultivated by a varamdar as well.

21. Section 13 (1) of the Act deals with the right of the tenants to fixity of tenure. The Section reads:

"Notwithstanding anything to the contrary contained in any law, custom, usage or contract, or in any decree or order of Court, every tenant shall have fixity of tenure in respect of his holding, and no land from the holding shall be resumed except as provided in Sections 14 to 22".

The benefit of Section 13 (1) of the Act is available to all tenants including cultivating tenants. In view of the definition of 'tenant' in Section 2 (57) of the Act the benefit should be available even to a person who is deemed to be a tenant under Sections 8 and 10 (iii) of the Act. Though at one stage of the argument some of the

counsel appearing for the owners took up the extreme position that a deemed tenant under Sec. 8 or Sec. 10 (iii) of the Act is not entitled to the benefit of Section 13 (1) of the Act, the matter was not pursued by them. It is also not possible to contend that Section 2 (57) of the Act has no application to interpret the expression 'tenant' in Section 13 (1) of the Act. An indication that a deemed tenant under Section 8 or Section 10 (iii) of the Act is taken in by Section 13 (1) of the Act is given by the other provisions in the Act. Section 35 of the Act provides for rent payable to a landlord when Land Tribunal has not determined fair rent. The said provision reads thus:

Section 35. "Rent payable when Land Tribunal has not determined fair rent. — Where in a case the rent payable in respect of a holding has not been determined by the Land Tribunal, either under Section 31 or Section 33, the landlord shall be entitled to receive and the tenant shall be bound to pay the rent that was payable immediately before the commencement of this Act.

Explanation:— For the purpose of this section, the rent that was payable immediately before the commencement of this Act, in the case of varamdar, shall mean the average of the share of the landlord in the produce for the three years immediately preceding such commencement, or, where the varamdar was not cultivating the land continuously for the said period of three years, the share of the landlord for the year in which the varamdar cultivated the land last immediately before such commencement".

The Explanation to the section was relied on by the counsel for the varamdar to show that it implies that the varamdar has a right to have the fair rent fixed. On the other hand the counsel for the owners submitted that there is no such implication. According to them, the Explanation to Section 35 of the Act only prevents the owners from realising from the varamdars any amount more than that fixed by S. 35. If so, the said provision will apply to the quantum of rent payable by a varamdar after the Act. The term 'tenant' in Section 35 of the Act must therefore include also a person deemed to be a tenant under Section 8 or Section 10 (iii) of the Act. If the term 'tenant' in Sec. 35 is susceptible of that interpretation we do not find any reason to interpret the term 'tenant' occurring in Section 13 (1) of the Act in a different manner. We are therefore of the view, that Section 13 (1) confers fixity on a varamdar also. This view will gain strength if the history of legislation in regard to varamdar is traced from Act I of 1957 to Act I of 1964.

22. If a varamdar is entitled to fixity under Section 13 (1) of the Act the owner of the nilam should have a corresponding right to resume the land from the former as provided in Sections 14 to 22 of the Act.

This is clear from Section 13 (1) of the Act itself.

23. Sections 53 to 72 of the Act deal with the purchase of the landlord's right by cultivating tenants. Section 53 (1) of the Act reads:

"Subject to the provisions of sub-sec. (2), a cultivating tenant (including the tenant of a kudiyruppu) entitled to fixity of tenure under Section 13, shall be entitled to purchase the right, title and interest of the landowner and the intermediaries, if any, in respect of the land comprised in his holding." There is a proviso to this Section and since it is unnecessary for our discussion it is not repeated. Section 65 of the Act is a special provision regarding the purchase of the rights of a religious, charitable and educational institution of a public nature by a cultivating tenant. Section 65 (2) fixes the annuity payable to the institution in consideration of the vesting in the Government of its right, title and interest in respect of a holding and the proviso to Section 65 (2) of the Act reads:

"Provided that where, in respect of a holding held by a tenant referred to in Section 4, Section 5, Section 6, Section 7, Section 8, Section 9, Section 10 or Sec. 11, there was no stipulation for payment of any rent immediately before the 21st January, 1961, the annuity shall be an amount equal to 4½ per cent of sixteen times the fair rent in respect of the holding determined under Section 31."

The above proviso indicates that in respect of a 'tenant' referred to in Section 8 or Section 10 (iii) of the Act, the annuity payable has to be decided on the basis of the fair rent determined under Section 31. If no fixation of fair rent is possible in the case of a varamdar the proviso to sub-section (2) of Section 65 will be unnecessary. The result is that it will not be possible to enforce the provisions of Section 65 of the Act in regard to varamdars.

24. Again Sec. 73 of the Act which prescribes a method of discharge of arrears of rent accrued due from a tenant provides in the Explanation to sub-section (1) of Section 73 that "for the purposes of this sub-section, arrears of rent due from a varamdar shall be calculated on the basis of the average of the share of the landlord in the produce for the three years immediately preceding the commencement of this Act or, where a varamdar was not cultivating the land continuously for the said period of three years, the share of the landlord for the year in which the varamdar cultivated the land last immediately before the commencement of this Act." It will be remembered that this Explanation is almost similar to the Explanation to S. 35 of the Act. S. 73 (1) of the Act opens with the clause 'all arrears of rent accrued due from a tenant'. The expression 'tenant' in view of the Explanation to the Section should necessarily include a person even deemed to be a tenant under Section 8 or 10 (iii) of the Act who is only the varamdar.

25. The above discussion shows that fixation of tenure in Section 13 (1) of the Act is available to a varamdar also. The right of resumption under Sections 14 to 22 is available to owner of the nilam against the varamdar. The right of surrender by a tenant under Section 51, purchase of landlord's right by cultivating tenants under Secs. 53 to 72, the right to discharge arrears of rent under Section 73 and the prohibition of future tenancies under Section 74 of the Act are intended to apply to a varamdar also. In all these provisions what we find is only the use of the specific expression 'tenant' or 'cultivating tenant'. In none of these provisions we find the specific reference to 'varamdar'. The intention of the Act is clear that all the benefits conferred on a tenant are given to the varamdar as well. We therefore hold that a 'varamdar' defined in the latter part of Section 2 (60) is a 'cultivating tenant' entitled to file an application for fixation of fair rent under Sec. 31 of the Act.

26. It is unnecessary to consider the contention raised on both sides regarding the scope and ambit of the legal fiction because of the declaration of a 'varamdar' as deemed tenant under Section 8 and Section 10 (iii) of the Act. The Act does not stop with merely declaring a 'varamdar' a deemed tenant by those provisions but goes further and by the device of the inclusive definition such a person is included in the definition of the 'tenant' in the Act itself. It is therefore unnecessary to consider the extent of the operation of the deeming provision in Section 8 and Section 10 (iii) of the Act.

27. The Civil Revision Petitions and the Original Petitions have therefore to be disposed of in the light of our finding. The appellate judge by the orders which are the subject-matter of C. R. Ps. 675 to 678 of 1966 disposed of the appeals only on the preliminary ground based on the competency of the varamdar to apply for fixation of fair rent and not on the merits. We therefore allow C. R. Ps. 675 to 678 of 1966 and remand L. T. A. S. Nos. 6 to 9 of 1965 to the file of the Subordinate Judge's Court, Cochin, for disposal on the merits.

28. In the view that we have taken we have only to dismiss C. R. Ps. 1174 and 1175 of 1966 and we do so accordingly.

29. In the Original Petitions the petitioners therein who are the same filed Land Tribunal Appeals 33 and 34 of 1966 on the file of the Sub-Court, Parur, against the orders of the Land Tribunal sought to be quashed in the writ petitions. Subsequent to the filing of the original petitions the appeals before the Sub-Court, Parur, were dismissed because of the memo filed by the petitioners withdrawing them in view of the filing of the writ petitions. Since we have held that the application for fixation of fair rent by a varamdar is maintainable, in the exercise of our jurisdiction under Article 227 of the Constitution we set aside the orders dismissing

Land Tribunal Appeals 33 and 34 of 1966 and direct the Subordinate Judge of Parur to take back the appeals to his file and dispose of the same on the merits and in accordance with law. The Original Petitions are dismissed subject to these observations.

30. We do not make any order as to costs in any of the cases.

R.G.D. Order accordingly.

AIR 1969 KERALA 19 (V 56 C 5)

P. T. RAMAN NAYAR J.

D. S. Thampi, Plaintiff-Appellant v. Charles D'Cruz John D'Cruz and others, Defendants-Respondents.

Second Appeal No. 668 of 1964 and C. M. P. No. 628 of 1968 D/-5-2-1968, from order of Dist. J., Trivandrum in A. S. No. 69 of 1963.

Civil P. C. (1908), Ss. 100-101, Order 6, Rule 17 — Suit for redemption and possession of mortgaged property — Amendment seeking to convert it into one for possession on basis of title — Cannot be allowed in second appeal.

In a second appeal court acts under the restrictions placed on its power by Section 100 of the Civil Procedure Code and cannot allow an amendment prayed for the first time in second appeal seeking to convert a pure and simple suit for redemption of a mortgage and possession of the mortgaged property into one for possession based on paramount title. (Para 4)

Cases Referred: Chronological Para 15

(1937) AIR 1937 Mad 176 (V 24) =

1937-2 Mad LJ 165, Kasi Chettiar

v. Ramasami Chettiar

(1937) AIR 1937 Nag 376 (V 24) =

ILR (1937) Nag 498, Ganba Paiku

v. Ganpatsao

(1928) AIR 1928 Mad 2 (V 15) =

53 Mad LJ 647, Doraiswami v.

Varadarajulu

Thayyil K. Vasudevan for Appellant, P. Raman Menon and K. Hrishikesan Nair, for Respondent 2.

JUDGMENT: I think the Courts below rightly dismissed the plaintiff appellant's suit as barred by limitation, rightly applying Article 148 of the Limitation Act of 1908.

2. The plaint runs as follows :—

"1. The property described in the schedule below belonged to Puliyarathala tharwad of Madathuvilakom Muri, do. village.

2. Mathevan Kali, who was the Karnavan of the tharwad had given 3 items of properties including the plaint schedule items on otti and Kuzhikanam under document No. 1286 of 1958.

3. That right had devolved upon Pathummal Veeyammal. Easwari Narayani, a member of the Puliyarathala Tharwad obtained a transfer of the right under the said document by paying the full amount of 1000

IL/IL/D950/68

fanams, and obtained possession of the properties and was enjoying the properties.

4. While so, Eswari Narayani died and her special right devolved upon her four heirs, Velayudhan Pillai, Narayana Pillai, Parvathi Pillai and Govinda Pillai, each of them getting a right to 250 fanams of the ottiyartham.

5. While they were enjoying the properties under this special right, Govinda Pillai alienated his otti right and defendants 1 to 6 are enjoying the plaint schedule property on the devolution of that right on them.

6. There was a partition in the said Kizhakke Puliyaarathala tharwad in 1954 and the plaint schedule property was included in schedule G in the partition deed.

7. The said G schedule property was allotted to Chellamma Bhagavathy Amma, who is the 11th party in the partition deed, and her children with full powers of disposal.

8. While so, Chellamma Bhagavathy Amma and others sold the schedule property to the plaintiff by sale deed No. 3545 registered on 17th October 1960. The sale deed is produced herewith.

9. The plaintiff is entitled to recover possession of the schedule property after paying off the otti liability etc.

10. The defendants were required to receive the Ottiyartham and deliver possession of the property to the plaintiff but they are simply delaying the matter asking for time. They have not yet put the plaintiff in possession and hence this suit.

11. The defendants do not put the plaintiff in possession because they want to misappropriate the income from the property which will come to Rs. 30/- per year. Therefore they are liable to pay the plaintiff mesne profits from the date of this plaint.

12. The defendants have committed much waste in the schedule property. But, the plaintiff does not claim compensation for the waste with a view to avoid complications in the suit. Even though the defendants have not effected any improvements, the plaintiff is willing to pay Rs. 10/- as value of improvements. Plaintiff is willing to pay a higher value for improvements, if the defendants establish by proof that they are entitled to a higher value.

13. The consideration for the document mentioned in paragraph 3 above is 100 fanams and there are 3 items of properties. But, only the rights of Govinda Pillai, who was entitled to $\frac{1}{4}$ of that otti amount, have devolved upon the defendants. Therefore the plaintiff is entitled to deposit proportionate otti amount and recover possession of the schedule property.

14. The cause of action for this suit has arisen from 11th August 1939 and after 17th October 1960, the date of the sale deed in favour of the plaintiff in Madathuvilagam pakuthy within the jurisdiction of this court where the schedule property is situate.

15. Valuation.

250 fanams or Rs. 35.10 P being the otti amount charged on the schedule property. Court fee is paid thereon under clause 3 of Section 4 of the Court Fees Act.

Reliefs.

Therefore the plaintiff prays for the following reliefs :—

1. The plaintiff may be put in possession of the schedule property after recovering possession thereof from defendants 1 to 6 on deposit by plaintiff of Rs. 35.10 nP. towards otti amount and Rs. 10 towards value of improvements, total Rs. 45.10 nP.

2. If the defendants prove more improvements in the schedule property plaintiff may be allowed to deposit the value of such improvements in the court and plaintiff may be put in possession after evicting the defendants.

3. Plaintiff is entitled to 12 per cent interest on the amount to be deposited in the Court from the date of deposit till eviction has been ordered and plaintiff is put in possession and defendants are personally liable for the interest for the charged amount.

4. Defendants are liable for the costs and interest at 6% from the date of the decree.

5. The Court may allow other reliefs and issue necessary orders as plaintiff may pray in due course.

3. It is impossible to read this plaint otherwise than as one for redemption of the Otti and consequent possession of the property concerned from the hands of the successors in title of an assignee of the Otti. Regarded as such a suit it is not disputed that it is barred by limitation under Art. 148 of the Act of 1908.

4. Defendants 1 and 2, who alone contested the suit, denied that they were holding the property under the Otti and claimed paramount title. But the plaint was not amended in the light of their plea and it was not converted from one for redemption and consequent possession into one for possession on the strength of title subject to the payment of compensation in respect of what the plaint calls the special rights which Govinda Pillai's successors the defendants, have in the property. It is true that the plaint alleges that the plaintiff's predecessor's tarwad was the owner of the property, that the plaintiff's predecessor got it in partition, and that the plaintiff got it from his predecessor. But that is only for showing how the plaintiff has become the mortgagor entitled to redeem the mortgage, and the suit is based only on that right to redeem and to obtain possession of the property as a consequence thereof; it is in no way based on the plaintiff's right as owner to obtain possession. No issue was joined on the question of title to the property, and the courts below very properly did not go into the question of the plaintiff's title as against the title claimed by the contesting defendants. That being so, I cannot, in second appeal, be asked to convert this suit on a mortgage to one for recovery of possession on title, and proceed

to decide the appeal on that basis, and the application, C. M. P. No. 628 of 1968, made for the first time in this court, for an amendment of the plaint so as to make that conversion must be dismissed. It was not made in the courts below so that there is no error of law or of procedure in those courts authorising interference in second appeal. The three decisions cited on behalf of the plaintiff, namely, Doraiswami v. Varadarajulu, AIR 1928 Mad 2, Kasi Chettiar v. Ramasami Chettiar, AIR 1937 Mad 176 and Ganba Paiku v. Ganpatsao, AIR 1937 Nag 376 only go to show that, in proper cases, the question of paramount title can be gone into and that, in proper cases, an amendment of the plaint can be allowed so as to convert a suit brought only on a mortgage into one for possession on title. They are not authority for the proposition that in a suit which is a suit, pure and simple, for the redemption of a mortgage, the question of paramount title can be canvassed and a decree for possession given to the plaintiff, not on the mortgage but on title, or for the proposition that an amendment of the kind prayed for can, when sought for the first time, be allowed in second appeal. In a second appeal this court acts under the restrictions placed on its power by Sec. 100 of the Civil Procedure Code, and it is little use pointing out that amendments of a more drastic character have been allowed by the Supreme Court in appeals before it.

5. I dismiss this appeal with costs. The Civil Miscellaneous Petition is also dismissed but I make no order as to costs therein.
 DRR Appeal dismissed.

AIR 1969 KERALA 21 (V 56 C 6)

M. MADHAVAN NAIR, J.

Kesava Kurup Raghava Kurup, Appellant v. Thomas Idicula and another, Respondents.

Second Appeal No. 1284 of 1967, D/-1-2-1968, from order of Sub-J., Pathanamthitta in A. S. No. 47 of 1967.

(A) Transfer of Property Act (1882), Section 122 — Gift of immovable property — Acceptance is essential — Acceptance must be before death of donor — Onus of proving acceptance — Evidence Act (1872), Sections 101-104.

A gift to be valid must have been accepted by the donee during the lifetime of the donor and while he is still capable of giving. Under Sec. 122, T. P. Act, the acceptance may be express or implied. (Para 4)

Acceptance to be effective has to be shown to have been made before death of the donor. Probably, when the donor had two inconsistent gifts of the same property, the proof by the donee under the first gift ought to be of acceptance even before ac-

ceptance of the later gift by the donee thereunder. (Para 4)

Acceptance, being thus an essential factor of validity of a gift, has to be proved or made out by the person relying on it. (Para 4)

(B) Evidence Act (1872), Sec. 114 — Presumption of retrospective continuity.

When a certain state of affairs has been proved an inference of its continuity backwards may sometimes be drawn. AIR 1966 SC 605, Rel. on. (Para 4)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 605 (V 53) =

(1966) 1 SCR 758, Ambika Prasad Thakur v. Ram Ekbal Rai 4

(1954) AIR 1954 Trav-Co. 348 (V 41) = ILR (1953) Trav-Co. 1121,

Lakshmi Amma Kalliyani Amma v. Kunji Pillai Amma Kutty Amma 4

(1952) AIR 1952 Trav-Co. 47 (V 39) = 1951 Ker LT 479, Ganga-

dhara Iyer v. Kulathu Iyer 4

K. N. Narayanan Nair, G. Raghava Panicker and N. Sudhakaran, for Appellant; K. C. John, for Respondent No. 1.

JUDGMENT: This appeal is by the 2nd defendant in a suit for declaration of title and for redemption.

2. P. W. 4 has mortgaged the plaintiff schedule property to the 1st defendant under Exhibit P-2, dated March 23, 1955, and thereafter assigned his equity of redemption to the plaintiff under Ext. P-1 dated June 23, 1955. This suit has been instituted on January 13, 1956, impleading the 2nd defendant also on the allegation that the 1st defendant has collusively surrendered the mortgaged property to him. The 2nd defendant denied P. W. 4 and the plaintiff to have any right to or possession of the property, and contended it to have originally belonged to Niravath tarwad, who in 1082 M. E. (1907) mortgaged it to Raman Kesavan and subsequently partitioned the equity of redemption under Ext. D-5 among its members out of whom Lakshmi Amma who got 12 cents of the property sold it to the aforesaid Raman Kesavan who under Ext. D-2 dated 3-4-1116 (November 1940) gifted all his interests in the property to his brother's daughter Narayani (he had no issue and Narayani was living with him as his foster-daughter) and her husband Narayanan Kesavan, who assigned to the 2nd defendant under Exts. D-3 and D-4 and that the 2nd defendant himself had purchased as per Ext. D-1 dated 19-3-1118 (1943) the equity of redemption in the remainder of the property from Krishnan Nair who obtained it under the aforesaid partition of the Niravath tarwad and thus claimed to be in possession of the property independently of the suit mortgage and the 1st defendant. In his replication the plaintiff admitted the title of the Niravath tarwad and pleaded that Raman Kesavan had gifted his rights to his wife Kochupennu as per Ext. P-3 dated 11-2-1116 (September 1940) and that Kochupennu had sold that property to P. W. 4

under Ext. P-4 dated 15-3-1118, therefore the plaintiff's purchase under Ext. P-1 is valid. The Munsif held title to the property with the plaintiff but Ext. P-2 mortgage not to have come to effect, and the 2nd defendant to have been long in adverse possession and dismissed the suit. On appeal, the Subordinate Judge held the plaintiff to have title under Ext. P-1 and the mortgage Ext. P-2 valid and effective and therefore decreed the suit in terms of the plaint. Hence this second appeal.

3. It was conceded by counsel on both sides that Raman Kesavan had a mortgage of 1082 (1907) from the Niravath tarwad and had also purchased equity of redemption from Lakshmi Amma. But the plaintiff's claim of Raman Kesavan's purchase of the equity of redemption over the entire suit property is disputed by the 2nd defendant. The conveyance of Lakshmi Amma in favour of Raman Kesavan is not produced in this case. As such the purchase of equity of redemption by Raman Kesavan can only be found to the extent it is conceded by both sides, and has to be negatived to the extent it is disputed by one of the parties. It then follows that Raman Kesavan had a mortgage right in the whole property and the equity of redemption in respect of 12 cents. He had executed two gifts, Exts. P-3 dated 11-2-1116 in favour of his wife, and Ext. D-2 dated 3-4-1116 in favour of his foster-daughter and her husband. Needless to say that if the first gift was valid the second was void; but if Ext. P-3 was invalid and Ext. D-2 was valid the title to the property is only with the 2nd defendant and the plaintiff has to be non-suited. The question therefore is whether it was the gift under Ext. P-3 or that under Ext. D-2 that is valid in law.

4. That both Exts. P-3 and D-2 are the acts of Raman Kesavan and do bear his signature and have been duly registered is not in dispute. The Sub-Registrar's endorsements show that Ext. P-3 has been presented for registration and got back from the sub-registry by Raman Kesavan himself. A gift to be valid must have been accepted by the donee "during the lifetime of the donor and while he is still capable of giving". Under Mithakshara the acceptance of a gift, particularly if it concerned immovable property, should be express.

"प्रतिग्रहः प्रकाशः स्यात् स्थावरस्य विज्ञपनं"

(Yajnavalkya, II-176).

But under the Transfer of Property Act acceptance may be express or implied. (Vide Mulla, 5th Edn., pages 774-76). Acceptance, being thus an essential factor of validity of a gift, has to be proved or made out by the person relying on it. The plaintiff has therefore to show that Ext. P-3 has been accepted by Kochupennu, the donee thereunder. He points out Ext. P-4, the sale deed executed by her in favour of P. W. 4 on 15-3-1118, which recites that the gift deed has been given by her to P. W. 4. That

recital spells clearly an acceptance, but it was, as the very document shows, after death of Raman Kesavan. Acceptance to be effective has to be shown to have been made before death of the donor. Probably, when the donor had made two inconsistent gifts of the same property, the proof by the donee under the first gift ought to be of acceptance even before acceptance of the later gift by the donee thereunder. However that complication does not arise here.

Counsel for plaintiff has only the recital in Ext. P-4 of delivery of the gift deed to P. W. 4 to show acceptance of Ext. P-3. When it is remembered that even if Raman Kesavan had deliberately kept Ext. P-3 with himself, it must on his death pass to the possession of Kochupennu, his widow, her possession of the deed of gift after his death would not prove that she had been given the deed before his death. Counsel read Ambika Prasad Thakur v. Ram Ekbal Rai, AIR 1966 SC 605, Para 15, to show that when a certain state of affairs has been proved an inference of its continuity backwards may sometimes be drawn. The proposition cannot be challenged. But a state of things that is possible in either event cannot prove either. Whether Raman Kesavan gave or did not give Ext. P-3 to Kochupennu, she would have had possession of it after his death. Her possession or production of the deed after death of Raman Kesavan cannot therefore prove retrospectively that she had possession of the deed before the death of Raman Kesavan. The necessity for proof of that fact (of a valid acceptance of Ext. P-3) assumes much importance here as Raman Kesavan is seen to have executed a second gift of the same property in favour of his foster-daughter and her husband within two months of Ext. P-3. If it is not proved or made out circumstantially the gift under Ext. P-3 has to be held to have failed.

Counsel read Lakshmi Amma v. Kunji Pillai, AIR 1954 Trav-Co. 348 and Ganga-dhara Iyer v. Kulathu Iyer, 1951 Ker LT 479 = (AIR 1952 Trav-Co. 47), to show that an acceptance of gift need not be express but may be implied. Nobody quarrels with that proposition. The question is only whether any circumstance has been made out in this case to show an implied acceptance of the gift. The delivery of the deed at the time of execution of Ext. P-4 is not such a circumstance as the possession of the deed found on 15-3-1118 cannot be presumed to have existed from the date of its registration in the particular circumstances of this case where the donee was the wife of the donor who had executed a later gift of the same property to his foster-daughter and her husband and all of them four were living together at the relevant time.

5. Counsel contended that the 1st defendant had been in possession of the property under the mortgage executed by P. W. 4 and therefore, P. W. 4 and his predecessors-in-interest including the donee

under Ext. P-3 must be found to have had possession of the property and therefore the gift Ext. P-3 to have come to effect. But 1st defendant's possession is not conceded in this case. The 2nd defendant has, in his written statement, denied P. W. 4 and his mortgagee the 1st defendant to have ever had possession of the property.

[His Lordship then discussed the evidence and continued as follows:—] It is obvious that the plaintiff has failed to prove that the 1st defendant has made a surrender of the property to the 2nd defendant. Admittedly on the date of the suit the property has been in the possession of the 2nd defendant. In the circumstances the plaintiff had to be held to have failed to prove that Kochupennu had accepted the gift Ext. P-3 at any time before the death of Raman Kesavan, the donor. Ext. P-3 must therefore be held not to have come to effect. On the other hand, Ext. D-2 has been presented for registration by one of the donees thereunder and got back by him. As the man who presented was the husband of the other donee it may be easily presumed that he acted for his wife as well in that act. It then follows that the donees under Ext. D-2 have accepted the gift to them, and that that gift had come to operation vesting title in the defendants' predecessors-in-interest and therefore in the 2nd defendant under his purchases.

6. In the result, the decree of the Court below has to be set aside and the second appeal allowed and the suit dismissed. The appellant is entitled to his costs in this Second Appeal. Decree accordingly.

DRR

Appeal allowed.

AIR 1969 KERALA 23 (V 56 C 7)

M. U. ISAAC, J.

Gopalan Nair, Plaintiff, Appellant v. Thevi Amma Thankamma and another, defendants, Respondents.

Second Appeal No. 547 of 1964, D/-29-2-1968, from order of Sub-J., Mavelikara, in A. S. No. 39 of 1963.

(A) Civil P. C. (1908), Ss. 100-101 — Easements Act (1882), Sec. 56 — Question whether certain licence is transferable — Not a pure question of law — Cannot be permitted to be raised for the first time in second appeal.

The question whether a licence is transferable or not is not a pure question of law and in the absence of specific plea in the trial Court, which alone can give the defendants an opportunity to meet it and adduce evidence, the contention cannot be allowed to be raised in second appeal. (Para 7)

(B) Easements Act (1882), Sec. 60 — Licensee executing work of permanent character — Licence not surrendered or abandoned — Licence cannot be revoked.

Foundation of a building is a work of a permanent character involving expenses; and

the grantor would not be entitled under Section 60 of the Act to revoke the licence after such a work has been executed. Where, therefore, the licensee has neither surrendered the licence, nor abandoned it, the grantor is not entitled to recover the property after demolishing the building constructed thereon. (Para. 8)

Cases Referred: Chronological Paras

(1959) AIR 1959 SC 1262 (V 46) =

(1960) 1 SCR 368, Associated Hotels of India v. R. N. Kapoor 4

(1953) AIR 1953 Trav-Co. 582

(V 40) = ILR (1953) Trav-Co. 373, Venkateswara v. Padmabathi

Ammal 4

13 Cochin LR 58, Vajravalan v. Abbu 4

K. Chandrasekharan, T. Chandrasekhara Menon, P. Kesavan Nair and C. Sankara Menon, for Appellant; S. Narayanan Potti, N. K. Varkey and Smt. Savithri Sankar, for Respondents.

JUDGMENT: This Second Appeal is by the plaintiff in O. S. 128 of 1960 on the file of the Munsiff's Court, Mavelikara. The suit was for a permanent injunction restraining the defendants from constructing a building in the plaint schedule property, to direct them to remove the building, if any, constructed therein, and for recovery of ground rent for the use of the said property at the rate of Rs. 10 per annum.

2. The plaint schedule property has an area of 3 cents; and it is part of Survey No. 70/18 in Vallikunnu Village, Mavelikara Taluk. This survey number has an area of 90 cents; and it belongs, admittedly, to the plaintiff's tarwad. The plaintiff and the first defendant are the children of one Krishnan Nair through different wives; and the second defendant is the son of the first defendant. Krishnan Nair has been conducting a market in the above property over an area of 40 cents. The plaint property is the south-western portion of the said 40 cents. Krishnan Nair constructed a shop building in the plaint property; and he sold the building to the first defendant as per sale deed Ext. D-1 dated 3-1-1123. The plaintiff alleged that Krishnan Nair was conducting the market for the benefit of the plaintiff and his mother; that the shop building was constructed with the permission of the plaintiff; that it was demolished and removed by the first defendant about five years ago, as required by the plaintiff and Krishnan Nair; and that the defendants were forcibly attempting to construct a new building in the plaint property. It was also alleged that, after the demolition of the shop building, the plaintiff had been in possession of the plaint property, and that he had been using it thereafter as part of the market area. The suit was contested by defendants 1 and 2 only. They contended that defendants 3 and 4 were unnecessary parties, that Krishnan Nair was conducting the market in his own right, that

the plaintiff's tarwad had surrendered its rights in respect of the 40 cents of land in which the market was conducted in favour of Krishnan Nair, and that the plaintiff's tarwad lost its title to the said property by adverse possession. They denied the alleged demolition of the shop building, and stated that they were not constructing any new building; but they were only replacing the old walls, which became damaged due to old age. They also contended that the plaintiff property would not fetch a ground rent of more than one rupee per year, and that the plaintiff was not entitled to any of the reliefs sought for.

3. The trial Court held that the plaintiff schedule property belong to the plaintiff's tarwad; that Krishnan Nair had only a licence in respect of the 40 cents of land which he was using for the market; that he constructed the shop building in the plaintiff property with the plaintiff's permission; that the building was actually demolished by the first defendant as alleged in the plaint; that, as Krishnan Nair constructed the building only as a licensee, the licence became revoked when the building was demolished; and that thereafter the first defendant had no right to construct any building in the plaintiff property. It fixed the ground rent of the property at Rs. 2 per annum. Accordingly, the trial Court passed a decree directing the defendants to surrender the plaintiff property, after removing the building therein, and to pay the plaintiff ground rent at the rate of Rs. 2 per year. Defendants 1 and 2 appealed to the Sub Court of Mavelikara. The learned Subordinate Judge held that the licence in favour of Krishnan Nair was irrevocable, that the demolition of the building was only for reconstruction; and that, as the reconstruction had commenced before the institution of the suit, there was no revocation of the licence. Accordingly, the lower appellate Court allowed the appeal and set aside the decree for the removal of the building and surrender of the plaintiff property. The plaintiff has, therefore, filed this Second Appeal.

4. The learned counsel for the appellant raised two contentions before me. First, Krishnan Nair was only a licensee in respect of the plaintiff property; and the first defendant cannot get the rights of Krishnan Nair under the licence, as such a right is not transferable. Secondly, the licence was revoked, when once the building constructed by Krishnan Nair was demolished and ceased to exist. These contentions are based on the assumption that Krishnan Nair constructed the shop building in the plaintiff property, under a licence from the plaintiff's tarwad, and that he had only a licensee's right in respect thereof. I do not think that this assumption is justified. There is no discussion in the judgment of the trial Court regarding the relation between the plaintiff's tarwad and Krishnan Nair in respect of the plaintiff property. It does not follow from its finding that Krishnan Nair put up the build-

ing with the plaintiff's consent, that it created only a licence, and not a lease. There is clear distinction between the two concepts; but it becomes sometimes difficult to determine whether a transaction evidences a lease or a licence. The Supreme Court held in *Associated Hotels of India v. R. N. Kapoor*, AIR 1959 SC 1262, that the following propositions may be as well established:—

"(1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form;

(2) the real test is the intention of the parties — whether they intended to create a lease or a licence;

(3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and

(4) if under the document a party gets exclusive possession of the property, 'prima facie', he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease". That was a case where a person took two rooms in a hotel on a yearly rent as per terms and conditions of a deed of licence, and carried on business therein as a hair-dresser. The Court held that, in spite of the clever phraseology used in the deed, what was actually created by the deed was not a bare personal privilege for the respondent to make use of the rooms; but it put him in exclusive possession of the rooms, untrammelled by the control and free from the direction of the appellants. Reference may also be made to a decision of the Chief Court of Cochin in *Vajravalan v. Abbu*, 13 Cochin LR 58. In that case the question arose whether a person to whom a land was handed over for constructing a building was a licensee or a lessee. The Court said:—

"When the site has been handed over to Komala for putting up a building, I think Komala has, in law a holding in respect of the paramba on which the house stands, and there cannot be any doubt that she is, in the absence of the contract to the contrary, entitled to the value of the house on eviction".

The above passage was quoted with approval of the Travancore-Cochin High Court in *Venkateswara v. Padmavathi Ammal*, AIR 1953 Trav-Co. 582.

5. In the instant case, there is no document evidencing the transaction. All that has been alleged by the plaintiff and accepted by the trial Court is the building was constructed with the consent of the plaintiff. The extent of the property is only 3 cents. It is alleged in the plaint that after the demolition of the building about 5 years before the institution of the suit, the plaintiff was in possession of the said property, and he was using it as part of the market. This case has not been accepted by any of the Courts below; and it is belied by the admitted facts and circumstances. The plain-

tiff has no case that after the building was constructed, the plaintiff had any sort of control or possession in respect of the plaintiff property. It formed the building site and its immediate precinct. Apparently, the whole property was in the possession and enjoyment of the person who was in possession of the building. So the relationship that was created between the parties, when the plaintiff's tarwad gave the plaintiff property to Krishnan Nair for construction of a shop building, is that of a lessor and lessee. The lower appellate Court has not considered this question; but it disposed of the case on the assumption that Krishnan Nair was a licensee. The plaintiff must fail on this short ground.

6. The appellants' learned counsel contended that the contesting defendants had no such case. It is true; but they denied the plaintiff's case that the building was constructed by Krishnan Nair with the plaintiff's consent, and they pleaded that Krishnan Nair got the property by surrender from the plaintiff's tarwad, and he put up the building in his own right. On the other hand, the plaintiff's case was that, after the demolition of the building, the plaintiff was in possession of the plaintiff property, and that the defendants subsequently trespassed on it. The cases put forward by the plaintiff and the contesting defendants were both rejected by the trial Court. The plaintiff was given relief by the trial Court on the basis that the original arrangement was a licence. This was denied by the defendants; and therefore, the question arises for determination whether the said arrangement evidences a licence; and if it is not a licence, the plaintiff would not succeed. I shall, however, consider the learned counsel's contentions on the assumption that Krishnan Nair was only a licensee.

7. Regarding the first contention, the respondents' learned counsel raised an objection that the plaintiff had no case in the Courts below that the licence was not transferable, and that he should not be allowed to raise such a contention for the first time in Second Appeal. Section 56 of the Easements Act, 1882 (hereinafter referred to as the Act) provides that, unless a different intention is expressed or necessarily implied, a licence cannot be transferred by the licensee or exercised by his servants or agents. So the question whether a licence is transferable or not is not a pure question of law. What Krishnan Nair was permitted to build was a shop building. There is no case that it was for him to carry on any trade. It was constructed on the side of a market; and apparently it was for leasing out on rent. Krishnan Nair gave usufructuary mortgage of the shop building in 1120; and then he executed superior mortgage in 1122. Finally he sold it to the first defendant in 1123 as per Ext. D-1. The first defendant redeemed it; and she was in possession of it, till its alleged demolition sometime before the institution of the suit. The plaintiff had

no objections to these transactions, and the transferees thereunder being in possession of the shop building, and using it. These are indications of the fact that the licence was transferable. At any rate, in the absence of specific plea in the trial Court, which alone can give the defendants an opportunity to meet it and adduce evidence, the contention cannot be allowed to be (raised) in second appeal.

8. The next question is whether the licence was revoked by the alleged demolition of the building. Immediately after the institution of the suit, a commission was taken out to inspect the property and submit a report. Ext. P-11 is the report of the Commissioner. It shows that at the time of his inspection, there was a foundation of a building about 30 years old, on which basements and side walls were under construction, and that there were also an old roof over this foundation resting on temporary pillars. The learned Munsiff held that the foundation was only 3 years old, and that the roof found by the Commissioner was that of some other old building, which the first defendant had brought into this property. He had stated no reason for rejecting the Commissioner's opinion. It is impossible to transfer the old roof of a building as such to another place. If it were a question of demolishing it and reassembling it over another structure, it can be easily found out. It is also almost difficult to reassemble it on temporary pillars. The learned Munsiff's finding is contrary to the evidence, and is a pure conjecture, which cannot stand scrutiny. If the foundation and roof were old, they show that what was being done is only replacing of the walls of the old building, as alleged by the contesting defendants. If the foundation is only 3 years old as the learned Munsiff held, it is a new construction in the place of the old construction, which was commenced without any objection from the plaintiff. The plaintiff's case is that the defendants trespassed on the plaintiff's property and commenced the impugned construction two weeks before the institution of the suit. So, in any view of the matter, the first defendant did not surrender or abandon his rights as a licensee and commenced the construction long before the institution of the suit. The objection to the construction was raised by the plaintiff, only in the course of the construction and after it had reached a substantial stage. Section 60 of the Act provides that a licence may be revoked by the grantor, unless the licensee acting upon licence has executed a work of a permanent character and incurred expenses in the execution. Foundation of a building is a work of a permanent character involving expenses; and the grantor would not be entitled to revoke the licence after such a work has been executed. It is also obvious that the licensee has neither surrendered the licence, nor abandoned it. The plaintiff is, therefore, not entitled to recover the plaintiff property after demolishing the

building, which the first defendant has constructed therein.

9. The question whether the plaintiff is entitled to recover the plaint property either as a landlord or as a licensor, even though the licence is irrevocable, on payment of the value of the improvements effected by the first defendant does not arise for decision in this case, as the plaintiff has not claimed any relief on any such basis. In the result this appeal is dismissed. The appellant will pay the costs of the respondents in this Court.

DRR

Appeal dismissed.

AIR 1969 KERALA 26 (V 56 C 8)

P. T. RAMAN NAYAR AND

K. K. MATHEW, JJ.

Krishna Pillai Raghavan Pillai and another, Appellants v. Karthiyani Amma Sarasamma and others, Respondents.

Second Appeal No. 225 of 1962, D/-27-11-1967, from order of Sub-J., Attaingal, in A. S. No. 85 of 1958.

(A) Civil P. C. (1908), Sec. 11, Expl. 6 — Identity of parties — Suit in which one person is authorised to represent others — Such others are parties to litigation — Decision is binding on all whom such person represented in the suit in a subsequent suit, unless former decision can be shown as vitiated under Sec. 44, Evidence Act — If however they were not in truth represented then fraud or collusion need not be proved — How far bona fide of former litigation can be presumed.

When a person is, either by operation of law, or by act of parties, duly authorised to represent another in a litigation, that other is, in truth a party to the litigation even if not eo nomine so. The case of a manager litigating on behalf of his joint family, which under their personal law he is competent to represent would satisfy the requirement of identity of parties in the body of Sec. 11 of the Code with regard to members of the family claiming as such in a subsequent litigation — all the members of the joint family being represented by the manager are, in truth, parties to the suit. The case would, of course, fall within Explanation VI, but it really does not need the aid of the explanation to satisfy the requirement of identity. The difference, from a practical point of view, is that, if the parties were really parties to the former suit (although only through a person competent to represent them) then, as indicated by Section 44 of the Evidence Act, they would have to show that the former decision was obtained by fraud or collusion to escape the bar of res judicata. But, if they were not, in truth, represented in the former suit and that suit was what is generally called a representative suit only because of the fiction in Explana-

tion VI, then, on the wording of the explanation, they would not be required to show that the former decision was obtained by fraud or collusion. On the contrary, it would appear to be for the person pleading the bar of res judicata to show that the fictional representative litigated bona fide, although bona fides, being very much in the nature of a negative quality, would probably be presumed in the absence of at least suspicion to the contrary. (Para 10)

(B) Travancore Nayar Act (2 of 1100 M.E.) S. 31—Section concerned with decrees binding on tarwad — It does not deal with capacity of person to represent tarwad — S. 31 does not affect Marumakkathayam Law — Section does not say who can obtain decree against a tarwad — If and when such decree would operate as res judicata (Obiter).

Section 31 is concerned only with what decree shall bind the tarwad, (with the direct impact of the decree, not with the indirect consequences of the decision resulting in the decree) and not with the question of who is competent to represent a tarwad in a litigation. On that latter matter, it does not seem to trench on the customary Marumakkathayam Law by which the Karnavan is competent to represent the tarwad. (It is to be noted that the section has nothing to say as to who can obtain a decree in favour of a tarwad). And if it did trench on the customary law, it would mean that even a decision obtained in favour of the tarwad (for example by a Karnavan suing on its behalf as he is undisputably entitled to) cannot operate as res judicata (except perhaps by resort to Explanation VI to Section 11 of the Code with the attendant requirement of bona fides) unless, not merely the Karnavan, but the senior andaravans as well, were parties to the suit.

(Para 11)

K. Velayudhan Nair, V. S. Moothathu, T. K. M. Unnithan and K. J. Joseph, for Appellants; M. P. Ramakrishna Pillai, for Respondent No. 1.

RAMAN NAYAR, J.: We think that the first Court was right in dismissing the respondent plaintiff's suit in the view that it was barred by res judicata and that the lower appellate Court was wrong in decreeing it in the view that it was not so barred.

2. The five items of property in suit admittedly belonged to a Nayar joint family (governed by the Travancore Nayar Act) known as the Akkaravaram family and were, along with the other properties of the family, in the possession of its Karanavan, Velayudhan, until his death in 1103 M. E. (1927-28 A. D.). Plaintiffs 1 and 2 are the daughters of the 18th defendant, Karthiyani by name; plaintiffs 3 to 6 are the minor children of the 1st plaintiff; and the 7th plaintiff is the minor daughter of the 2nd plaintiff. It is their case that the 18th defendant's mother, Lakshmi, was a sister of Velayudhan. Velayudhan had another sister

by name Narayani, and he and the thavazhees of these two sisters constituted the Akkaravaram joint family to which the suit properties belonged. Soon after Velayudhan's death, there was a partition in this joint family by means of Ext. IV dated 10-11-1103 (23-6-1928) and, in this partition, the suit properties were allotted to the 18th defendant's thavazhee, then consisting of herself and her minor daughter, the 1st plaintiff. Velayudhan's son, the 1st defendant, however, managed to obtain possession of the properties and hence this suit for a declaration of the plaintiffs' title, for possession and for other reliefs.

3. According to defendants 1 and 2, the appellants herein, Velayudhan was the sole surviving member of the Akkaravaram joint family. The Narayani and Lakshmi, to whose thavazhees the plaintiffs and defendants 10 to 21 claim to belong, were not sisters of Velayudhan (who had no sisters but had two distant cousins by name Narayani and Lakshmi whose thavazhees have become, long since, extinct) but utter strangers, and the plaintiffs and these defendants are mere pretenders. The properties of the Akkaravaram joint family belonged exclusively to Velayudhan as its last surviving member, and, on his death, his children, defendants 1 and 2, succeeded to them as his heirs.

4. We are here concerned only with the claims of the thavazhee of the 18th defendant to which the plaintiffs belong — they are undivided from the 18th defendant — and need not concern ourselves with the claims of defendants 10 to 17 and 19 to 21. The matter directly and substantially in issue between the plaintiffs, on the one hand and the contesting defendants, defendants 1 and 2, on the other, is whether, at the time of Velayudhan's death, this thavazhee of the 18th defendant belonged to his joint family. This, it seems to us clear, was the matter directly and substantially in issue in a former suit O. S. No. 276 of 1106 (of the very Court in which the present suit was brought so that no question of the competency of the court which tried that suit to try the present suit arises) between, as we shall presently show, the same parties litigating, as is quite apparent, under the same title.

5. O. S. No. 276 of 1106 was a suit brought by the present 1st defendant in respect of item 1 of the properties in suit. This item had been bought by the present 9th defendant in execution of a money decree he had obtained against the 18th defendant and her sister Kamalakshi in O. S. No. 428 of 1104. The present 9th defendant was the first defendant in that suit while the 18th defendant was the 2nd defendant. The suit was for a declaration of the present 1st defendant's title to and possession of the property there in suit and (rather unnecessarily) for a cancellation of the decree and execution proceedings in O. S. No. 428 of 1104 to which the 1st defendant was in no sense a party.

The suit was decreed in favour of the plaintiff therein (namely, the present 1st defendant) as representing the personal heirs of Velayudhan who it was held became entitled to this property on his death, Velayudhan being—so it was found—the last surviving member, of the Akkaravaram joint family and, therefore, the property being exclusively his. This decree was affirmed by the District Court in appeal and by the High Court in second appeal.

6. As we have already observed, the question directly and substantially in issue in O. S. No. 276 of 1106 between the present 1st defendant and the present 18th defendant (the plaintiff and the 2nd defendant respectively therein) was whether the 18th defendant and, therefore, the members of her thavazhee, were members of the Akkaravaram joint family to which Velayudhan belonged at the time of his death. The finding was in the negative.

7. It is pointed out that while the 1st defendant's case then, as now, was that the 18th defendant and the other members of the thavazhees of Narayani and Lakshmi were utter strangers to Velayudhan and sheer impostors the finding of the District Court (as affirmed by the High Court in Second Appeal) in the former suit, O. S. No. 276 of 1106, was that these persons were members of a divided branch of a common tarwad to which that branch and Velayudhan's branch at one time belonged. But that is of no consequence whatsoever, for, the question was, and is whether the members of the thavazhees of Narayani and Lakshmi were members of Velayudhan's joint family at the time of Velayudhan's death, not whether they bore kinship to him. So long as they were not members of Velayudhan's joint family, it matters nought whether they were utter strangers or were related to him by ties of blood. And, whether what was found in the former suit, could properly be found on the pleadings and the evidence therein, is not a matter for us to consider.

8. As we have seen, the plaintiffs are not divided from the 18th defendant and their claim (which is for the entire property, not merely their share therein) is obviously made on behalf of the 18th defendant's thavazhee. The 18th defendant, as also all the other adult members of the thavazhees of Narayani and Lakshmi, were parties to O. S. No. 276 of 1106, and the question then is whether the 18th defendant was a party there only in her bare individual capacity or also as representing her thavazhee (then consisting of herself and her then minor daughter, the 1st plaintiff) of which she was the manager.

9. True, the plaint in O. S. No. 276 of 1106 did not expressly aver that the present 18th defendant was being sued as the manager of her thavazhee. But the plaint did say that the 18th deft. and the other members of the thavazhees of Narayani and Lakshmi were made party defendants because they

3. The counsel of the petitioners urges that the court has no power to interfere with the investigation by the police or direct them to file a charge-sheet. He has drawn my attention to the recent decision of the Supreme Court in *Abhinandan Jha v. Dinesh Mishra* AIR 1968 SC 117, wherein *Vaidialingam J.*, speaking for the Court, has stated:

"There is no power expressly or impliedly conferred, under the Code, on a Magistrate to call upon the police to submit a charge-sheet, when they have sent a report under Section 169 of the Code that there is no case made out for sending up an accused for trial."

Vaidialingam J. has also stated:

"The functions of the Magistracy and the police are entirely different, and though the Magistrate may or may not accept the report, and take suitable action, according to law, he cannot impinge upon the jurisdiction of the police, by compelling them to change their opinion, so as to accord with his view." In that case, what happened was that the respondent before the Supreme Court lodged a first information statement before the police that he saw a thatched house situated on the northern side of his house burning and the petitioners before the Supreme Court running away from the scene. The police made investigation and submitted what was called a 'final report' under Section 173 (1) of the Code to the effect that the offence complained of was false. The Sub-Divisional Magistrate received this report, but in the meanwhile, the respondent had filed what was termed 'a protest petition', challenging the correctness of the report of the police. The magistrate then perused the police diary, heard the counsel of the respondent and the Public Prosecutor and passed an order directing the police to submit a charge-sheet. These were the facts of one of the cases before Supreme Court; and in the other two cases the facts were similar.

4. It is clear that the magistrate had no authority to interfere with the investigation of the police under Chapter XIV of the Code of Criminal Procedure; and what happened in the cases before the Supreme Court was such interference with the investigation. In the case before me, no question of interference with the investigation of the police under Chapter XIV arises. Here the question is whether under Section 190 of the Code of Criminal Procedure the Sub-Divisional Magistrate had power or jurisdiction to pass an order as he has done in this case.

5. Section 190 (1) of the Code appearing in Chapter XV dealing with the jurisdiction of criminal courts in inquiries and trials lays down, inter alia, that any Sub-Divisional Magistrate may take cognizance of any offence upon receiving a complaint of facts which constitute such offence upon a report in writing of such facts made by any police officer, and upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that

such offence has been committed. It is clear that under one or other of the clauses of this sub-section the magistrate can take cognizance of any offence, even upon his own knowledge or suspicion. Therefore, there is no doubt regarding the jurisdiction of the magistrate to take cognizance in a case like this. What he has done in this case is not to direct investigation by the police and file a charge-sheet. The magistrate has only taken cognizance of an offence against the petitioners after perusing the report in writing submitted by the police and the connected records including the first information statement (complaint) filed by *Damodaran Pillai*. Therefore, the action of the magistrate cannot be impugned on the ground of absence of jurisdiction.

6. Then it is urged that the action of the magistrate was under Cl. (c), of S. 190 (1) in which case he should have directed the trial of the case by another magistrate. I do not think the counsel is right in this contention either. What the magistrate had done in this case was to peruse the report in writing submitted by the police and the records in the case and then direct the array of the petitioners as accused persons. This action falls squarely within Cl. (b) of the sub-section.

7. Lastly, I come to the objection whether the facts and circumstances of the case disclosed by the records in the case justify the course adopted by the Sub-Divisional Magistrate. The complaint, as already stated, mentioned the names of seven persons including the names of the petitioners who were arrayed as accused persons 2, 3 and 4 therein. The first information report sent to the magistrate by the police also contained these names. The complaint also disclosed that these seven accused persons and twelve others stopped *Damodaran Pillai* when he was going on a bicycle with some rice in two bags. They shouted threatening words at him, surrounded him and accused persons 1 to 3 pushed him off the bicycle, when the bicycle and the rice bags fell on the road. *Damodaran Pillai* got up and picked up the bicycle; and when he was afraid to leave the place because of the attitude of the crowd, the first accused person showed an open knife and threatened him. The second accused person also shouted at him demanding him to release his hold on the bicycle. Ultimately, the first accused person took away the bicycle and rice.

8. According to the statements taken under Section 162 of the Code of Criminal Procedure from the petitioners by the police, what appears is that the three petitioners and about 20 others stopped *Damodaran Pillai* and asked him to sell the rice there at the control rate, when accused persons 1, 5, 6 and 7 mentioned in the complaint came suddenly on the scene and took away the bicycle with the rice. The bicycle was kept leaning against a lamp post. Even if this version given by the petitioners is the true version, still as rightly pointed out by the

Sub-Divisional Magistrate, in a case where a group of persons detain a person carrying some Articles and engage themselves in some negotiation with him and another group suddenly appears at the scene and remove the Articles while the first group remain silent spectators, the natural inference is that the group which detained the person and the group which removed the Articles are members of a gang acting in furtherance of a common intention. Therefore, the facts revealed by the records in the case justify the course adopted by the Sub-Divisional Magistrate. It may also be interesting to note that the number of the accused persons was brought down by the police to less than five and the offence also reduced to one under Section 379 of the Penal Code.

9. The order of the Sub-Divisional Magistrate is confirmed; the revision petition is dismissed.

DRR. Petition dismissed.

AIR 1969 KERALA 31 (V 56 C 10)

T. C. RAGHAVAN AND

M. U. ISAAC, JJ.

Neelakanta Iyer Subramania Iyer, Appellant v. Ramakrishna Iyer Venkitachalam Iyer and another, Respondents.

A. S. No. 238 of 1967, D/-22-12-1967, from order of Sub-J., Alleppey, in C. M. P. No. 2149 of 1961.

Civil P. C. (1908), Sec. 144 — Suit for recovery of property on deposit of certain amount — Amount deposited not withdrawn by defendant — Suit decreed — Decree executed pending appeal — Decree reversed in appeal — Application by defendant under Sec. 144 for possession and mesne profits — Plaintiff claiming that he should be given credit for interest on deposit in assessing his liability for mesne profits — Held, claim was not tenable. AIR 1954 All 119, Dissent. from; 1966 Ker LJ 844, Overruled; (1871) 3 PC 465, Ref. and Explained; AIR 1966 Ker 225 and AIR 1953 SC 136, Relied on. (Paras 8 and 9)

Cases Referred: Chronological Paras

(1966) AIR 1966 Ker 225 (V 53) =

1966 Ker LJ 197, Central Bank of India Ltd. v. Chattanath Karayalar

(1966) 1966 Ker LJ 844 = 1966 Ker LT 939, Sreedevi Amma v. Rugmini Amma

(1954) AIR 1954 All 119 (V 41) = 1953 All LJ 549, Wasiq Ali Khan v. Nand Kishore

(1953) AIR 1953 SC 136 (V 40) = 1953 SCR 559, Bhagwant Singh v. Sri Kishen Das

(1871) 3 PC 465 = 17 ER 120, Rodger v. Comptoir D'Escompte De Paris

V. Harihara Iyer and N. Narayanaswamy, for Appellant; T. S. Venkiteswara Iyer and R. C. Plappilly, for Respondents.

GL/HL/C811/68

ISAAC, J.: This is an appeal by the second plaintiff in O. S. No. 110 of 1119 in the Court of the erstwhile Second Judge, Alleppey from an order under Section 144, Civil P. C. The suit was for recovery of 47 acres of paddy land with mesne profits from defendants Nos. 6 and 7, on deposit of Rs. 10,800. The suit was dismissed with costs. But in A. S. No. 336 of 1124 (T), it was decreed with costs by the Travancore-Cochin High Court. Pursuant to the decree of the High Court, the second plaintiff recovered possession of the property on 3-4-1954. Defendants Nos. 6 and 7 filed C. A. No. 744 of 1957 in the Supreme Court against the decree of the High Court. The appeal was allowed by the Supreme Court with costs, by its judgment dated 30-3-1961. Thereupon an application under Section 144 Civil P. C. was filed by defendants Nos. 6 and 7 on 12-6-1961 for restoration of the property with mesne profits. Though the application was resisted by the second plaintiff on several grounds, the property was delivered back to the 6th and 7th defendants through Court in November 1961; and thereafter only the question relating to the mesne profits remained to be determined.

2. The claim for mesne profits relates to the period from April 1954 to November 1961. The property concerned in this case formed part of a larger block of paddy land, having an extent of 257 acres. There was a suit for partition of the whole land, as O. S. No. 102 of 1116, in which the parties to this appeal were also parties. The appellant herein was appointed receiver in that suit; and during all the relevant period, he was in management of the property. Regarding the claim of the respondents for mesne profits, the appellant contended that it had been fixed in the suit at 2090 parabs of paddy, and that the respondents were not entitled to get anything more than that rate. Secondly, it was contended that the appellant, as receiver, had accounted to the Court in O. S. No. 102 of 1116 for the income of the property, and that the respondents' right was only to get in that suit their share of the income from the property. Thirdly, it was contended that the whole property was leased out from year to year through Court in O. S. No. 102 of 1116 for cultivation, that the appellant had not been able to collect from the lessees the whole income, and that he was not liable for what he has not collected. The appellant did not let in any evidence in support of his contentions. The first respondent was partly examined, when it was agreed by the parties that the case can be disposed of by both parties filing statements with regard to the amounts payable as mesne profits, and after hearing their counsel. Accordingly, both parties filed statements; and the case was disposed of by the lower Court after hearing the counsel.

3. The statements filed in the lower Court showed that both the parties agreed that the mesne profits may be determined on the basis of the amount for which the

property was leased out in O. S. No. 102 of 1116. The dispute related only to the market value of paddy, and the claim of the appellant for expenses, and the commission which he claimed to get as receiver's remuneration. With respect to these matters, the appellant's claims were finally conceded by the respondents; and the lower Court passed an order fixing the mesne profits as the net amount shown in the statement filed by the appellant's counsel as payable to the respondents. The lower Court also awarded interest on the mesne profits.

4. Ordinarily, one would have thought that the above order would put an end to the litigation. The concessions made by the respondents in the lower Court were apparently for buying peace, and getting out of the long drawn-out litigation, which was started by the appellant about twenty-three years ago. This application for restitution itself has been pending in that Court for about six years. Paddy has been valued in fixing the mesne profits only at the rates fixed by the Government, though it is well known that, during the years concerned in this case, paddy had a far higher price in the open market, which is sometimes called the blackmarket. However, the same contentions as were originally raised by the appellant in the lower Court were seriously pressed before us by his learned counsel. These contentions have no merit, and the appellant is also precluded from raising them, in view of the fact that the mesne profits were determined by the lower Court in the manner agreed to by the parties. The appellant's learned counsel, however, contended that the lower Court failed to consider the appellant's contention that his liability for mesne profits was only for what he had or might reasonably have received as income from the property, and that, therefore, he was liable only for what he actually received from the lessees. It was submitted, that, in respect of the rent for one year, he received only part of the rent, and that he had filed a suit for the balance. It was also submitted that no rent for another year had been deposited by the lessee in Court in O. S. No. 102 of 1116.

5. These are all matters of evidence. The appellant did not adduce any evidence in the lower Court. If the lessee had deposited any amount in O. S. No. 102 of 1116, the appellant was the only person entitled to receive the same under the decree, as it then stood before it was reversed in the Supreme Court. One does not know whether he has not withdrawn from the Court his share of the income in respect of this property. If he has not done it, he may do so even now; but that is no answer to the respondents' claim against him for mesne profits. Again, he cannot absolve himself from the liability by simply saying that he has not realised the whole amount, and that he has filed a suit. He has to establish that he acted in the ordinary course of business in giving the lease, that he took all reasonable steps

in recovering the whole rent, and that, in spite of such efforts, he could not recover the same. Without these factual basis, his contention cannot be sustained. We also find from a perusal of the statement which he filed in the lower Court that the difference between what he has been found liable to pay and what, according to his contention, he would have been liable, is only a small amount; and there is no justification to remand this case for a further enquiry on these questions of fact.

6. The learned counsel also raised a contention that the lower Court was not justified in awarding interest on the mesne profits, and that, at any rate, interest on the sum of Rs. 10,800, which the appellant deposited in Court, when instituting this suit, should have been given credit to him. He submitted that restitution arises in equity, and that mesne profits have to be worked out according to the principles of justice, equity and good conscience. The learned counsel cited a decision of the Division Bench of the High Court of Allahabad in *Wasiq Ali Khan v. Nand Kishore*, AIR 1954 All 119, in support of the above contention. In that case a mortgagor filed a suit for redemption of a usufructuary mortgage which was decreed by the trial Court; and the plaintiff took possession of the property in execution of the decree on depositing the mortgage amount. The decree was reversed in appeal; and the defendants claimed redelivery of the property with mesne profits by way of restitution. The plaintiff contended, among other things, that the defendants should have withdrawn the mortgage amount, and that the amount which the defendants would have earned by way of interest, if the mortgage amount was drawn by them, should be deducted from the mesne profits. In accepting the above contention, Malik C. J., who pronounced the judgment of the Court, said:—

“Here the successful defendants are claiming mesne profits from the plaintiff for the period during which they had been deprived of possession of the property under the decree of the trial Court. These mesne profits have to be worked out according to the principle of justice, equity and good conscience, there being no other guide for the purpose. In working out the figures, it appears that the loss suffered by the defendants could have been mitigated by them to some extent if they had withdrawn the amount which had been deposited and by reason of which deposit they had been deprived of possession of the property. It is not shown to us that the withdrawal of the amount would have, in any manner, prejudiced the defendants' case. In the circumstances, it appears to us that they voluntarily suffered part of the damage by allowing the money to remain in deposit in Court when they could have easily withdrawn the amount. In calculating mesne profits, therefore, the Courts can take that fact into con-

THE All India Reporter 1969

Madhya Pradesh High Court

**AIR 1969 MADHYA PRADESH 1
(V 56 C 1)**

FULL BENCH

**P. V. DIXIT, C. J., K. L. PANDEY,
AND A. P. SEN, JJ.**

Municipal Council, Pandhurna, Petitioner v. R. P. Dube and another, Respondents.

Misc. Petn. No. 234 of 1965, D/- 4-4-1968.

(A) Municipalities — C. P. and Berar Municipalities Act (2 of 1922), S. 66 (1) (e) — Expression “brought within the limits of the municipality” — It means conveyed from another place and come to rest within municipal limits.

It will be seen from the terms of section 66 (1) (e) of the C. P. and Berar Municipalities Act, 1922 and the Octroi Imposition Rules framed by the Municipal Council, Pandhurna, that the essential features of the octroi tax are (a) the bringing of the goods into the municipal limits and (b) the requirement that the goods should have been brought for the purpose of consumption, use or sale therein. In the words “brought within the limits of the municipality” appearing in section 66 (1) (e), there is an element of pause or repose and they mean that animals or goods on which octroi is levied must be conveyed from another place and come to rest within the municipal limits. Thus goods or animals in transit which merely pass through the limits of the Municipal Council, even if they are used within those municipal limits, cannot be said to have been brought within the limits of such a Municipality “for the purpose of use or consumption”. The octroi tax is not a tax on the traffic of goods. The taxable

event is the bringing of the goods within the municipal limits and that must be for the purpose of sale, use or consumption within the municipal limits : AIR 1963 SC 906, Foll.; 1962 MPLJ 775, Approved. (Para 5)

(B) Municipalities — Octroi Imposition Rules framed by Municipal Council, Pandhurna (1958), Item No. 87 (Class VIII) of Schedule — Expression “carriages and all sorts of conveyances” — Expression includes motor bus. 1955 Nag LJ 323 and 1957 MPLJ 809, Ref. (Para 9)

Cases Referred: Chronological Paras (1968) Second Appeal No. 469 of

1964, D/- 11-1-1968 (Madh Pra), Municipal Council, Durg v. Gyan Singh 7

(1963) AIR 1963 SC 906 (V 50) = 1963 Supp (2) SCR 216, *Burmah Shell Co. v. Belgaum Municipality* 6

(1962) 1962 MPLJ 775 = ILR (1963) Madh Pra 811, *Anand Transport Co. (P.) Ltd. v. Board of Revenue* 7

(1957) 1957 MPLJ 809 = 1958 Jab LJ 43, *S. R. Saharia v. Municipal Committee, Jabalpur* 2, 9

(1955) 1955 Nag LJ 323 = ILR (1955) Nag 590, *Municipal Committee Malkapur v. Govind* 2, 9

Y. S. Dharmadhikari, for Petitioner; K. A. Chitale Advocate General for the State; Rameshwar Prasad Verma and R. K. Tankha, for Respondent No. 2.

DIXIT, C. J.: By this application under articles 226 and 227 of the Constitution the petitioner, Municipal Council, Pandhurna, seeks a writ of certiorari for quashing an order passed in appeal by the sub-divisional Officer, Sausar setting aside a notice issued by the Municipal Council to the respondent no. 2 Abdul Rashid Khan asking the said respondent

GL/HL/C949/68

1969 Madh. Pra./1 I G—28

to pay double octroi duty in respect of a motor bus belonging to him.

2. This petition first came up for hearing before a Division Bench. At the time of the hearing of the petition before the Division Bench, one of the points raised on behalf of the respondent Abdul Rashid Khan was that the Municipal Council had no power to impose octroi tax on motor vehicles inasmuch as motor vehicles did not fall within the meaning of the word "motors" as used in item no. 87 (Class VIII) of the Schedule to the Rules framed by the Municipal Council for imposition of octroi tax. The Division Bench made this reference to a larger Bench as in its opinion the decisions in *Municipal Committee, Malkapur v. Govind*, 1955 Nag LJ 323 and *S. R. Saharia v. Municipal Committee, Jabalpur*, 1957 MPLJ 809 differed about the meaning of the word "motor" as used in Octroi Imposition Rules framed by the Municipal Committee, Malkapur and the Municipal Committee, Jabalpur, and these rules were similar to the rules framed by the petitioner Municipal Council.

3. The material facts are that the respondent purchased a bus for the purpose of plying a stage carriage service from Mohgaon to Teegaon via Sausar and Pandhurna under a permit issued by the Regional Transport Authority, Jabalpur. The bus was first brought to Chhindwara and it was at Chhindwara that it was tested and passed before it was put on road. The petitioner Municipal Council made a demand for payment of octroi duty on the ground that as the bus halts at Pandhurna and takes up and leaves passengers at that place, it was brought within the municipal limits of the Pandhurna Municipal Council for consumption and use. The Municipal Council rejected the contention of the respondent Abdul Rashid Khan that as the bus only passed through Pandhurna while plying from Mohgaon to Teegaon, it could not be said to have been brought within the municipal limits of the Pandhurna Municipal Council for use and consumption and, therefore, the Council was not entitled to demand any octroi tax in respect of the bus. This contention was, however, accepted in appeal which Abdul Rashid Khan preferred before the Sub-Divisional Officer.

4. Section 66 (1) (e) of the C. P. and Berar Municipalities Act, 1922 authorised the Municipal Council, to impose "an octroi on animals or goods brought within the limits of the municipality for sale, consumption or use within those limits". On 26th July 1958 the petitioner Municipal Council published rules sanctioned by the State Government imposing octroi tax on animals or goods brought within the octroi limits of the Municipal Council

for sale, consumption or use within those limits. Clause (a) of item no. 87 (Class VIII) of the Schedule to these Rules specified the rate of octroi tax on "motors", "carriages" and "all sorts of conveyances" and other articles.

5. It will be seen from the terms of section 66 (1) (e) of the Act and the Rules framed by the petitioner Municipal Council on 26th July 1958 that the Municipal Council is entitled to demand octroi tax only in respect of those goods which are brought within the municipal limits for sale, consumption or use within those limits. The essential features of the octroi tax are, therefore, (a) the bringing of the goods into the municipal limits and (b) the requirement that the goods should have been brought for the purpose of consumption, use or sale therein. The words "brought within the limits of the municipality" are very significant. In them there is an element of pause or repose, and they mean that animals or goods on which octroi is levied must be conveyed from another place and come to rest within the municipal limits. The second requirement of section 66 (1) (e) and of the Rules shows that the goods must come to rest within the municipal limits for the purpose of sale, consumption or use therein. Thus, goods or animals in transit which merely pass through the limits of the Municipal Council, even if they are used within those municipal limits, cannot be said to have been brought within the limits of such a Municipality "for the purpose of use or consumption". The octroi tax is not a tax on the traffic of goods. The taxable event is the bringing of the goods within the municipal limits and that must be for the purpose of sale, use or consumption within the municipal limits.

6. In *Burmah Shell Co. v. Belgaum Municipality*, AIR 1963 SC 906, the Supreme Court while elucidating the difference between terminal tax and octroi has said that terminal tax is connected with the traffic of goods and that octroi is leviable in respect of goods brought into the municipal area for consumption, use or sale. The observations made by the Supreme Court in paragraph 21 of the judgment elucidating the meaning of the word "consumption" support the view that in the expression "goods brought within the municipal limits for sale, consumption or use", there is an element of pause or repose within the municipal limits for the purpose which the goods are brought. In fact, the Supreme Court has said in paragraph 21 that the concept of "octroi" includes "the bringing in of goods in a local area so that the goods come to a repose there."

7. A Division Bench of this Court has pointed out in *Anand Transport Co. (P.) Ltd. v. Board of Revenue*, 1962 MPLJ 775 that to attract section 66 (1) (e) of the Act it is not enough that certain goods have been brought within the limits of a municipality or that they have been merely used within such limits; it is only when goods are brought within the limits of a municipality for use within those limits that clause (e) is attracted. In that case it has also been held that when a vehicle merely passes through the limits of a municipality or is casually brought within those limits, it cannot be taxed under clause (e) and that similarly when a vehicle is so brought not for use within those limits but for making it fit for use, such as registration, passing or repairs, it cannot be taxed under section 66 (1) (e). The decision in the case of *Anand Transport Co. (P.) Ltd. v. Board of Revenue* (supra) was referred to by Shrivastava J. in *Municipal Council, Durg v. Gyan Singh*, Second Appeal No. 469 of 1964, D/- 11-1-1968 (Madh. Pra) as indicating that the word "use" occurring in section 66 (1) (e) of the C. P. and Berar Municipalities Act had to be given a restricted meaning and hence a casual visit of a truck within the municipal limits would not make the truck liable to octroi duty. In that case Shrivastava J. rejected the claim of the Municipal Council, Durg, that it was entitled to impose octroi duty on certain trucks which used to transport gitti and other material to Durg from an outlying village and which trucks were always kept outside the municipal limits of Durg.

8. Now, in the present case, it is common ground that the owner of the bus in question, the respondent Abdul Rashid Khan, used to ply a stage carriage service from Mohgaon to Teegaon via Sausar and Pandhurna and the bus made a halt at Pandhurna for the purpose of picking up and alighting passengers. The halt of the bus at Pandhurna en route did not in any way constitute bringing in of the bus within the municipal limits of Pandhurna for the purpose of sale, use or consumption. It is nobody's case that the bus was brought to Pandhurna for sale to some purchaser residing within the municipal limits of Pandhurna. The bus was no doubt used by some passengers at Pandhurna when they alighted from it or boarded it. But it was not brought within the municipal limits of Pandhurna for use or consumption. It was only in transit and in the process of being used. The consumption or use of a stage carriage consists in the plying of a service with its aid. The bus comes to a repose within the limits of that municipality where it is brought for

commencing the service. The running of a service may be through the limits of several municipalities and passengers may use the bus in those limits. The bus may even at times run empty. But that does not make any difference to the position that the vehicle is brought for use and consumption within the limits of that municipality and comes to a repose there, where it is brought for commencing the service. It would be that Municipal Council and not the petitioner Municipal Council which would be entitled to impose an octroi tax in respect of the vehicle. It was never the intention of the Legislature to permit Municipal Councils to levy octroi tax on goods in transit which are not brought within the municipal limits and which do not come to rest there for the purpose of sale, use or consumption. The claim of the petitioner Municipal Council to levy an octroi tax on the respondent no. 2's bus merely on the ground that it passes through Pandhurna Municipality and makes a halt there cannot, therefore, be sustained.

9. In the view of the matter, it is really not necessary to consider the question whether item no. 87 (Class VIII) of the Schedule to the Octroi Rules framed by the Pandhurna Municipal Council covered a bus. It may, however, be pointed out that there is really no conflict between the decisions in 1955 Nag LJ 323 (supra) and 1957 MPLJ 809 (supra) with regard to the meaning of the word "motor". In both these cases it has been held that the word "motor" as used in the Octroi Rules of the Malkapur and Jabalpur Municipalities is wide enough to include motor cars and motor trucks. The two decisions differ in regard to the effect of the word "excluding" used in item-58, Class VIII, of rule 1 of the Malkapur Municipality as well as in item (70), Class VIII, of rule 1 of the Octroi Rules of the Jabalpur Municipality. It may be noted that in item no. 87 (Class VIII) of the Schedule to the Octroi Rules of the petitioner Municipal Council the expression "carriages and all sorts of conveyances" also occurs. These words are plainly wide enough to include a motor bus.

10. Learned counsel for the petitioner urged that the Sub-Divisional Officer had no authority after the coming into force of the M. P. Municipalities Act, 1961, to hear the appeal preferred by the non-applicant no. 2. The short answer to this contention is that the appeal preferred by Abdul Rashid Khan was pending when the M. P. Municipalities Act, 1961, came into force. Section 311 (1) of the 1961 Act provides that an appeal or revision pending before any authority under any of the enactments repealed by the 1961 Act immediately before the

commencement of that Act shall be heard and disposed of by the authority competent to hear such appeal or revision in accordance with the provisions of the enactment so repealed. Thus it is plain that the Sub-Divisional Officer who was authorised to hear and dispose of appeals under section 83 of the C. P. and Berar Municipalities Act, 1922, was competent to hear and dispose of the appeal preferred by Abdul Rashid Khan which was pending when the 1961 Act came into force.

11. For these reasons, this petition is dismissed with costs of both the respondents. Counsel's fee for each of the respondents is fixed at Rs. 100/-. The outstanding amount of the security deposit after deduction of costs shall be refunded to the petitioner,

MBR/D.V.C.

Petition dismissed.

**AIR 1969 MADHYA PRADESH 4
(V 56 C 2)**

**T. C. SHRIVASTAVA
AND SHIV DAYAL, JJ.**

Rameshwar Prasad, Appellant v. Krishna Mohanath Raina, and others, Respondents.

First Appeal No. 21 of 1966, D/- 23-4-68, from decree of Addl. Dist. J., Chhindwara, D/- 24-12-1965.

(A) Madhya Pradesh Public Trusts Act (30 of 1951), S. 32 — Bar under — Principal office of trust outside State — Suit by Trust not barred under S. 32 for want of registration.

Trusts, whose principal office is outside the State of Madhya Pradesh, do not require registration under the Madhya Pradesh Public Trusts Act, 1951 and section 32 of that Act is not a bar to the institution of suits by such trusts.

(Para 7)

(B) Evidence Act (1872), Ss. 90, 114 — Will more than fortyfive years old — Will rational in character having made in favour of trust and dependent widows well provided for — Presumption is that testator was of sound mind at time of execution — Proof of handwriting of attesting witnesses sufficient to prove soundness of mind of executor.

The burden of proving the fact that the testator at the time of execution of the will was of sound mind lies upon the party setting up the will. However, when the will was executed about 45 years back by which time almost all the attesting witnesses would have been dead, it is not necessary to prove that the executor was of sound mind at the time of execution of the will. The fact that the will was rational in character as having

been made in favour of a public trust and that by the will the widows of the testator had been nicely provided for up to their lifetime and that no near relative had been deprived of the property, will itself raise a presumption that the executor was of sound mind at the time of making the will. Hence the proof of the handwriting of the attesting witnesses will be sufficient to prove the fact that the executor was of sound mind when he executed the will. AIR 1947 PC 15, Rel. on.

(Paras 10, 11)
Cases Referred: Chronological Paras
(1947) AIR 1947 PC 15 (V. 34) =

73 Ind App 223, Munnalal v. Mst. Kashibai

10

C. P. Sen, for Appellant; Y. S. Dharma-dhikari and L. S. Baghel, for Respondents.

SHRIVASTAVA, J.: The Sanskrit Pustakonnati Sabha, Itawah (respondent 1-B) through its seven trustees (respondents 1-A (1) to 1-A (7) and the Temple of Shri Mahasaraswatiiji, Itawah (respondent 2), hereinafter referred to as the plaintiffs, brought Civil Suit No. 25-A of 1961, in the Court of Additional District Judge, Chhindwara, for possession of properties detailed in Schedules A and B attached to the plaint, against the appellant Rameshwar Prasad. The trial Court impleaded one Ram Dulare as defendant 2 in the case on an application made by him on 11-7-1963. The suit was decreed with respect to only part of the properties claimed against Rameshwar Prasad. He has, therefore, filed this appeal. Ram Dulare, defendant 2, also has been impleaded in the appeal as respondent 4.

2. It is no longer in dispute that the property in suit belonged to one Bal Govind who died, leaving behind two sons Sitaram and Raghuvar Dayal, Sitaram died on 27-7-1920, leaving his widow Dulari Bai as his only heir. Raghuvar Dayal died on 11-6-1923, leaving behind his widow Shahzadi Bai. Both these widows continued in possession of the properties. Shahzadi Bai died on 12-8-1955 and Dulari Bai died on 30-1-1960.

3. The case of the plaintiffs was that Raghuvar Dayal executed a will on 31-5-1923 by which he bequeathed the property in dispute in favour of the plaintiffs, subject to the life interest of the two widows Shahzadi Bai and Dulari Bai. They are, therefore, entitled to possession of the properties after the death of the last surviving widow Dulari Bai on 30-1-1960. However, the properties have been taken possession of by the defendant Rameshwar Prasad (appellant) without any right or title. Accordingly, they claimed possession of the properties from him.

4. The defendant Rameshwar Prasad denied that any will was executed by Raghuvar Dayal and pleaded that even if any will was executed by him, he did so in unsound mental condition. The will, if any, therefore, did not bind the estate. Rameshwar Prasad himself is the son of Raghuvar Dayal's wife's sister. He pleaded that he was living with the two widows and managing their estate on their behalf. The two widows executed a joint will in his favour on 7-12-1944 and after the death of Shahzadi Bai, Dulari Bai executed another will in his favour on 7-4-1956. Accordingly he claims that he is entitled to retain possession of the properties under the two wills.

Ram Dulare (respondent 4), who was subsequently impleaded on his application, claims to be the nephew of Raghuvar Dayal. He joined defendant Rameshwar Prasad in denying the will in favour of the plaintiffs. He further pleaded that there was a partition between Sitaram and Raghuvar Dayal in their lifetime, according to which Sitaram separated his half interest in the family property. That interest continued with Sitaram's widow Dulari Bai and after her death, passed to him. He denied the wills set up by the defendant Rameshwar Prasad and claimed that all the properties left by Sitaram and Raghuvar Dayal passed to him after the death of the two widows.

5. The trial court found that Raghuvar Dayal had made the will as pleaded by the plaintiffs, but held that Sitaram and Raghuvar Dayal had divided the family property between themselves and, therefore, the will could operate only to the extent of the share of Raghuvar Dayal in the property. Accordingly, the claim was decreed only as regards Raghuvar Dayal's share. It was also held that the two widows had executed wills in favour of Rameshwar Prasad, but the wills were got executed by him under undue influence. Accordingly, it was held that Rameshwar Prasad was not entitled to claim any property under those wills. So far as the defendant Ram Dulare is concerned, the court held that he was entitled to part of the properties, but no decree in his favour was passed as the court held that a separate suit was the proper remedy for him.

6. Several other defences were raised by the defendants to attack the claim of the plaintiffs, but it is not necessary for us to refer to them, as they are not material for the purpose of this appeal. Shri C. P. Sen appearing for the appellant has confined his argument only to two points against the plaintiffs. Those points are—

(1) that the plaintiff Trust not being registered under the Madhya Pradesh

Public Trusts Act, [1951], the suit was barred under section 32 of that Act; and (2) that it has not been proved that the will by Raghuvar Dayal was executed when the testator was of sound disposing mind.

7. So far as the first point is concerned, it will be noticed that the plaintiff Trust is situate at Itawah in Uttar Pradesh and it is registered under the Societies Registration Act (No. 21) of 1860. Section 32 of the Madhya Pradesh Public Trusts Act, 1951 undoubtedly provides that "no suit to enforce a right on behalf of a public trust which has not been registered under this Act shall be heard or decided by any Court". This section, however, shall be attracted in case of those Trusts only which have to be registered under that Act. The Madhya Pradesh Public Trusts Act, 1951, being a State Act, cannot have any extra-territorial jurisdiction and it is for this reason that the scheme of jurisdiction in the Act is confined to Trusts operating in Madhya Pradesh. Section 3 of the Act provides that "the Collector shall be the Registrar of Public Trusts in respect of every public trust the principal office or the principal place of business of which is situate in his district". This provision makes it clear that in case of public trusts, which have their "principal office" or "principal place of business" outside the State of Madhya Pradesh, registration is not necessary for the simple reason that Collector in Madhya Pradesh will be competent to perform the functions of a Registrar in respect of such a trust. Section 4 requires every working trustee to make an application to the Registrar having jurisdiction for registration of the trust. In the instant case, as the office of the trust was situate in Itawah in Uttar Pradesh, no application was required from the trustees thereof for registration of the trust in Madhya Pradesh, as no such application would lie to any of the several Registrars in Madhya Pradesh. Reading the provisions in the Act, we have no doubt that trusts, whose principal office is outside the State of Madhya Pradesh, do not require registration under the Madhya Pradesh Public Trusts Act, 1951 and section 32 of that Act is not a bar to the institution of suits by such trusts.

8. Turning now to the question whether the testator had a sound disposing mind at the time when he executed the will, it is true that the burden of proving this fact lies on the party setting up the will. The burden thus lay on the plaintiffs in the present case. However, it is to be noticed that the will was executed on 31-5-1923, i.e., about 45 years back. The attesting witnesses are all dead. The plaintiffs have examined several witnesses to prove the handwriting of the attesting

witnesses as also the endorsement made on the will by the testator and the attesting witnesses. Raghuvar Dayal himself has endorsed on the will (Ex. P-3). "I have read and understood the above". This endorsement is proved by the defendant's own witness Bal Govind (D. W. 4). One of the attesting witnesses, Lalchand Patni, who was an Honorary Magistrate, endorsed "The executant has signed the above after having read and understood it". Similar was the endorsement of another attesting witness Anand Vinayak Wazalwar Advocate, that the executant had signed the deed in his presence having read and understood it. The third attesting witness Moolchand, who was a Sub-Registrar, also made a similar endorsement. As has already been said, the handwriting of the several witnesses making the endorsement has been duly proved.

9. D. W. 1, Parmeshwar Deen, who was the agent of Raghuvar Dayal, has been produced by the defendant to show that Raghuvar Dayal was not in his senses for some days before he died. The witness, however, admits in paragraph 4 of his deposition that after he told him his name, he recognised him and talked in full senses. The envelope containing the will was handed over to him by the wife of Raghuvar Dayal for being deposited with the Sub-Registrar and the witness admits that he did so. He was aware that the document was a will and it is unlikely that he would take to the Sub-Registrar if he knew that the testator was not in proper senses when he executed it.

10. As we have said, the will is about 45 years old. Evidence of persons who were present at the time of execution is not available. In *Munnalal v. Mst. Kashibai*, AIR 1947 PC 15 their Lordships have laid down the law applicable to ancient wills as follows:

"A party setting up a will is required to prove that the testator was of sound disposing mind when he made his will but, in the absence of any evidence as to the state of the testator's mind, proof that he had executed a will rational in character in the presence of witnesses must lead to a presumption that he was of sound mind, and understood what he was about. This presumption can be justified under the express provisions of section 90, since a will cannot be said to be 'duly' executed by a person who was not competent to execute it; and the presumption can be fortified under the more general provisions of section 114, since it is likely that a man who performs a solemn and rational act in the presence of witnesses is sane and understands what he is about." In view of the law as laid down in this decision, we must accept that the will

was executed by the testator when he had a sound disposing mind.

11. The will was in favour of a Trust and there are no suspicious circumstances attaching to its execution. At the time of its execution no one was present on behalf of the Trust to exercise influence on the mind of the testator to execute a will in its favour. Unlike the case of a will in favour of some individual, who benefits under it and is interested in securing the disposition by the testator by dubious means, the will in favour of a Trust stands on a different footing. Further, the disposition under the will is quite natural inasmuch as the only two dependents in the family, namely, the widows, have been provided full maintenance for their lifetime and there was no near relation who has been deprived of the property. Under the circumstances, the presumption that the will was made by the testator with a sound disposing mind becomes much stronger. We hold that the will was executed by Raghuvar Dayal after understanding fully the nature of the disposition he was making. Accordingly, the plaintiffs are entitled to the property which was left by Raghuvar Dayal under the will to the Trust.

12. The dispute raised by Ram Dulare attacking the two wills made by the two widows and setting up his own title as a near relation of Raghuvar Dayal and Sitaram as compared to Rameshwar Prasad is really a matter between the two defendants inter se. The trial court has recorded findings on some of the points raised by Ram Dulare against Rameshwar Prasad. However, the court finally observed that no relief could be given to Ram Dulare on the basis of those findings as the matter could be decided in a separate suit between the two defendants.

13. Shri C. P. Sen appearing for Rameshwar Prasad (appellant) and Shri Baghel, appearing for Ram Dulare (respondent 4) stated before us that the findings on the points in dispute between the defendants inter se are quite unnecessary for the disposal of the case set up by the plaintiffs. As desired by the two defendants, we make it clear that the findings of the trial court, so far as they relate to the dispute between them, are not binding on them, as no relief has been given to any of them on the basis of those findings and they have been directed to file a separate suit in which the matter will be canvassed on the merits of the case of each of the parties.

14. In the result, the decree of the trial court awarding relief to the plaintiffs in respect of Raghuvar Dayal's share in the family property is correct. The appeal is dismissed. The appellant

1969

Rameshwar Prasad shall pay the costs of the plaintiff-respondents. The respondent 4 shall bear his costs as incurred.
BNP/D.V.C. Appeal dismissed.

AIR 1969 MADHYA PRADESH 7 (V 56 C 3)

S. P. BHARGAVA, J.

Mst. Manmati and others, Applicants
v. Mohan and others, Non-Applicants.
Civil Revn. No. 821 of 1965, D/- 12-9-1966, from order of 1st. Addl. Dist. J., Bilaspur, D/- 12-7-1965.

(A) Arbitration Act (1940), Ss. 32, 34—
Suit for complete partition of Hindu joint family — Existence of arbitration agreement between coparceners in respect of part of the property — Suit neither barred nor can be stayed.

Under the Hindu law every coparcener has an inherent right to ask for the partition of the joint family property. It is open to members of a coparcenary to divide some items of the joint family property and to keep the other properties as their joint family properties. Any agreement in respect of one property alone can in no way adversely affect the right of the coparcener to claim the general partition and separate possession of either all of the properties or at any rate of the other properties which are not the subject matter of any arbitration agreement. A suit seeking partition of whole property and possession can be hit by the provisions of S. 32 only if the arbitration agreement is admitted or proved to relate to the entire subject-matter of the suit but not otherwise. The legal proceeding which is sought to be stayed must be in respect of a matter which the parties have agreed to refer and which come within the ambit of the arbitration agreement. A suit seeking complete partition of the Hindu joint family property is not barred under section 32, nor any stay under section 34 can be granted, only because of the arbitration agreement between coparceners in respect of part of the property. AIR 1953 SC 182, Rel. on. (Paras 6, 8)

(B) Arbitration Act (1940), S. 32 —
Suit filed for partition and separate possession of joint family property — Mere mention of arbitration agreement and award in plaint does not bar the suit — Burden is on defendant to plead necessary facts in support of the bar set up by them. AIR 1954 Nag 332 and AIR 1964 Mad 1 (FB) and AIR 1957 Madh Pra 24, Rel. on. (Para 7)
Cases Referred: Chronological Paras
(1964) AIR 1964 Mad 1 (V 51) =
ILR (1963) Mad 922 (FB), Moham-mad Yusuf v. S. Hajee Moham-mad Hussain

(1962) AIR 1962 Madh Pra 66 (V 49) =
1961 MPLJ 745, Shyamsingh
Jaswantsingh v. Pralhadsingh
Tikaram
(1957) AIR 1957 Madh Pra 24
(V 44) = 1957 Jab LJ 70, Bansidhar v. E. B. Sukhia
(1954) AIR 1954 Nag 332 (V 41) =
ILR (1954) Nag 614, Abdul
Quddoos v. Abdul Gani
(1953) AIR 1953 SC 182 (V 40) =
1953 SCR 572, Gaya Electric
Supply Co., Ltd. v. State of
Bihar

Ramkumar Verma, for Applicants; A. P. Sen, for Non-Applicants.

ORDER: The plaintiff-non-applicant Mohan instituted a suit in the trial Court against Balaram, whose legal representatives on record now are applicants Nos. 1(a) to (e), and the other three applicants Raspalsingh, Mansaram and Nanki. In the suit the plaintiff-non-applicant impleaded his sons Mahajanlal and Lilaprasad also as defendants. They are non-applicants 2 and 3. The plaintiff instituted the suit claiming general partition of the joint family property and separate possession thereof. The joint family property comprised of agricultural lands in seven villages including the village Jajang and five houses which are situate in two of these seven villages.

2. The plaintiff's case was that the plaintiff and the first defendant Balaram constituted a joint Hindu coparcenary and held the properties which are described in paragraph 4 of the plaint as their joint family properties since the death of their father Sobharam; that the defendant Balaram was the manager of the joint family after the death of Sobharam and that he acquired lands and constructed two residential houses which are mentioned in schedule B attached to the plaint. It was urged that all these properties constituted joint family properties though the acquisitions thereof were made in the names of different members of the family. In para 7 of the plaint it was averred that the plaintiff orally demanded partition and separate possession of his share in April 1954. The matter was referred to panchas by the parties but the decision was not accepted by the defendant No. 1. The defendant No. 1 ultimately refused to give plaintiff's 1/8th share saying that the interest of the minor sons of the plaintiff will suffer adversely in the month of June 1956.

3. Balaram denied the plaintiff's claim for partition and in reply to the above quoted allegations of para 7 of the plaint stated the following in para 7 of his written statement: "It is denied that the plaintiff ever demanded any partition. In fact he has no right, title or interest in

the property of the defendants. The plaintiff raised disputes in the lands obtained by the defendant No. 1 under the will of his aunt Mst. Suhawan. The Gountia of Bakeli accepted the defendant as the exclusive owner of the said lands. The plaintiff demanded share in that land. The land 50.54 acres at Jajang acquired in the names of 4 sons of the defendant 1 and 2 sons of Mohan the plaintiff have not been partitioned into specific shares, although year after year the produce of those lands used to be divided among the sons of the plaintiff and those of the defendant No. 1. These disputes were referred to the arbitration of Balakram Gountia of Turekela and some more Panchas to be nominated by Balakram. At no time Balakram took down the statements of the parties or took the statements of other persons nor has he nominated any Panch so far. Under some pretext or the other he has obtained this defendant's signature on a stamp paper without disclosing its contents to him. The defendant No. 1 is an illiterate man. He knows only to sign his name. It is further submitted that in view of the plea in para 7 of the plaint, that reference had been made to an arbitration and some Award has been given, the plaintiff's suit is barred under S. 32 of the Indian Arbitration Act and therefore, it is not maintainable".

4. The defendants 2, 3 and 4 (applicants 2, 3 and 4) raised the same contentions as Balakram. The non-applicants 2 and 3 supported the plaintiff's claim for partition in their written statements. The contention with which we are concerned in this revision is as to whether the lower appellate Court has rightly come to the conclusion that the plaintiff's suit is not hit under S. 32 of the Arbitration Act. The trial Court had dismissed the plaintiff's suit on the ground that Section 32 operated as a bar to the said suit. The other issue tried by the trial Court was whether a written submission was made to arbitrators. The trial Court held that there was a written submission made to the arbitrators regarding a part of the property in suit, i.e. with respect to the properties situate at village Jajang. The appellate Court came to the conclusion that it was not clear that any written submission to arbitration was made. Differing from the trial Court it held that the suit of the plaintiff was maintainable and section 32 of the Arbitration Act did not constitute a bar to the tenability of the suit.

5. The contention advanced by the learned counsel for the applicant is that the lower appellate Court has misdirected itself in law about the provisions of the Arbitration Act, specially sections 32 and 34 of the Act, and that has resulted in a decision which cannot be supported in

law. The learned counsel further relies strongly on the observations made by the Division Bench of this Court, of which I was a member, in *Shyamsingh Jaswantsingh v. Pralhadsingh Tikaram*, 1961 MPLJ 745 : (AIR 1962 Madh Pra 66). In that case the view taken is that a suit for a declaration that an arbitration agreement or award did not exist or that it was invalid is barred under sections 32 and 33 of the Act, and that even if any of the reliefs expressly mentioned in Sections 32 and 33 is not directly claimed in the suit, still the suit would be barred if it in any way involves enforcement, or amendment or modification, or setting aside, of an award.

6. Having given my earnest attention to the arguments advanced on behalf of the applicant, I am of the view that there is no substance in this revision and it must be dismissed. In the first place, it may be pointed out that it is not even pleaded that the arbitration agreement referred to the entire property of which partition is claimed in the suit. The subject matter of the suit, as already stated, consists of lands of seven villages and five houses. The alleged arbitration agreement, on the other hand, is said to relate to the agricultural lands at the village Jajang only. Under the Hindu Law every coparcener has an inherent right to ask for the partition of the joint family property. It is open to members of a coparcenary to divide some items of the joint family property and to keep the other properties as their joint family properties. Any agreement in respect of one property alone can, in no way adversely affect the right of a coparcener to claim the general partition and separate possession of either all of the properties or at any rate of the other properties which are not the subject-matter of any arbitration agreement. In my opinion, the suit can be hit by the provisions of section 32 only if the arbitration agreement is admitted or proved to relate to the entire subject-matter of the suit but not otherwise. In the context of section 34 of the Arbitration Act, the Supreme Court held in *Gaya Electric Supply Co. Ltd. v. State of Bihar*, AIR 1953 SC 182 that the legal proceeding which is sought to be stayed must be in respect of a matter which the parties have agreed to refer and which comes within the ambit of the arbitration agreement. Where, however, a suit is commenced as to a matter which lies outside the submission, the Court is bound to refuse a stay. This reasoning, in my opinion, fully applies for considering the bar of suits under section 32.

7. In the second place, the plaint does not make it clear in the instant case that the matter was referred to the arbitration of panchas by written agreement,

1969

AIR 1969 MADHYA PRADESH 9
(V 56 C 4)

P. V. DIXIT, C. J. AND A. P. SEN, J.
Commissioner of Income-tax, M. P.,
Applicant v. Badrilal Bholoram, Indore,
Opposite Party.

Misc. Civil Case No. 141 of 1965 D/-
8-3-1968.

(A) Income-tax Act (1922), S. 16 (3)
(a) (ii) — Minor — Admission to benefits
of partnership — Income accruing to
minor and interest earned by him as also
interest on profits credited to minor are
assessable in the total income of the
guardian — When such income is neither
direct nor indirect result of admission to
benefits of partnership, then it is not
assessable.

If the income arising to the minor
child has direct or indirect connection
with the fact of its admission to the
benefits of the partnership, then the
minor's income has to be included in the
total income of the individual. If, on the
other hand, the income derived by the
minor child is quite independent of the
fact of its admission to the benefits of a
partnership then that income of the
minor cannot be included in the total
income of the individual. Therefore, if
the minor gets interest on any capital
contributed by him to the firm, then the
interest earned by him on the capital
amount is an income which he derives
from his association to the benefits of the
partnership. If, on the other hand, the
minor makes a deposit with the firm or
advances a loan to the partnership firm,
then the interest paid to him on the
loan or deposit amount has no connection
whatsoever with the fact of his
admission to the benefits of the partnership.
If the share of profits of the minor
was allowed to accumulate and interest
was paid on the accumulated profit, then
that interest amount is also assessable
in the hands of the guardian under S. 16
(3) (a) (ii) of the Act, (1965) 55 ITR 435
(All) and (1961) 41 ITR 570 (Assam), Rel.
on; AIR 1955 Bom 16, Disting. (1963) 47
ITR 458 (AP) and AIR 1966 Pat 216 & AIR
1967 SC 517, Referred. (Paras 6, 8)

(B) Partnership Act (1932), S. 13 —
Capital contribution and advance, distinction
between — Partner can withdraw
capital by agreement with other partners
— Withdrawal of capital contribution
does not make it an advance merely
because there is no compulsion in partnership
deed to contribute towards capital —
Withdrawal of capital does not
mean want of obligation to contribute to
capital.

An amount in fact contributed by a
partner as capital does not become an
advance merely because under the part-

nor is there anything in the plaint to
suggest that there was a written award
made by the arbitrators. In the absence
of the necessary averments in the plaint,
the allegations made in para 7 of the
plaint cannot be held to be sufficient to
support a conclusion that a reference to
arbitration in writing was made and a
written award was made by the arbitra-
tors. Actually the appellate Court found
that the plaintiff had acquiesced in the
first defendant's non-acceptance of the
award, if any; that it has not even been
alleged by the plaintiff to be a written
award; that even according to the defen-
dant-applicants not even a panel of arbitra-
tors had been constituted as was
agreed to in the alleged arbitration agree-
ment and that the arbitrators who were
to be nominated by Balakram had not
been nominated. It further held that it
was for the contesting defendant to plead
the necessary facts in support of the bar
set up by them. See Abdul Quddoos v.
Abdul Gani, AIR 1954 Nag 332; Bansid-
har v. E. B. Sukhia, AIR 1957 Madh
Pra 24 and Mohammad Yusuf v.
S. Hajee Mohammad Hussain, AIR
1964 Mad 1 (FB). The appellate Court is
very correct in observing that instead of
pleading such a bar the plea of the de-
fendant itself indicates that the panel of
arbitrators was never formed.

8. The important point for considera-
tion in this case is, as to whether the
plaintiff's suit has been brought for the
purpose of a decision upon the existence,
effect or validity of an arbitration agree-
ment or award. If it is such a suit, the
jurisdiction of Court to entertain the suit
would be barred. The relief sought in
the suit is one of partition and separate
possession. None of the reliefs envisaged
in section 32 of the Act has been pray-
ed for in the suit. The suit as instituted
does not in any way involve en-
forcement or amendment or modifi-
cation or setting aside of an award,
and therefore Shyamsingh's case, referred
to above, does not help the
applicants. It is very pertinent to note
that the defendant did not positively
plead that an award was made by the
panchas but only stated in the witness-
box that his signatures had been obtain-
ed on a stamp-paper and it was not dis-
closed to him as to what the contents
were. The Appeal Court was correct in
commenting upon the pleadings of the
defendant that they were not unambigu-
ous.

9. For these reasons, the revision ap-
plication is dismissed with costs and the
order of the Appeal Court dated 22-7-
1965 is confirmed. Counsel's fee Rupees
50/- if certified.

DVT/D.V.C.

Revision dismissed.

GL/HL/C960/68

nership deed there is no compulsion on the partner to contribute or maintain any capital with the firm. There is a material distinction between capital contribution of a partner and advances made by him to the firm. The fact that several partners made some withdrawals from the capital account does not necessarily lead to the conclusion that there was no obligation on them to contribute any capital. It is settled law that the agreed capital of a partnership can be added to or withdrawn with the consent of all the members of the partnership. If, therefore, there was such consent on the part of all the members of the partnership, then the fact of withdrawal by itself cannot justify the inference that there was no obligation on the partners to contribute any capital.

Cases Referred: Chronological (Para 8) Paras

- (1967) AIR 1967 SC 517 (V 54) = 1967-63 ITR 273, S. Srinivasan v. Commr. of Income Tax, Madras 113
 (1966) AIR 1966 Pat 216 (V 43) = 1966-61 ITR 467, Commr. of Income Tax, B. and O. v. Bilas Rai Tekriwal 112
 (1965) 1965-55 ITR 435 (All), Ram Narain Garg v. Commr. of Income Tax, U. P. 9
 (1963) 1963-47 ITR 458 = ILR (1963) Andh Pra 574, A. Venkatasubbiah v. Commr. of Income Tax 112
 (1961) 1961-41 ITR 570 (Assam), Chouthmal Kejriwal v. Commr. of Income Tax, Assam 4, 10, 11, 13
 (1955) AIR 1955 Bom 16 (V 42) = 1954-25 ITR 523, Bhogilal Laherchand v. Commr. of Income Tax, Bombay City 5, 11, 13

M. Adhikari and P. S. Khirwadker, for Applicant; M. D. Choudhary, for Opposite Party.

DIXIT, C. J.: This consolidated reference under section 66 (1) of the Indian Income-tax Act, 1922, by the Income-tax Appellate Tribunal at the instance of the Commissioner of Income-tax arises out of the Tribunal's common order disposing of the assessee's appeals for the assessment years 1956-57, 1957-58, 1958-59 and 1959-60. The question, which has been referred to this Court for decision, is:

"Whether the sum of Rs. 3,440/-, Rs. 6,806/-, Rs. 7,468/- and Rs. 6,457/-, each being interest earned by Sureshchandra the minor son of the assessee on the amounts standing to his credit in the firm of M/s Badrilal Bholaram, for the years 1956-57, 1957-58, 1958-59 and 1959-60 respectively are liable to be included in the total income of the assessee under section 16 (3) (a) (ii) of the Indian Income-tax Act, 1922?"

2. The material facts are that the assessee Badrilal, his three major sons and a minor son Sureshchandra constituted a Hindu undivided family till or about 11th September 1955. The undivided family was carrying on business of forest contracts. On or about 11th September 1955, there was a partial partition of the family as regards the business of forest contracts. In this partition, the business capital of the Hindu undivided family was divided between the father and his sons. On 12th September 1955, a partnership consisting of Badrilal and his three major sons for carrying on the business of forest contracts was brought into existence by a partnership deed. The minor son Sureshchandra was admitted to the benefits of the partnership. The amount that came to the share of the father and his sons in the division of the business capital was credited in the account-books of the firm to the father and his sons respectively. The firm was granted registration under section 26-A of the Act for the assessment year 1956-57. The registration was renewed for subsequent years.

3. The Income-tax Officer included in the total income of the assessee Badrilal for the assessment year 1956-57 the share income from the partnership arising to the minor Sureshchandra as also the interest earned by him on the capital amount standing to the credit of Sureshchandra in the books of the firm. In the subsequent assessment years also, the share in the profits of the firm arising to Sureshchandra, interest earned by him on the capital amount standing to his credit as also interest on accumulated profits were included in the total income of the assessee Badrilal. This inclusion was made by the Income-tax Officer under section 16 (3) (a) (ii) of the Act.

4. The assessee then preferred appeals before the Appellate Assistant Commissioner questioning the correctness of the decision of the Income-tax Officer with regard to the inclusion of the interest earned by the minor on the "capital amounts standing to his credit in the accounts of the firm". All those appeals were dismissed by the Appellate Assistant Commissioner who took the view that the minor had supplied capital to the firm and, therefore, the inclusion of the interest amount credited to the account of the minor justified under section 16 (3) (a) (ii) of the Act. The Appellate Assistant Commissioner relied on the decision of the Assam High Court in Chouthmal Kejriwal v. Commr. of Income Tax, Assam, 1961-41 ITR 570 (Assam).

5. The assessee then filed appeals before the Tribunal. The Tribunal took the view that as there was no obligation on any of the partners or the minor to

contribute or maintain any capital in the firm, the amount of interest paid to the minor could not be considered as income arising to the minor from his admission to the benefits of the partnership and, therefore, the interest amount could not be included in the total income of the assessee-Badrilal for the relevant assessment years. The Tribunal sought support for this conclusion in the decision of the Bombay High Court in *Bhogilal Laherchand v. Commr. of Income Tax, Bombay City*, 1954-25 ITR 523 : (AIR 1955 Bom 16) where interest earned by minors on deposits maintained in a partnership firm was held to be not a benefit which the minors received from their admission to the benefits of the partnership firm.

6. The material provision of the Act to consider in this case in Section 16 (3) (a) (ii) of the Act, which runs as follows:—

"16. (3) In computing the total income of any individual for the purpose of assessment, there shall be included —

(a) so much of the income of a wife or minor child of such individual as arises directly or indirectly

(i) * * * * *

(ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner;...." This provision is clear enough. It says that in the total income of an individual the income of a minor child arising directly or indirectly "from the admission of the minor to the benefits of partnership" in a firm of which the assessee is a partner shall be included in the total income of the assessee for the purpose of assessment. If the income arising to the minor child has direct or indirect connection with the fact of its admission to the benefits of the partnership, then the minor's income has to be included in the total income of the individual. If, on the other hand, the income derived by the minor child is quite independent of the fact of its admission to the benefits of a partnership then that income of the minor child cannot be included in the total income of the individual. For the inclusion of the minor child's income in the total income of an individual under section 16 (3) (a) (ii), there must be a direct or indirect connection between the minor's admission to the benefits of partnership and the receipt of the income. It follows, therefore, that if the minor child gets interest on any capital contributed by him to the firm, then the interest earned by him on the capital amounts is an income which he derives from his association to the benefits of the partnership. It is because of his admission to the benefits of the partnership that he can contribute to or maintain any capital in the firm. If, on the other hand, the minor makes a deposit with the firm or advances

a loan to the partnership firm, then the interest paid to him on the loan or deposit amount has no connection whatsoever with the fact of his admission to the benefits of the partnership. The minor child could have made the deposit or advanced the loan and earned interest thereon even if he had not been admitted to the benefits of the partnership firm.

7. Now here, the Tribunal has not found that the amount, which came to the share of the minor Sureshchandra in the division of the business capital, and was credited in the books of the firm when the partnership was formed was an amount advanced by Sureshchandra and was not capital contributed by him. On the other hand, it has found that the amount, which Sureshchandra and other members of the Hindu undivided family got in the partition, was credited in the account books of the firm as their capital. But there was no obligation on any of the partners "to retain any moneys in the shape of capital in the firm". The Tribunal found that several partners had been withdrawing amounts from the amounts standing to their credit and this indicated that there was no obligation of any of the partners to "retain any moneys in the shape of capital in the firm". The Tribunal also said:—

"Here in this case the conduct of parties as evidenced by the withdrawals from the capital accounts would indicate that there was no agreement as to their contribution of capital and we may safely therefore infer that there was no obligation on the partners to contribute capital."

Further, it was observed by the Tribunal:

"In the instant case there is no evidence that the minor was required to supply the capital and it cannot be said therefore that the supply of capital was incidental to the admission of the minor to the benefits of the partnership."

In paragraph 6 of its order, the Tribunal also made the observation:—

"So, if there is no obligation on the part of a partner to bring in any capital but he advances certain moneys it will be very difficult to say that the interest on the advances made or the capital contributed voluntarily is income arising directly or indirectly from his admission to the benefits of the partnership."

8. It is thus manifest that the Tribunal, though it held that the amount standing to the credit, in capital account, of minor Sureshchandra in the books of account of the partnership firm was capital amount, reached the conclusion that the interest paid on that amount could not be regarded as income which arose directly or indirectly to the minor Sureshchandra from his admission to the benefits of partnership in the firm as there was no obligation on him or any partner

to retain any moneys in the shape of capital in the firm. We are unable to accept this reasoning. In our opinion if the minor child did contribute any capital to the partnership firm, and if on that capital he earned interest, then that income would be one falling under section 16 (3) (a) (ii) of the Act, no matter whether the minor or any partner was or was not under any obligation to contribute any capital. An amount in fact contributed by a partner as capital does not become an advance merely because under the partnership deed there is no compulsion on the partner to contribute or maintain any capital with the firm. There is a material distinction between capital contribution of a partner and advances made by him to the firm. This is clear from section 13 of the Partnership Act, 1932. Again, the fact that several partners made some withdrawals from the capital account does not necessarily lead to the conclusion that there was no obligation on them to contribute any capital. It is settled law that the agreed capital of a partnership can be added to or withdrawn with the consent of all the members of the partnership. If, therefore, there was such consent on the part of all the members of the partnership then the fact of withdrawal by itself cannot justify the inference that there was no obligation on the partners to contribute any capital. Be that as it may, whether or not there was any obligation on the part of the minor Sureshchandra or other partners to contribute to the capital of the firm, the fact, as found by the Tribunal, remains that the amount, which Sureshchandra got in the division of the business assets of the Hindu undivided family, was credited in the capital accounts of the partnership when it was formed. On this finding, the interest income, which arose to Sureshchandra on this capital amount, was clearly an income which arose to him from the fact of his admission to the benefits of the partnership. The Income-tax Officer, therefore, rightly included the interest income earned by Sureshchandra in the total income of the assessee Badrilal. If the share of profits of Sureshchandra was allowed to accumulate and interest was paid on the accumulated profit, then that interest amount is also assessable in the hands of the assessee Badrilal under section 16 (3) (a) (ii) of the Act.

9. The view we have taken is amply supported by authorities. In *Ram Narain Garg v. Commr. of Income Tax*, U. P. 1965-55 ITR 435 (All) the Allahabad High Court held that interest paid to a minor son admitted to the benefits of a partnership on his capital investment is income derived directly or indirectly by him from the admission and is includi-

ble in the income of the father under section 16 (3) (a) (ii) of the Act. It was observed by the Allahabad High Court (at page 439)—

"In order that the provision may apply to it, the receipt of the income must have some connection, whether direct or indirect, with the fact of his admission. Any income that could have been derived by him without his being admitted to the benefits of the partnership cannot be said to have been derived by him from the admission. Once some connection between the receipt of income and the admission is established, the provision applies, whether the connection is direct or indirect."

The Allahabad High Court also pointed out that interest paid on a loan advanced to the partnership by the minor is connected with the fact of his admission to the benefits of partnership, if the partnership deed forbids raising of a loan from any person other than a partner or a person admitted to its benefits; it is not connected with the fact if interest is paid on a deposit made, or a loan advanced by the minor, and the partnership was free to accept a deposit or a loan from any person even if not connected with it.

10. The case before us is analogous to the case of 1961-41 ITR 570 (Assam), where the Assam High Court has held that where a minor has been admitted to the benefits of partnership in a firm in which his father is a partner, and the minor has supplied capital, any income accruing to the minor as interest on the capital is an indirect result of his being admitted to the benefits of partnership and has to be included in the total income of his father under section 16 (3) (a) (ii) of the Act. In that case also, it was contended that as there was no obligation on the minor to contribute any capital interest earned by him on the capital amount did not fall under section 16 (3) (a) (ii). While dealing with this contention, the learned Judges of the Assam High Court said—

"It was contended that there may be cases where a minor may be admitted to the benefits of partnership without supplying capital and, consequently, the supply of capital cannot be regarded as obligatory on the part of the minor before he could be admitted to the benefits of the partnership. It may be that a minor may be admitted to the benefits of the partnership without supplying any capital and to that extent the supply of capital may not be obligatory on him. But when a minor has been admitted to the benefits of the business and has supplied capital, any income accruing to him as an interest on the capital is certainly an indirect result of his being admitted to the benefits of partnership."

11. The decision of the Bombay High Court in 1954-25 ITR 523 : (AIR 1955 Bom 16) on which the Tribunal relied, is not in point here. That was a case where interest was paid to minors on some deposits made by them with a partnership firm and there was no obligation on the minors admitted to the benefits of the partnership to make a deposit. It was, therefore, held that interest earned by minors on deposits maintained in the firm could not be held to be a benefit which the minors derived from their admission to the benefits of partnership. As there was no obligation on the minors to make any deposit, it could not be said that the deposit made by them had any connection with their admission to the partnership and hence the interest accruing on such deposit could not be said to have arisen directly or indirectly by the admission of the minors to the partnership. While distinguishing the Bombay case, the Assam High Court has pointed out in Chouthmal Kejriwal's case, 1961-41 ITR 570 (Assam) (supra) that the case of supply of capital stands on a footing different from the case of deposits and that unless there is anything express in the deed of partnership to the contrary, the supply of capital by the minor can only be the necessary result of his admission to the benefits of partnership and, consequently, any interest accruing on the capital will arise directly or indirectly from the admission of the minor to the benefits of partnership. The Bombay case is inapplicable here as in the present case the interest amount, which arose to the minor Sureshchandra, was not the result of any deposit made by him with the firm.

12. To the same effect are the decisions in A. Venkatasubbaiah v. Commr. of Income Tax, 1963-47 ITR 458 (AP) and Commr. of Income Tax, B. and O. v. Bilas Rai Tekriwal, 1966-61 ITR 467 : (AIR 1966 Pat 216). In those cases it was held that interest on the capital contributed by the minors was an indirect result of his being admitted to the benefits of partnership and consequently the interest amount had to be included in the total income of the father in his assessment. It may be noted that in Bilas Rai Tekriwal's case, 1966-61 ITR 467 : (AIR 1966 Pat 216) (supra) also the Tribunal had found that there was no compulsion on the minor sons to either contribute or maintain any capital to and with the firm.

13. The decision of the Supreme Court in S. Srinivasan v. Commr. of Income Tax, Madras, (1967) 63 ITR 273 : (AIR 1967 SC 517) shows that interest earned by the minor Sureshchandra on the accumulated profits is assessable in Badrilal's hands. That was a case in which S.

Srinivasan was a senior partner in a firm in which his wife and a stranger were partners and his two minor sons had been admitted to the benefits of partnership. For a number of years up to the relevant assessment year, the shares of profit of the wife and the minor sons were allowed to accumulate without interest. With effect from the previous year to the relevant assessment year the firm decided to allow 9% interest per annum on these accumulated profits. The Supreme Court held that the interest accrued to the wife and the minor sons at least indirectly because of their capacity mentioned in section 16 (3) (a) (i) and (ii) and was, therefore, assessable in S. Srinivasan's hands. By distinguishing the decision of the Bombay High Court in 1954-25 ITR 523 : (AIR 1955 Bom 16) (supra) and of the Assam High Court in 1961-41 ITR 570 (Assam) (supra), the Supreme Court affirmed the principle laid down in those two cases.

14. For these reasons, our conclusion is that interest earned by Sureshchandra, the minor son of the assessee, on the amount standing to his credit in the firm for the years 1956-57, 1957-58, 1958-59, 1959-60 has to be included in the total income of the assessee Badrilal under section 16 (3) (a) (ii) of the Act. Our answer to the question posed before us is, therefore, in the affirmative. The Commissioner of Income-tax shall have costs of this reference. Counsel's fee is fixed at Rs. 200/-.

BDB/D.V.C.

Answer accordingly.

AIR 1969 MADHYA PRADESH 13
(V 56, C 5)

P. V. DIXIT C. J.
AND G. P. SINGH, J.

Abdul Mohi Siddiqui, Petitioner v. The State Transport Appellate Authority, Gwalior and others, Respondents.

Misc. Petn. No. 109 of 1968, D/- 23-4-1968, for quashing order of State Transport Appellate Authority Gwalior, D/- 22-2-1968.

Motor Vehicles Act (1939), Ss. 57 (8) and 47 (3)—Extension of route — Grant of, amounting to new permit — Not permissible.

Granting an extension on a route by Regional Transport Authority to a holder of permit for Stage Carriages which so affects the identity of the original permit as to make it a permit for a new route altogether is not permissible under section 57 (8). (Para 6)

Where the Regional Transport Authority permitted an extension for 19 miles

GL/HL/C951/68

on a route thereby exceeding the limit of number of Stage Carriages permits fixed under section 47 (3) on another route the extension cannot be called a little change of the original permit and is not permissible under section 57 (8) of the Act. AIR 1968 SC 748, Disting. Case law discussed. (Para 7)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 748 (V 55) =
Service Ltd. v. Raman and Raman
Service Ltd.

(1967) Misc. Petn. No. 46 of 1967,
D/- 26-4-1967 (Madh Pra), M/s.
Civil Appeal No. 258 of 1967,
D/- 20-10-1967, Sri Ramvilas
Ramgopal Satyanarayan v. Regi-
onal Transport Authority

(1963) Misc. Petn. No. 266 of 1963,
D/- 14-10-1963, (Madh Pra),
Ugratara Motor Service v. Regi-
onal Transport Authority, Rewa

V. S. Dabir, for Petitioner; R. K.
Tankha, for Respondent No. 3.

SINGH, J.: The petitioner, who holds a stage carriage permit on Bhopal-Nazirabad route, by this petition, under Articles 226 and 227 of the Constitution, calls into question the orders of Transport Authorities by which the stage carriage permit of the respondent No. 3, which was originally for Bhopal-Barasia, has been extended upto Nazirabad.

2. Bhopal-Barasia is a route of 26 miles and Bhopal-Nazirabad via Barasia is a route of 45 miles. The respondent No. 3 applied sometime in 1966 to the Regional Transport Authority, Bhopal for extension of his Bhopal-Barasia permit upto Nazirabad. On publication of the application, the petitioner objected on the ground that the grant of extension will virtually amount to granting a new permit and that it will violate the ceiling order limiting the number of stage carriage permits on Bhopal-Nazirabad route. The Regional Transport Authority by its order passed on 16th October, 1967, allowed the extension. The petitioner then filed an appeal before the State Transport Appellate Authority which was dismissed on 22nd February, 1968. The extension of the permit upto Nazirabad has been ordered under Section 57 (8) of the Motor Vehicles Act as a variation of the condition of the original permit for Bhopal-Barasia. It is not disputed that there is a ceiling order in force which limits the number of stage carriage permits on Bhopal-Nazirabad route and if the extension allowed to the respondent No. 3 was in reality grant of a new permit the limit was violated.

3. The only point urged by Shri V. S. Dabir, learned counsel for the petitioner is that the extension of Bhopal-Barasia permit of respondent No. 3 upto Nazirabad in effect amounted to grant of a new

permit and was not permissible under section 57 (8) of the Act.

4. The point so raised relates to the scope of section 57 (8) which reads as follows:

"An application to vary the conditions of any permit other than a temporary permit, by the inclusion of a new route or routes or a new area or in the case of a stage carriage permit, by increasing the number of services above the specified maximum, or in the case of a contract carriage permit or a public carrier's permit, by increasing the number of vehicles covered by the permit, shall be treated as an application for the grant of a new permit."

5. This sub-section has been construed by this Court in a number of cases. In Ugratara Motor Service v. Regional Transport Authority, Rewa, Misc. Petn. No. 266 of 1963, D/- 14-10-1963 (Madh Pra) it was observed as follows:

"It (Regional Transport Authority) also failed to notice that the permanent permit held by the respondent No. 3 was for a route of 32 miles and the extension desired by him was for another 30 miles. In granting an extension for these 30 miles, the Regional Transport Authority virtually granted a permit to the non-applicant No. 3 for a new route altogether, practically destroying the identity of the original route."

The above passage was quoted and applied in M/s Ramgopal Satyanarayan v. Regional Transport Authority Misc. Petn. No. 46 of 1967 D/- 26-4-1967 (Madh Pra). Ramgopal Satyanarayan's case, Misc. Petn. No. 46 of 1967 D/- 26-4-1967 (Madh Pra) clearly laid down that the variation of the condition as to route contemplated by the sub-section is limited to "a little change" of the original route. The Court pointed out:

"To us it appears that under clause (8) of Section 57 an application for modification, that is, introducing a little change either by the inclusion of a new route or in other manner, is envisaged, and not an application for making a change which would destroy the identity of the permit and would make it a permit for a new route altogether. This is what was held by this Court in Ugratara Motor Service's case, Misc. Petn. No. 266 of 1963, D/- 14-10-1963 (Madh Pra) (supra)." Rangopal Satyanarayan's case, Misc. Petn. No. 46 of 1967, D/- 26-4-1967 (Madh Pra) was in its turn followed in Rasul Motor Transport Co. v. Regional Transport Authority, Jabalpur, Misc. Petn. No. 108 of 1967, D/- 2-5-1967 (Madh Pra).

6. It is no doubt true that in all these cases the extensions granted were either longer or nearly equal in distance to routes originally covered by the permits; but that does not mean that extensions

1969

AIR 1969 MADHYA PRADESH 15
(V 56 C 6)P. V. DIXIT, C. J.
AND G. P. SINGH, J.Balbhadra Prasad, Petitioner v. The
State of Madhya Pradesh and others, Res-
pondents.Misc. Petn. No. 132 of 1968, D/- 4-5-
1968.(A) Municipalities — M. P. Municipa-
lities Act (37 of 1961), Ss. 332 and 328 —
Power of review — Scope — Order dis-
solving municipal council — Order can
be reviewed.

There is nothing in section 332 to show that under that provision only quasi-judicial orders can be reviewed and not an administrative or an executive order. Indeed, as is evident from S. 21 of the General Clauses Act, an executive or an administrative order can be amended, varied or rescinded in the same manner and subject to the like sanctions and conditions in which the order is made. The contention, therefore, that the order dissolving the Municipal Council being an administrative order could not be reviewed under section 332 cannot be accepted. AIR 1963 SC 395, Foll.

(Para 6)

(B) Municipalities — M. P. Municipa-
lities Act (37 of 1961), Ss. 332, 328 (1) and
328 (6) — Power of review — Scope —
Order of dissolution—Consequences men-
tioned in S. 328 (6) follow — Order res-
toring council can still be made in exer-
cise of power of review.

It is no doubt true that when a Council is dissolved, all the Councillors of the Council vacate their offices as from the date of the order of dissolution and the administration of the Council is taken over by a person or a committee of persons appointed by the State Government. But these are not consequences which make the restoration of the Council an impossibility. It cannot be denied that an order of the State Government under section 328 superseding or dissolving a Council can be quashed by the High Court in proceedings under Article 226 of the Constitution. If the order is quashed, then its effect is to restore the Council and the consequences mentioned in sub-section (6) of section 328 cease to be operative. The same result would have followed if the Act had provided for an appeal, against an order under section 328 giving to the appellate authority the power to vary or modify or rescind the order made by the State Government under section 328. If the Council could be restored in the afore-said proceedings, then it is difficult to appreciate why it could not be restored by the State Government itself in exer-

for a shorter distance are always permis-
sible. The test applied in these cases was
to see if by granting the desired exten-
sion, the Regional Transport Authority
had introduced only a little change of
the original route or whether the exten-
sion allowed was such which had affect-
ed the identity of the original permit.
The transport authorities were clearly in
error in distinguishing the aforesaid
cases simply on the ground that exten-
sions held invalid in them were either of
routes longer in distance or nearly equal
to the routes covered by the original per-
mits.

7. In the instant case the distance covered by the original permit was of 26 miles and the extension granted was for a distance of 19 miles. The permit extended was originally for Bhopal-Barasia and after extension it became a permit for Bhopal-Nazirabad via Barasia, which is a separate route and on which a limit of the number of stage carriage permits has been fixed by an order under S. 47 (3). Having regard to the distance and other factors extension of 19 miles cannot be called a little change of the original permit and was not permissible under section 57 (8) of the Act. In our opinion, the Regional Transport Authority acted in excess of its jurisdiction in granting the extension.

8. It was, however, contended by Shri Tankha learned counsel for the respondent No. 3 that in Sri Ramvilas Service Ltd. v. Raman and Raman Service Ltd. Civil Appeal No. 258 of 1967 D/- 20-10-1967 : (reported in AIR 1968 SC 748) it has been held that the Regional Transport Authority can grant extension of the original permit without any limitation. The question in that case was whether the limit prescribed by S. 48 (3) (xxi) (Madras Amendment) applied whether a condition to that effect had been put in a permit or not. We do not find anything in their Lordships' judgment which decides the extent of variation permissible under section 57 (8). Ramvilas case, Civil Appeal No. 258 of 1967 D/- 20-10-1967 : (reported in AIR 1968 SC 748) is, therefore, distinguishable.

9. The petition is allowed. The order of the Regional Transport Authority, Bhopal granting the extension to the respondent No. 3 and the order of the State Transport Appellate Authority, Gwalior dismissing the petitioner's appeal are quashed. The petitioner will have his costs of this petition from the respondent No. 3. Counsel's fee Rs. 100/- if certified. The security amount will be refunded to the petitioner.

BNP/D.V.C.

Petition allowed.

cise of its power of review under S. 332. 1967 MPLJ 949, Ref. (Para 7)

(C) Municipalities — M. P. Municipalities Act (37 of 1961), Ss. 332, 3 (18), 4 and 5 — Powers of review — Notice to parties interested to be heard in support of order under review — Notice to all citizens residing in Municipal area not necessary — Councillors found to be not interested in supporting order of dissolution — Order setting aside order of dissolution not vitiated for want of notice to them.

The expression "parties interested to appear and be heard in support of such order" appearing in section 332 (1) Proviso clearly means those parties who are interested in the maintenance of the order sought to be reviewed.

(Para 8)

From the definition of "Municipality" or the classification of municipalities given in section 4 of the Act or the issue of a notification under section 5, it does not follow that all the citizens residing in a municipality are parties interested for the purpose of the first clause of the proviso to section 332 (1). Before the issue of notice it is not possible to know the citizens who would be interested in supporting dissolution and who would be in favour of the restoration of the Municipal Council. Hence clearly notice to all citizens residing in the Municipal area cannot be given. The expressions "the parties interested to appear" and "be heard in support of such order" cannot be read disjunctively.

Where the dispute is about the dissolution of a Council, then the principal party interested can be only the councillors or the party who asked the Government to dissolve the Council. But where the councillors are not interested in supporting the order of dissolution, the order passed by the Government, setting aside the order of dissolution is not vitiated for want of notice to the councillors. (1875) 3 O'M and H 19 and AIR 1958 SC 687, Disting. (Para 9)

(D) Municipalities — M. P. Municipalities Act (37 of 1961), S. 328 — Scope — Regular formal enquiry into allegations on which it is proposed to dissolve or supersede council, is not contemplated — Such enquiry is not also barred by section. (Para 10)

(E) Municipalities — M. P. Municipalities Act (37 of 1961), S. 332 — Power of review — Scope — Government can review its order if it is not reasonable, proper or legal — Power is to be exercised sparingly and in extraordinary circumstances. AIR 1958 MP 323 (FB), Foll. (Paras 10, 11)

Cases Referred: Chronological Paras (1967) 1967 MPLJ 949=1968 Jab

LJ 1, Akbarali Arif v. Govt. of Madh Pra

(1963) AIR 1963 SC 395 (V 50) = (1962) Supp 3 SCR 713, Bachhittar Singh v. State of Punjab 6
(1958) AIR 1958 SC 687 (V 45) = 1958 SCJ 680, Kamaraja Nadar v. Kunju Thevar 9
(1958) AIR 1958 Madh Pra 323 (V 45) = 1958 Jab LJ 589 (FB), Kareli Municipality v. State 10
(1875) 3 O'M & H. 19, In re, Tipperary Case 11

Y. S. Dharmadhikari, for Petitioner; K. A. Chitale, Advocate General with K. K. Dubey Govt. Advocate (for No. 1) and R. K. Tankha and P. C. Pathak (for Nos. 3 and 4), for Respondents.

DIXIT, C. J.: The petitioner in this case, who was elected as a Councillor of the Municipal Council, Rewa, seeks a writ of certiorari for quashing an order made by the State Government on 23rd March 1968 rescinding its earlier order dated 4th January 1968 dissolving the Municipal Council.

2. On 5th May 1967 the Government issued a notice to the Municipal Council, Rewa, under section 328 of the Madhya Pradesh Municipalities Act, 1961 (hereinafter referred to as the Act) asking it to show cause why it should not be dissolved on account of its certain acts of commission and omission stated in the charges enumerated in the notice. The Council gave its explanation. After considering the explanation furnished by the Council in reply to the notice, the Government passed an order under section 328 (1) of the Act dissolving the Council. The operative portions of that order ran thus:

"The State Government after carefully considering the explanation furnished by the Council in regard to the above charges is of opinion that the Council has failed to meet the charges satisfactorily. The State Government accordingly, find that all the charges excepting charge No. 3 described above have been established.

The State Government, are, therefore, satisfied that the Council has exceeded and abused its powers to a grave extent and that it is not competent to perform the duties imposed by or under the Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961).

The State Government, therefore, hereby order that the Municipal Council, Rewa in Rewa district be dissolved under subsection (1) of section 328 of the said Act and that a fresh election be held."

3. It appears that subsequently the respondent No. 4 Sheikh Habib Monsur, former President of the Municipal Council, and two others moved the State Government for a review under section 332 of the Act of the order dated 4th January 1968 dissolving the Municipal Coun-

THE All India Reporter

1969

Madras High Court

AIR 1969 MADRAS 1 (V 56 C 1)

FULL BENCH

**M. ANANTANARAYANAN, C. J.,
RAMAKRISHNAN AND
NATESAN, JJ.**

The Chief Controlling Revenue Authority, Madras, Board of Revenue Madras, Referring Officer v. The Canara Industrial and Banking Syndicate Ltd., Madras and others, Respondents.

Ref. Cases Nos. 12, 13 and 17 of 1965, D/- 17-4-1967, on order of reference made by Chief Controlling Revenue Authority, Madras, D/- 31-7-1963.

(A) Stamp Act (1899), Ss. 2(6), 2(12), 2(14), 2(10), Sch. 1 Art. 23 — Instrument executed but conditions validating transfer of rights absent — Instrument not registered — However if instrument is fully dispositive in character it is chargeable to stamp duty. AIR 1936 Lah. 449 (S.B.), Dissented.

A document has to be considered as chargeable to stamp duty, when it is executed, which term "executed" itself has to be interpreted in the light of the definition embodied in S. 2(12). AIR 1963 SC 1307, Foll.

(Para 6)

Under S. 2(12) "executed" means "signed", and 'execution' means 'signature', so it is clear that this will include the signatures of all persons, who are required by the character of the document to sign in the document, in order to give that document effect according to law. Therefore, if a document is of such a character that both parties to the document should sign it, to constitute it a binding agreement between them, it should contain the signatures of both; similarly, if

it had to be signed by two other attesters in order to make it legal, this will also be necessarily part of the definition. But, once a document is complete in execution in this sense, and the effective words of disposition are there, immediately transferring rights by the very virtue of the document, the question of its subsequent registration is a distinct matter altogether, and the document is certainly liable to stamp duty with reference to the relevant Article of the Stamp Act, since execution is complete. Though registration is necessary under the law, to give legal effect to the document, it is not merely a power of the executant to register the document, the party to whom the interest is conveyed can also have it compulsorily registered. Obviously, the category under which an instrument falls cannot be affected by the mere absence of registration, if the document is otherwise fully dispositive in character, and duly executed. AIR 1953 Mad 764 (F. B.) considered and held has to be interpreted as of restrictive scope. (Document held liable for stamp duty under Art. 23 of Sch. I). AIR 1967 Mad 10 (F.B.), Ref.; AIR 1936 Lah 449 (S.B.), Dissented; (1889) 23 Q.B.D. 579, Dist.

(Para 9)

(B) Civil P. C. (1908), Preamble — Precedents — Interpretation — Has to be read as whole — (Precedents) — (Civil P. C. (1908), O. 20, R. 4).

It would be erroneous principle of interpreting a judgment to press into service the last few observations alone divorced from the earlier dicta and passages.

(Para 9)

Cases Referred: Chronological Paras (1967) AIR 1967 Mad 10 (V 54) = (1966) 2 Mad LJ 320 (F.B.), Revenue Authority v. Industrial Investment Corporation

(1963) AIR 1963 SC 1307 (V 50)=
 (1964) 1 SCR 535. New Central
 Jute Mills v. State of West Bengal 5
 (1953) AIR 1953 Mad 764 (V 40)=
 (1953) 1 Mad LJ 620 (F.B.),
 Crompton Engineering Co. (Mad-
 ras) Ltd. v. Chief Controlling
 Revenue Authority, Madras 1, 4, 6,
 7, 9, 12

(1936) AIR 1936 Lah 449 (V 23)=
 ILR 17 Lah 223 (S.B.), Shamdin
 v. Collector, Amritsar 9
 (1889) 23 Q.B.D. 579=61 LT 832,
 Commrs. of Inland Revenue v.
 Angus and Co. 11

Addl. Govt. Pleader, for the State;
 M. L. Naick, R. Gopalaswami Aiyangar,
 K. Venkataswami, K. Alagiriswami and
 S. Jagadisan, for Respondents.

ANANTANARAYANAN, C. J.— These references under Section 57 of the Indian Stamp Act 1899, are closely inter-related in the substantial question involved, namely, what was precisely decided in Crompton Engineering Co., (Madras) Ltd. v. Chief Controlling Revenue Authority Madras, 1953-1 Mad LJ 620=(AIR 1953 Mad 764) (F. B.) and how far should the dicta in that judgment be pressed with regard to an unregistered instrument, which, but for registration, is effective to transfer rights as a conveyance or a deed of mortgage? Of the three references, R. C. 13 of 1965 is the most significant, on the facts, and the arguments were really elaborated in this case. Therefore, we consider it most appropriate to deal with this reference immediately, and in detail. The question for our decision is:

"Whether the instrument in question is not liable to be stamped under Art. 23 of Sch. I of the Stamp Act, even though it is not registered, and whether instruments in general are to be stamped on execution notwithstanding that other conditions which validate the transfer of rights which the instruments purport to make are not present?"

Before dealing with the main issue, in this select reference (R. C. No. 13 of 1965), it is essential to set forth the several definitions and provisions of the Indian Stamp Act II of 1899, as amended upto date. No apology is, hence, needed for these verbatim citations, as the definitions and their juxtaposition have to be borne in mind, when considering the question really involved.

Section 2(6)—Definition of 'chargeable': 'Chargeable' means, as applied to an instrument executed or first executed after the commencement of this Act, chargeable under this Act, and, as applied to any other instrument, chargeable under the law in force in India, when such instrument was executed or, where several persons executed the instrument at different times, first executed.

Section 2 (10)—Definition of 'conveyance': 'Conveyance' includes a conveyance on sale and every instrument by which property, whether moveable or immoveable, is transferred inter vivos and which is not otherwise specifically provided for by Sch. I (or by Sch. I-A as the case may be

Section 2 (12)—Definition of 'executed' and 'execution': 'Executed' and 'execution' used with reference to instruments, mean "signed" and "signature."

Section 2 (14)—Definition of 'instrument'. 'Instrument' includes every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded.

Section 2 (17)—Definition of 'Mortgage deed': "Mortgage deed" includes every instrument whereby for the purpose of securing money advanced, or to be advanced by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates to, or in favour of, another, a right over or in respect of specified property".

Section 3.—"Subject to the provisions of this Act and the exemptions contained in Sch. I, the following instruments shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefor respectively, that is to say—

(a) every instrument mentioned in that schedule which, not having been previously executed by any person, is executed in India on or after the first day of July 1899.....

Section 17.—"All instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution".

A very brief reference is sufficient to the relevant Articles of the Stamp Act. Under Art. 23 of Sch. I, a document is liable to duty as "a conveyance as defined by Sec. 2 (10)....."

2. **Section 2 (23)** embodies the definition of a 'receipt', which 'includes any note, memorandum or writing (a) whereby any money, or any bill of exchange, cheque or promissory note is acknowledged to have been received". The relevant Article of Sch. I is Art. 53, which is "Receipt as defined by Sec. 2 (23) for any money or other property, the amount or value of which exceeds twenty rupees". One other Article that may be conveniently referred to here, is Art. 40 relating to 'mortgage deed', of which there are two sub-divisions (a) and (b) depending upon whether possession of property is forthwith given or is not.

3. The facts in R. C. 13 of 1965 can be very briefly stated. On 13-11-1958, C. R. Gopalachari and C. G. Parvathavardhani Ammal sold valuable proper-

ties, namely, rice, flour etc. mills, together with their accessories, for Rs. 17000 to S. P. S. Subramanian. The instrument is styled as 'receipt' and is written on plain paper, bearing revenue stamp of the value of ten naya paise. Admittedly, the land and the buildings in which the rice and flour mills and the appurtenant machinery were installed, were separately sold between the same persons, by a registered sale deed dated 15-11-1958, the same date. But one very important feature of the alleged receipt is that it does not, as may be considered ex facie from the facts, relate to the sale of moveable properties. On the contrary, the properties sold for Rs. 17000 were embedded and attached to the earth, and the instrument (receipt) really relates to the sale of immoveable properties, that is not in dispute.

4. It was contended on behalf of the respondent, on the authority of 1953-1 Mad LJ 620=(AIR 1953 Mad 764) (F. B.) that, notwithstanding the above fact, the instrument, not being registered, was not a valid conveyance, and could not be held liable to stamp duty under Art. 23 of Sch. I of the Stamp Act. We might here note that in an earlier reference to this court, Revenue Authority v. Industrial Investment Corporation, 1966 2 Mad LJ 320=(AIR 1967 Mad 10) (F. B.) the learned Government Pleader sought to raise the very same question, that we should now authoritatively interpret the scope of the dicta in 1953-1 Mad LJ 620=(AIR 1953 Mad 764) (F. B.) or, if we accepted the argument of the learned Government Pleader on that aspect, have the decision posted for reconsideration at the hands of a Fuller Bench. We then pointed out that there was no actual case before the court at all, which involved the question, and that "in the mere context of a hypothetical case and a document which may never eventuate", we did not consider that the principle of stare decisis should be departed from. But, in the present case, there can be no doubt that the dicta in 1953-1 Mad LJ 620=(AIR 1953 Mad 764) (F. B.) do fall to be squarely considered. The learned Additional Government Pleader strenuously contends, that that decision cannot be taken as authority for the view that a document is not liable to be charged with duty, either as a conveyance or as a mortgage deed, as the case may be merely because it is unregistered, and the law requires registration to effectuate such transfer of rights. On the contrary, he contends that any such interpretation would involve a situation which is patently opposed to the Stamp law, which has always envisaged a document as being liable to stamp duty, at the time of its execution, and prior to its registration. We shall dwell on this aspect

for a moment, for we do not think that this proposition can be seriously doubted.

5. The proposition that the entire Stamp Law envisages a document as liable to stamp duty, at the time when the instrument is executed, would appear to necessarily follow from the definition of 'chargeable' under Sec. 2 (6), from the terms of Section 3 (a), and also from the explicit terms of Sec. 17 of the Stamp Act, that we have set forth earlier. The matter is indeed set at rest, by the dicta of their Lordships of the Supreme Court in New Central Jute Mills v. State of West Bengal, AIR 1963 SC 1307, though the facts of that case are different, and perhaps, an unique situation. That was a case in which a mortgage deed was executed in Uttar Pradesh, though it related to property situate in West Bengal, and the document was received in that State for registration. The document had been stamped in accordance with the law of West Bengal, but the judgment held that when the document came up before the officers of Uttar Pradesh for decision, whether it was duly stamped or not, the officers of Uttar Pradesh were bound to hold that the instrument was not duly stamped, as it did not bear Uttar Pradesh stamps. This particular situation of a document executed in one State and attempted to be registered in another State, does not now concern us. But the Supreme Court authoritatively held that, "Primarily, the liability of an instrument to stamp duty arises on execution". Again,

"It is clear that in many cases the only one liability, viz., the liability on execution of the document will arise. After the amendment of the Act, the liability can no longer be said to arise generally in India but must be held to arise in the particular State where the instrument is executed.....In all these cases the instrument can be said to be duly stamped, only if it bears stamps of the amount and description in accordance with the law of the State concerned—the law including not only the Act but also the rules framed under the Act".

6. The learned Additional Government Pleader would thus appear to be perfectly justified in his contention that the document has to be considered as chargeable with stamp duty, when it is executed, which term "executed" itself has to be interpreted in the light of the definition embodied in Sec. 2 (12). Actually, there can be no question of impounding the document and recovering the proper stamp duty from the party liable, subsequent to registration, and this is not disputed. The real question is, did the case in 1953-1 Mad LJ 620=(AIR 1953 Mad 764) (F. B.) purport to decide that, even though a document is

otherwise complete as a conveyance, or a deed of mortgage, and the recitals therein fully transfer the relevant rights in property, it is still not liable to stamp duty, either as a conveyance or as a deed of mortgage, purely because it has not been registered?

7. The facts in 1953-1 Mad LJ 620= (AIR 1953 Mad 764) (F. B.) have to be carefully borne in mind, in this context. We are definitely of the view that the dicta in this decision would appear to have been misinterpreted, and pressed beyond their proper scope. The document itself is set forth, with reference to the effective clauses (1) and (9) in the headnote of the judgment. After extracting these clauses Rajagopalan J., who delivered the judgment on behalf of the Full Bench, stated as follows—

"The document dated 22nd March 1948 was not attested. It was not registered". The learned Judge then extracted the definition of "mortgage deed" embodied in Sec. 2 (17) of the Act, that we have earlier set forth. Later, he proceeded to extract Sec. 59 of the Transfer of Property Act, which makes it essential that where a mortgage secures a principal of one hundred rupees or upwards, and it is other than a mortgage by deposit of title deeds, it can be effected only by a registered instrument, signed by the mortgagor and attested by at least two witnesses. The learned Judge then proceeded to make the following observations—

"That the transfer contemplated by Section 2 (17) of the Indian Stamp Act is a transfer valid in law, should be obvious. Such a valid transfer would not have been effected under the document dated 22nd March 1948, which was neither attested nor registered. Under Sec. 59 of the Transfer of Property Act a valid mortgage can be effected only when the instrument is (1) signed by the mortgagor, (2) attested by at least two witnesses and (3) registered. Leaving aside the question of registration of an insufficiently stamped document, no one can claim that a document not signed by the mortgagor is an instrument of mortgage liable to be stamped..... The law embodied in Sec. 59 of the Transfer of Property Act necessitates the signature of the mortgagor and the attestation by at least two witnesses in equal degree. To ensure the validity of the instrument as a mortgage, attestation is made as much a part of the execution as the signature of the mortgagor".

8. Later, towards the end of the judgment, the learned Judge observes—

"The very difference between the definition of an instrument in Sec. 2 (14) and a mortgage deed in Sec. 2 (17) should show that the 'transfer' provided for in

Sec. 2 (17) is a transfer valid in law. To make a document liable to stamp duty as a mortgage deed, it is not enough if the document purports to effect a transfer. It must 'transfer' (our emphasis)."

9. We think that it is obvious and indisputable that the last observation we have extracted, will have to be read in conjunction with the earlier passage, which we have also set forth, and the facts of the case. It would be an erroneous principle of interpreting the judgment, to press into service the last few observations alone, divorced from the earlier dicta and the explicit fact that the learned Judges were dealing with a document, which could not be a 'mortgage deed' at all, because it was not attested by two witnesses, as the law requires. Clearly, what the learned Judge meant was that, where the document contained recitals of disposition creating a transfer of rights, by the very force of the recitals, between the parties, and it has been completely executed the requirements of the law being satisfied in that respect it must be interpreted as actually transferring the rights, and hence as amounting either to a conveyance or a mortgage deed, as the case may be. But, where this execution is incomplete, even if the recitals purport to transfer rights, the document cannot come under the category of a 'mortgage deed', as defined in law. The learned Judge explicitly observed 'Leaving aside the question of registration of an insufficiently stamped document' in the earlier passage. We may point out that though registration is necessary under the law, to give legal effect to the document, it is not ~~merely~~ a power of the executant to register the document, the party to whom the interest is conveyed can also have it compulsorily registered. Obviously, the category under which an instrument falls cannot be affected by the mere absence of registration, if the document is otherwise fully dispositive in character and duly executed.

The case in 1953-1 Mad LJ 620=(AIR 1953 Mad 764) (FB) did not go beyond this, for the learned Judges of the Full Bench had before them an actual document which was not 'duly executed' at all. A different interpretation of this judgment would really render the provisions of the Stamp Act nugatory, envisaging as they do the charging of an instrument under the relevant Article of Sch. I, depending solely on the terms of the creation of rights and due and complete execution, since the document is necessarily executed prior to its registration. An interesting decision on this aspect is (Firm) Shamdin v. Collector, Amritsar, AIR 1936 Lah 449 (SB). During the course of the judgment of the

Special Bench, the learned Judges observed, with reference to the definition in Sec. 2(12) at p. 451—

".....the intention of the new clause was to make it clear at that time a document becomes executed so as to be chargeable with stamp duty under S. 3 of the Act... For the purpose of the Stamp Act, the clause makes all documents which are chargeable with duty, when executed, chargeable as soon as they are signed by the executant".

With respect, we may point out that the words "by the executant" occurring in this passage, are a distinct addition to the definition in Section 2 (12) and, hence, not warranted. If 'executed' means 'signed', and "execution" means "signature", it is clear that this will include the signatures of all persons, who are required by the character of the document to sign in the document, in order to give that document effect according to law. We have no doubt, therefore, that if a document is of such a character that both parties to the document should sign it, to constitute it a binding agreement between them, it should contain the signatures of both; similarly, if it had to be signed by two other attestors in order to make it legal, this will also be necessarily part of the definition. But, once a document is complete in execution in sense, and the effective words of disposition are there, immediately transferring rights by the very virtue of the document, the question of its subsequent registration is a distinct matter altogether, and the document is certainly liable to stamp duty with reference to the relevant Article of the Stamp Act, since execution is complete.

10. We have next to see whether in this particular case, the Tamil text of the alleged receipt (which has been placed before us) does or does not justify the interpretation of the document as a complete conveyance, as defined in the Stamp Act. We think it is sufficient to observe that very explicit words are to be found in the Tamil text, to the effect that for the consideration of Rs. 17000, absolute title was being conveyed in the properties to the vendee. There can be no doubt whatever, therefore, that this is not a receipt, but a conveyance, and the due and complete execution of the document is undeniable.

11. Learned counsel for the respondent (Sri Gopalaswami Aiyangar) has drawn our attention to certain observations of Hawkins, J. and Lord Esher M. R. in *Commrs. of Inland Revenue v. Angus and Co., the Same v. Lewies and Sons*, (1889) 23 Q.B.D. 579. That was a very different case of a document which was really an agreement to convey, which the Court of Equity would have enforced by a decree for specific performance, in

the event of the vendor not fulfilling his contract. Such a document, the courts held, did not fall within the definition of 'conveyance on sale' in Sec. 70 of the Stamp Act, 1870. We are of the view that there is nothing in the dicta in this decision, which can possibly reinforce the interpretation that the document, with which we are now concerned, is not, by its terms, effective as an actual conveyance. As we have stressed, due execution is undisputed. As Lord Esher M. R. said if the document is not effective as a conveyance, but it requires a subsequent decree for specific performance "it would be a contradiction of terms" to say, that by itself it constituted a conveyance. We are quite unable to see how this decision helps the respondent.

12. This reference has to be accordingly answered in the form that the document is liable for stamp duty under Art. 23 of Sch. I and that the dicta in 1953-1 Mad LJ 620=(AIR 1953 Mad 764) (F B) will have to be interpreted as of restricted scope and with reference to the facts of that case, as we have earlier pointed out.

13. R. C. 12 and 17 of 1965: These references can be very briefly disposed of. Admittedly, on the same interpretation, these documents cannot be possibly held to fall within the category of mortgage deeds under Art. 40 (b) of Sch. I. In each of these two cases, it is indisputable, that the document was not attested, as required by law, quite apart from the question of registration. Therefore, within the scope of the relevant definition, these were not 'executed' documents at all. They do not fall within the category, because they are not complete documents purporting to transfer rights of the kind contemplated. In these two cases, the References must be declined. BDB/D.V.C. References answered.

AIR 1969 MADRAS 5 (V 56 C 2)

RAMAPRASADA RAO, J.

V. Rajagopal Naidu, Petitioner v. Smt. Muthulakshmi Ammal and others, Respondents.

Civil Revn. Petn. No. 2577 of 1965, D/-20-10-1967 from order of Sub-J., Dindigul in CMA No. 23 of 1964.

(A) Civil P. C. (1908), O. 21, R. 66 (2) (e) (as amended in Madras) — Requirement mandatory — Sale proclamation not disclosing two valuations i. e. both of decree-holder and that of judgment-debtor — Proclamation suffers from irregularity not curable by acquiescence.

The inclusion of the judgment-debtor's valuation in the proclamation is a manda-

tory requirement. If a sale proclamation does not contain this mandatory and a statutory requirement, the mere fact that constructive notice of sale and notice under O. 21, R. 66, C. P. C. is imputed to the judgment-debtor by an a priori consideration of the facts, would not prevent it from being a sale held on a proclamation which was not drawn up in accordance with law. O. 21, R. 66(2) (e), which is a particular and peculiar amendment introduced in Madras State, has to be strictly enforced and if as a fact there is any defect in the sale proclamation in that it does not disclose the two valuations, that is, both of the decree-holder and that of the judgment-debtor, which are obligatorily to be described then the proclamation suffers from an irregularity which cannot be cured even by acquiescence: AIR 1964 Mad 424 & AIR 1965 Mad 198, Rel. on. (Paras 4, 7)

(B) Civil P. C. (1908), O. 21, Rr. 66 (as amended in Madras) and 69 — Judgment-debtor not personally served with notice of sale proclamation nor given opportunity to substantiate inadequacy of value — Value given by decree-holder misleading — Held, considerable prejudice was caused to judgment-debtor and sale was to be set aside: 25 Ind App. 146 (PC), Rel. on. (Paras 5, 11)

(C) Civil P. C. (1908), S. 115, O. 21, R. 66 — Finding of fact — Finding as to service of notice to judgment-debtor — Finding is binding in revision. (Para 7)

(D) Civil P. C. (1908), O. 21, R. 66 (as amended in Madras) — Service of notice to judgment-debtor in suspicious circumstances and not beyond reasonable doubt — Judgment-debtor cannot be presumed to have, at particular point of time, all information about defective proclamation of sale. (Para 7)

(E) Civil P. C. (1908), O. 21, R. 66 (as amended in Madras) — Duty of Court — It is to send out completed sale proclamation containing details as required in law and also to avail itself of all information from records in court. (Para 8)

(F) Evidence Act (1872), S. 115 — Civil P. C. (1908), O. 21 Rr. 66 (as amended in Madras) and 69 — Waiver of irregularities in sale proclamation — Judgment-debtor having no knowledge of irregularity in sale proclamation applying for adjournment of sale — Only deliberate intention on his part to waive his right to object to irregularity in proclamation could constitute waiver, as estoppel must be certain to every intent and not to be taken by argument or inference: AIR 1945 PC 67 & AIR 1938 PC 230, Rel. on. ILR 1967 Mad 140 & AIR 1935 Mad 150, Ref. (Paras 9, 10)

Cases	Referred:	Chronological	Paras
(1967) ILR 1967 Mad 140=(1966) 1 Mad LJ 441, Vaidyalinga Pillai v. Chidambara Pillai			9
(1965) AIR 1965 Mad 198 (V 52)=77 Mad LW 676, Nagendra Iyer v. Varadaraja Pillai			5
(1964) AIR 1964 Mad 424 (V 51)=77 Mad LW 169, Ramalingam Pillai v. Sankara Iyer			4
(1956) AIR 1956 Mad 231 (V 43)=1956 1 Mad LJ 47, Karunakaran Nair v. Chathu			4
(1945) AIR 1945 PC 67 (V 32)=ILR (1945) Mad 601, Marudanayagam Pillai v. Manickavasakam Chettiar			7, 9
(1938) AIR 1938 PC 230 (V 25)=1939 1 Mad LJ 147, Shyam Sunder Singh v. Kaluram Agarwala			9
(1935) AIR 1935 Mad 150 (V 22)=68 Mad LJ 48, Pottareddi v. Karuppa Goundan			9
(1898) 25 Ind App 146=ILR 20 All 412 (PC), Sadatmand Khan v. Mst. Phul Kuar			5
(1888) ILR 12 Mad 19=15 Ind App 171 (PC), Arunachelam v. Arunachellam			9
(1876) 3 Ind App 230 (PC), Girdhari Singh v. Hurdeo Narain Singh			9

JUDGMENT: The judgment-debtor-petitioner, aggrieved by the orders of the lower court who refused to set aside a sale of the property in execution of a money decree, canvasses the legality of the same, as petitioner in this court. The petitioner's case is that the property has been valued by him even at the stage when it was attached before judgment at Rs. 6500. After the suit ended in a compromise decree, the attachment having been raised, that first respondent-decree-holder reattached the property in execution. The property consists of two items (1) garden land of an extent of 74 cents and (2) cultivable land of an extent of 58 cents with a well in it. In E. P. 632 of 1962, the property was valued by the village munsif itemwar at Rs. 800 and Rs. 1000 each. Incidentally the second item of the property was subject to an encumbrance in favour of the Co-operative Society from whom the judgment-debtor secured a loan to widen the well. After the property was attached in execution, the petitioner's case is that no notice was validly served on him under O. 21 R. 66 C. P. C. when the sale was directed. Even in the proclamation of sale Ex. C. 2 only the decree-holder's valuation and the court's valuation have been mentioned and his valuation and the encumbrance were not included therein. It appears after knowing the sale date, he sought for an adjournment of the sale and was asked to deposit some money towards the decree. The sale was final-

1969

ly held on 3-4-1963 and was knocked out in favour of the husband of the decree-holder for Rs. 501 in respect of the first item and for Rs. 1001 in respect of the second item. The petitioner contends that as (1) there was no notice under O. 21 R. 66 C. P. C., (2) there was no proper tom tom of such sale, (3) there was no insertion in Ex. C. 2 of his valuation and (4) the property was knocked down for a ridiculously low price, the sale suffers from material irregularities and the petitioner is adversely affected by such a sale.

2. As regards the first objection that no notice under O. 21 R. 66 C. P. C. was served on the petitioner, it has to be noted that the service in the instant case was effected by affixture consequent upon the refusal by the judgment-debtor. Both the courts below found, as a matter of fact, that such service was sufficient service. It must however be noted that due to the alleged refusal and consequential affixture, the courts below imputed the judgment-debtor with constructive notice under O. 21 R. 66 and this conclusion was arrived at on a detailed examination of the oral evidence in the case. The main contention of the petitioner is that the attesting witnesses are not those ordinarily residing in the village in which the property is situate. Though at first sight this argument appears to be well with force, but in revision the matter cannot be successfully canvassed by the petitioner, because the factum of service is clearly a fact found concurrently by the courts below. The conspicuous event in this case is that if the judgment-debtor did not have such effective notice of sale it was well within his rights to apply for setting aside the ex parte order which accepted such service as good service. The judgment-debtor, however, did not file any such application to set aside the ex parte order. As regards the other contention that no proper tom tom can be said to have been effected by the decree-holder at or near the place of auction, it does not appear to me that the reasons given by the petitioner in this Court are in any way convincing to disturb the concurrent findings of fact of both the courts below.

3. But the contention of the judgment-debtor that the sale proclamation was defective in that the valuation of the judgment-debtor was not incorporated therein and such an inchoate and irregular sale proclamation cannot be the foundation of a legal and valid court or public sale, has considerable force. The trial court does not appear to have adverted to this material circumstance. The lower appellate court, however, held that there is nothing on record to show that the judgment-debtor gave any value for being mentioned in the sale proclamation and

therefore it held that the sale is not vitiated and not liable to be set aside. I shall presently advert to the other main contention of the petitioner that by reason of the irregular proclamation resulting in an illegal sale, he has been considerably prejudiced in that the real market value of the property was not incorporated in the document which has to be circulated to the public to enable them to come and bid at the sale. What is the impact of O. 21, Rule 66 (2) (e) over a sale proclamation which is admittedly defective, in that there is a lacuna therein which relates to the absence of valuation of the judgment-debtor?

4. Before the above question is answered directly, it would be necessary to find out as to what is the purpose and intentment of the Civil Procedure Code in prescribing certain requirements which have to be found and publicly exhibited in a sale proclamation before any public sale is attempted. This aspect was considered in a different light by Veeraswami J. in *Ramalingam Pillai v. Sankara Iyer*, 77 Mad LW 169=(AIR 1964 Mad 424). That was a case which arose under circumstances wherein the complaint was that the notice under O. XXI, Rule 66 C. P. C. was not served. There the learned Judge, agreeing with Panchapakesa Aiyar J. in *Karunakaran Nair v. Chathu*, 1956-1 Mad LJ 47=(AIR 1956 Mad 231) held that if a proclamation is drawn up on inchoate and illegal material, and in any event on the basis of information which was either incorrect or untrue, then the resultant sale would be a nullity and it will not be a case of mere irregularity. No doubt, this was the ratio in the above case. But applying the same test to the particular facts of the case before me, it appears to me that if a sale proclamation does not contain a mandatory and a statutory requirement, the mere fact that constructive notice of sale and notice under Order XXI Rule 66 C. P. C. is imputed to the judgment-debtor by an a priori consideration of the facts, it would nevertheless be a sale held on a proclamation which was not drawn up in accordance with law. Learned counsel for the petitioner rightly contends that Order XXI Rule 66 (2) (e), which is a particular and peculiar amendment introduced in Madras State, has to be strictly enforced and if as a fact there is any defect in the sale proclamation in that it does not disclose the two valuations, that is, both of the decree-holder and that of the judgment-debtor, which are obligatorily to be described, then the proclamation suffers from an irregularity which cannot be cured even by acquiescence.

5. A Division Bench of this court in *Nagendra Iyer v. Varadaraja Pillai*, 77 Mad L. W. 676=(AIR 1965 Mad 198) was of the view that the court has to give, under

O. XXI rule 66 (2) (e) C. P. C. the value of the property as, stated by the decree-holder and the judgment-debtor, and added:

"Where this rule is not complied with and the upset price given in the proclamation is the one given by the decree-holder which on the evidence is found to be grossly inadequate, and it reveals a clear intention on the part of the decree-holder to conceal from the intending bidders the true value of the property and thereby, dissuade a good many of them from taking part in the sale, in such circumstances the sale is clearly vitiated and liable to be set aside".

In this case the judgment-debtor originally valued the property at Rs. 6000. When he attempted to substantiate before the lower appellate court that the value as stated by the decree-holder is inadequate and considerably low, he was not allowed to do so. His application for reception of additional evidence was summarily rejected by the lower appellate court. The lower appellate court, while refusing to receive additional evidence, observed:

"Further, even if the documents are received, they are not sufficient to rebut the evidence already on record".

This appears to me to be a conclusion without any consideration. The value as evaluated by the judgment-debtor at the time of the attachment before judgment proceeding was nearly six times the value as stated by the decree-holder. Thus, the value put in the proclamation is ridiculously low. At any rate, an opportunity was given to the judgment-debtor to establish that the decree-holder's valuation was designedly low. The insistence of the decree-holder to hold on to such a value which is obviously self-serving and to his ultimate advantage, savours of lack of bona fides. Honesty is a duty of universal obligation. The fact that the value of both the items of property is depicted as low, might prejudice the minds of buyers about the quality of the land. In the words of the Privy Council in *Sadatmand Khan v. Phul Kuar*, 25 Ind App 146 (PC):

"It is a mis-statement of the value of the property which is so glaring in amount that it can hardly have been made in good faith, and which, however, it came to be made, was calculated to mislead possible bidders and to prevent them from offering adequate prices or from bidding at all." Thus, therefore, the value as given by the decree-holder is misleading and has caused considerable prejudice to the judgment-debtor, and without hesitation we can conclude that the sale is thus vitiated.

6. Mr. K. Raman appearing for the decree-holder however contends that even though the sale proclamation did not include the price of the judgment-debtor

the sale is not vitiated for two reasons: (i) the judgment-debtor did not make any attempt to give his price at the appropriate time for the same to be mentioned in the proclamation of sale, (ii) there is a waiver of such an irregularity, even if it is one.

7. Regarding the first objection, the instant case is one in which the judgment-debtor was deemed to have been served. Therefore he had no real or effective opportunity to state the valuation of the property. The inclusion of the judgment-debtor's valuation in the proclamation is not a rule of mere procedure, but one of substance. This is a mandatory requirement. There is therefore no force in the first contention. The second contention which closely follows the first requires a serious consideration. This is mainly rested on the ground that the judgment-debtor applied for postponement of the sale after he came to know of it. In this case, notice under Order XXI rule 66 was affixed and the evidence is that the judgment-debtor refused. But the case of the judgment-debtor is that he was not present in the house on that day and the note made by the process server that he refused summons is incorrect and he even states that it is false. But sitting in revision I am constrained to accept the finding of fact that notice was served under O. XXI R. 66 on the judgment-debtor. But, in my view, the circumstances are suspicious and not beyond reasonable doubt.

It cannot with certainty be presumed that the affixture which was made by the process server in the instant case, which was attested by non-residents of the village, could have been done, or even if it was done, whether the version given by the decree-holder through his witnesses can be true. Suffice it, however, to say without further probing into the details of the evidence regarding such service, that though it has been held that the judgment-debtor should be deemed to have had notice or constructive notice of such service, yet, for all just and equitable purposes, it cannot be presumed that the judgment-debtor, at that point of time, had all the information about the defective proclamation of sale which propelled the public sale. In the words of the Privy Council in *Marudanayagam Pillai v. Manickavasakam Chettiar*, ILR 1945 Mad 601 at p. 607=(AIR 1945 PC 67 at p. 70).

"The efficacy of a plea of waiver by the appellant depends on the ability of the respondent to prove that the appellant knew the true facts from which an intention on his part to waive his right to object to a mis-statement in the proclamation can be inferred". No such proof has been let in this case by the respondents.

8. There is also a duty cast on the court to send out a completed sale proclamation containing details as required in law. It has also the duty to avail itself of all information from the records in court. In the attachment before judgment proceedings, the judgment-debtor has valued the property at Rs. 7000. This material was thus available. But the court has not adverted to such material information on its records and failed to discharge one of its statutory duties and thus failed to exercise its jurisdiction vested in it by law.

9. Learned counsel for the respondents strenuously stressed the plea of waiver by the judgment debtor to contend that the sale cannot be set aside. As already stated, the application for postponement of sale is pressed into service in support of this contention. No doubt certain observations of the Privy Council in *Girdhari Singh v. Hurdeo Narain Singh*, (1876) 3 Ind App 230(PC) and in *Arunachalam v. Arunachalam*, (1888) ILR 12 Mad 19 (PC) were relied upon. Mr. K. Mohan appearing for the petitioner equally relied upon two other Privy Council decisions reported in *Raja Shyam Sunder Singh v. Kaluram Agarwala*, 1939-1 Mad LJ 147=(AIR 1938 PC 230) and ILR 1945 Mad 601=(AIR 1945 PC 67). I have already adverted to the decision reported in ILR 1945 Mad 601=(AIR 1945 PC 67). In this case the two other decisions cited by the learned counsel for the respondents are referred to but yet the learned Law Lords laid down in no uncertain terms the rule that waiver can only be sustained, if the party against whom it is projected did have full knowledge of all the material facts put against him. This is not so in this case as the judgment debtor was not personally served with the notice under O. XXI rule 66. There is no clinching evidence to show that the petitioner knew the true facts, to wit the absence of his valuation in the proclamation, from which a deliberate intention on his part to waive his right to object to a mis-statement in the proclamation can be fairly, legitimately and properly inferred. It is only such a state of affairs that could constitute waiver, as estoppel must be certain to every intent and not to be taken by argument or inference. To the same effect are the observations of the Privy Council in 1939-1 Mad LJ 147 = (AIR 1938 PC 230):

"There is a distinction in law between waiver and admission; in the case of waiver a person is not to be held to have waived a right of which he was reasonably ignorant, but in the case of a representation or admission which is acted, on the party making it cannot plead ignorance unless it is induced by the other party,

for, if he does not choose to enquire beforehand, he takes the risk of error".

The case cited by Mr. K. Raman, *Vaidyalinga Pillai v. Chidambara Pillai*, ILR 1967 Mad 140 has no application to the facts of this case. There the judgment debtor stood by and allowed the sale to go on and *Kailasam, J.*, held that he cannot be heard to set up a plea of misdescription in the sale proclamation. The other case cited by the learned counsel for the respondents, *Pottareddi v. Karuppa Goundan*, AIR 1935 Mad 150 is yet again one in which the judgment-debtor in spite of notice took no part in the setting of the proclamation and thereafter applied for adjournment of the sale. In those circumstances, *Walsh, J.* held that he is estopped from filing an application for setting aside such a sale.

10. In such instant case, the notice was not directly served. The court did not perform its duty to avail itself of the available material on record to complete the proclamation in all respects. The judgment debtor cannot be said to have had all information regarding the defective sale proclamation when he applied for adjournment. The application for adjournment is obviously made in an emergency to avert a sale and highly involuntary rather than a free act in exercise of one's volition being conscious of all the defects with which the proclamation was suffering.

11. I am satisfied that in this case the petitioner is not estopped from raising the plea that the proclamation is defective and thus there was a serious irregularity, which goes to the root of the court sale. I have already found that the conduct of the decree holder coupled with the fact that the judgment debtor was not given a fair opportunity to prove the market value raises a considerable doubt whether the price paid is adequate.

In fact, by reason of the law and inadequate price the judgment debtor has been damnified considerably. This is a fit case in which the sale has to be set aside and accordingly it is set aside. The order of the lower court is consequently set aside and this civil revision petition is allowed. There will be no order as to costs.

M.B.R./D.V.C.

Petition allowed.

AIR 1969 MADRAS 10 (V 56 C 3)

FULL BENCH

**M. ANANTANARAYANAN, C. J.,
VEERASWAMI, RAMAKRISHNAN,
NATESAN AND ISMAIL, JJ.**

C. Subramaniam, Petitioner v. Speaker of the Madras, Legislative Assembly, Madras and others, Respondents.

Writ Petn. No. 897 of 1968, D/- 14-3-1968.

(A) Constitution of India, Arts. 194(3), 19, 13, 20 and 21 — Powers, privileges and immunity of Legislature, law relating to — Such law will be subject to Arts. 13 and 21 but not 19 — Only a final order imposing a disability on the subject is justiciable.

Any law that the State Legislature may enact under Art. 194(3), with regard to its powers, privileges and immunities, will be subject to Art. 13, and the Fundamental Rights guaranteed under the Constitution. The Corpus of law which has to prevail, until such an enactment is made, will not be subject to Art. 19(1) (a), because, under the rule of harmonious construction, the particular provision in Art. 194(3) will have to prevail. But equally, this Corpus of law will be subject to the right guaranteed under Article 21. A final order imposing a disability on a subject for the alleged breach of privilege or contempt of the legislature will however be justiciable. But a mere notice asking the petitioner to show cause as to why he should not be held to have committed the breach of the Legislature is a pre-mature stage to judge upon the alleged contempt and as such no writ of prohibition can issue on such a notice. AIR 1965 SC 745, Rel. on; AIR 1961 SC 613 & AIR 1959 SC 395, Ref.

(Paras 8, 9 & 14)

(B) Constitution of India, Art. 194(3) — Powers, privileges and immunities of Legislature — Absence of any law made by such legislature does not result in such privileges having lapsed by reason of inaction of Legislature. (Para 11)

(C) Constitution of India, Art. 194(3) — Powers, privileges and immunities of legislature — Form of law — The corpus is the law of Constitution itself. (Para 12)

Cases Referred: Chronological Paras

(1966) AIR 1966 Mad 8 (V 53)=ILR

(1965) 2 Mad 461, T. M. Transports (Pvt.) Ltd. v. Regional Transport Authority

(1965) AIR 1965 SC 745 (V 52)=

(1965) 1 SCR 413, In re, Article 143, of the Constitution of India

3, 4, 5, 6, 11, 12

(1961) AIR 1961 SC 613 (V 48)=

(1962) 1 SCJ 411, Dr. Jatish Chandra Ghosh v. Hari Sadhan Mukherjee

(1959) AIR 1959 SC 395 (V 46)=

1959 SCJ 925, M. S. M. Sharma v. Krishna Sinha

(1866) 1 PC 328=4 Moo PC (N.S.)

203, Doyle v. Falconer

(1858) 11 Moo PC 347=14 ER 727,

Fenton v. V. Hampton

92 C.W.L.R. 157, Queen v. Richards

V. K. Thiruvengkatachari for T. Martin, for Petitioner; M. K. Nambiar and K. K. Venugopal, Amicus Curiae appointed by Court.

ANANTANARAYANAN, C. J.:— This is a proceeding under Art. 226 of the Constitution, for the issue of a writ of Prohibition restraining the Speaker of the Madras Legislative Assembly (respondent 1) and the State of Madras (respondent 2) from proceeding further with the notice forming Annexure A to the petition, asking the petitioner (Mr. C. Subramaniam) to show cause why he should not be held to have committed contempt of the Legislative Assembly. The Union of India, the Attorney General of India and the Advocate General of Madras have been shown in the array of parties as the third, fourth and fifth respondents to the petition.

2. Annexure C to the petition is an excerpt from a leading daily of Madras dated 11-2-1968, describing a speech made by the petitioner at Dindigul, under the caption "Political Fraud". The report states that Mr. C. Subramaniam (petitioner) referred to the recent Language Bill (more strictly, Language Resolution) adopted by the State Assembly, as the 'biggest political fraud'. In respect of this matter, Annexure B shows that the Legislature adopted a motion to the effect that this was a question of privilege to be dealt with by the House itself and this motion further authorised the Speaker to issue a notice to Mr. Subramaniam, asking him to show cause why he should not be held to have committed contempt of the House, in respect of the passage in his speech, already set forth. Annexure A is the actual notice to show cause received by the petitioner, after the Speaker had held that there was a prima facie case of breach of privilege.

3. The single line of reasoning upon which this petition has been argued before us by Mr. V. K. T. Chari for the writ petitioner, proceeds on two related aspects of the law, which are set forth in the sub-paragraphs of paragraph 6 of the affidavit. Before embarking on a scrutiny of this, which is the heart of the matter, we may refer to certain ear-

lier averments in the affidavit. We might immediately state that the accuracy of the report of the speech, is not now in controversy; arguments were submitted, upon the basis of the report being accurate. But the petitioner states that he has been a Member of the Legislative Assembly of Madras, a Member of the Parliament, a Minister of the Madras Government and the Leader of the House in the Madras Assembly, and also a Minister of the Union Government. He is currently holding the political office of the President, Tamilnad Congress Committee. He has a duty towards the public, particularly in the field of political matters, which he must discharge fearlessly, and by virtue of rights inherent in British subjects from the days of the Magna Carta, and re-affirmed by the Constitution of India, particularly in the Preamble and in Art. 19 thereof. After noting these averments, we may first proceed to set forth the reasoning of Mr. Chari, upon the petition. Mr. Chari fully concedes that, whatever might have been the somewhat hazy or indeterminate state of rights as between the subject and the Legislature, and between the Legislature and the Judiciary, which hitherto prevailed, matters are now clear beyond controversy, by virtue of the dicta of the Supreme Court in three important cases, namely, Sharma's case, 1959 SCJ 925=(AIR 1959 SC 395), Dr. Jatish Chandra's case, 1962-1 SCJ 411=AIR 1961 SC 613) and In re Art. 143, Constitution of India, AIR 1965 SC 745.

4. At the outset, Mr. Chari stressed the Preamble to the Constitution, particularly the second clause thereof, which enshrines the solemn resolve to secure to all citizens of this country "liberty of thought, expression, belief, faith and worship". He would link this with the Fundamental Right to freedom of speech and expression guaranteed under Article 19 (1) (a), but subject to reasonable restrictions under Article 19 (2). Again, he contends that though the privileges of the State Legislature are guaranteed under Art. 194(3), in view of the failure of the State Legislature to enact the necessary law within a reasonable time, as contemplated by the first limb of Art. 194(3), these privileges must now be regarded as subject to the Fundamental Rights of citizens. This Article states—

".....the powers, privileges and immunities of a House of the Legislature of a State.....shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution".

The line of reasoning that emerges from the further arguments of learned counsel is this. Entry 39 of list II of the Seventh Schedule relates to "powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof....." This has to be read along with Art. 246, which embodies the principles of competency of legislation, respectively by Parliament and by the State Legislatures. The Constitution was completed in formulation by the Constituent Assembly on 26-11-1949, and came into effect and force on 26-1-1950. The old Constituent Assembly continued as a single provisional Parliament, till the respective elections were held. Clearly therefore, Art. 194(3) was transitional or transitory in character. It was never contemplated that this state of affairs in respect of the powers, privileges and immunities of the State Legislature should continue for any indefinite term; enacted laws were expected to be made, in this respect, as early as convenient.

But one indisputable effect of Sharma's case 1959 SCJ 925=(AIR 1959 SC 395) & in AIR 1965 SC 745, affirming the same proposition, is that any such law hereafter to be made by the Parliament or a State Legislature, would be subject to the Constitutional limitations of Art. 13, and the Fundamental Rights guaranteed under the Constitution. The State Legislature was fully aware of this, as petitions had been presented even in Parliament, and the decision of the Supreme Court in AIR 1965 SC 745, was the subject of discussion. Nevertheless, for many years, no law embodying such rights, privileges and immunities has been made, and this is deliberate inaction; the consequence of it must be that what is guaranteed under the second limb of Art. 194(3) to the Legislature, is no longer available, and must be held to have lapsed by default.

5. Linked with this is an argument, upon what may be termed the 'juristic norms' which have to be applied to any law, the infringement of which may expose a subject to penalties, or to any disability. Any Law is a rule, and, further, necessarily a rule of prohibition or injunction; it follows that such a rule must be definite and ascertainable, before the subject can be exposed to untoward consequences, for infringement of the law. The Law of British Parliamentary Privileges is "wilderness of single instances". This is a vague and amorphous jurisprudence. Further, it involves a study of what these privileges were as on 26-1-1950, and several of them might have lapsed owing to desuetude. This law is hardly ascertainable, for the sources of the law, namely, Hansard, running into hundreds of volumes, and

Erskine Moy's Parliamentary Practice are not even available, without much difficulty, to a lawyer, leave alone a citizen.

This entire argument is, in its turn, made to impinge on Art. 20(1) and Art. 21 of the Constitution, since AIR 1965 SC 745, is authority for the view that, though the body of privileges made part of the law under Art. 194(3) may prevail, so long as this law is enforced, over Article 19(1)(a), it does not prevail over Article 21. It is here stressed that such a proceeding, asking the petitioner to show cause against a conviction for contempt of the Legislature, is essentially in criminal jurisdiction. Mr. Chari points out, upon authority, that the House of Commons in the United Kingdom, unlike the House of Lords, does not impose a fine or imprisonment for limited periods, but directs an indefinite detention in custody, of the person in contempt. This infringes Art. 21 and Art. 20(1), the combined effect of which Articles is to declare that no person can be proceeded against with regard to any offence, except for the violation of a law in force, and "according to procedure established by law".

6. Before dealing with these arguments, it may be necessary to set forth certain postulates or propositions which are very clear and now well established, in the light of the decisions of the Supreme Court, already referred to. Since, for this purpose, we have already largely to draw upon the observations in AIR 1965 SC 745, and many paragraphs of this judgment in the text AIR 1965 SC 745 have been read before us, we shall set forth the bare propositions, in the interests of brevity, confining ourselves to citing only one or two observations of the learned Chief Justice (Gajendragadkar, C. J.)

7. Firstly, the perspective of approach to any question of this kind has been determined, in constitutional terms, in paragraph 43. To quote:

"In this connection it is necessary to remember that the status, dignity and importance of these two respective institutions, the Legislatures and the Judiciary, are derived primarily from the status, dignity and importance of the respective causes that are assigned to their charge by the Constitution. These two august bodies.....must function not in antimony nor in a spirit of hostility, but rationally, harmoniously and in a spirit of understanding within their respective spheres....."

8. Next, it may be taken as now settled beyond doubt that any Law that the State Legislature may enact under Art. 194(3), with regard to its powers, privileges and immunities, will be subject to Art. 13, and the Fundamental Rights guaranteed under the Constitution. Third-

ly, it may be taken as the Constitutional Law, however, that the Corpus of law which has to prevail, until such an enactment is made, will not be subject to Art. 19(1)(a), because, under the rule of harmonious construction, the particular provision in Art. 194(3) will have to prevail. But, equally, this Corpus of law will be subject to the right guaranteed under Art. 21. We may take it that the content of Art. 21, may have to be interpreted also in the light of the terminology of Art. 20(1) of the Constitution.

9. Fourthly, while the foregoing postulates may be true of the respective spheres of action of the Legislature in respect of its powers and immunities, and the Judiciary, it does not mean that a final order imposing a disability on a subject, for alleged breach of privilege or contempt of the Legislature, will not be justiciable. It has to be carefully noted that, in paragraph 129 (page 787), their Lordships have referred to the amplitude of the unrestricted power of the High Court under Art. 226, and, in another context, they have not approbated the dicta of Dixon C. J., in the *Queen v. Richards*, 92 C.W.L.R. 157 at p. 167, that, if the warrant issued by the Legislature does not specify the grounds of commitment, it is conclusive.

This matter need not be further referred to for the simple reason that, notwithstanding what Mr. Chari strenuously urged on this aspect, we are not here concerned with any warrant, or anything analogous to a committal proceeding. We are concerned, purely and simply, with a notice to the writ petitioner to show cause why he should not be held to have committed a breach of privilege of the Legislature, by way of contempt of the Legislature. Further, it is clearly premature, and even impossible, to judge now, upon the matter of the alleged contempt itself, we may add that the affidavit itself contains no averment with regard to this. What we are asked to do is to issue a writ of prohibition restraining the Speaker of the Legislative Assembly from proceeding further, which is virtually on a ground of absence of an ab initio jurisdiction.

10. Mr. Chari has referred to a passage in Halsbury's Laws of England, Simonds Edn. Volume 5, page 478, (Sec 1058), with regard to the extent of power of the privilege of Legislatures, as applying to the Commonwealth. It is claimed that these privileges do not include any power "to punish by arrest and commitment". The authorities cited are *Fenton v. Hampton*, (1858) 11 Mo PC 347 and *Doyle v. Falconer*, (1866) 1 PC 328. But, obviously, we are not further concerned with this aspect, for we are here upon the effect of Art. 194(3) of our Constitution, and the body of rights,

privileges and immunities which it thereby secures to the State Legislature. The same observations may apply to the dicta cited from Moore on the Australian Constitution 2nd Edn. page 138-A.

11. It is very difficult to see how any theory of automatic lapse, or lapse due to inaction, can apply to Art. 194(3), in its relation to the State Legislature. It is of considerable interest to note, and this is discussed in AIR 1965 SC 745, itself, that Sec. 49 of Australian Constitution was in almost identical terms, except, that the operative word was 'declare'. But, as Mr. Nambiar, assisting us as *amicus curiae*, has emphasised, though this was over sixty years ago, enactments have not superseded the state of rights secured for the Legislature by Sec. 49 in Australia, except in two minor respects; apparently, the Legislature was content with the body of rights, privileges and immunities thus secured, without seeking any enlargement or modification. We may take notice of the fact that certain petitions have been submitted to Parliament and to the State Legislature, stressing the need for early enactment, in the interest of the Rule of law, as Mr. Chari has described; but it is impossible to arrive at any conclusion that the inaction is deliberate; far more so, to sustain any theory that such inaction has the effect of a lapse or extinction. Per contra, Mr. Nambiar points out that where the Constitution intends setting a term to any situation of rights, it explicitly says so, and Arts. 334, 337 and 343 are very clear instances.

12. The argument that these powers, privileges and immunities thus secured for the Legislature, do not form a law at all, in the juristic sense, is equally unsubstantial. Actually, this Corpus is part of the Law of the Constitution itself. Nor can it be contended that this law is amorphous and unascertainable, though it may be true that certain sources of the law, comprising precedents are not easily available. Mr. Nambiar has set forth before us certain interesting passages in "Constitutional and Administrative Law" by Hood Phillips (3rd Edn.) pages 186 and 187. It is very clear from these paragraphs, that defamatory or disrespectful speeches, outside the House of Commons, by third parties, reflecting on the House, or tending to bring the House into contempt or ridicule, could be properly regarded as contempt of the Legislature. There are even precedents, such as Allighan's case 1947 HC Pap 138; but we need not explore any further into this aspect here, for obvious reasons.

The argument that this is essentially a criminal jurisdiction, because, as observed in AIR 1965 SC 745, the practice of the House of Commons has been, not to impose fine for contempt, while it may

detain indefinitely, is clearly quite inapplicable to the present stage of the proceedings. This is a stage of assumption of jurisdiction, and nothing more. Actually, if we are to judge from the passage at page 189 of Hood Phillips (earlier cited), Reprimand and Admonition are also included in forms of punishment, which are open to the House of Commons. It is impossible to accept the argument that we have, at the present stage, any procedure whatever, which impinges on Art. 20(1) or Art. 21 of the Constitution of India.

13. Finally, a word may be stated about the character of a writ of prohibition, even though this court is not confined to the precise scope of the Prerogative Writs in the United Kingdom, and Art. 226 embodies a wider amplitude of power. The history of this writ, and the true scope of its issue and function, were discussed by a Division Bench of this court in *T. M. Transports (Pvt.) Ltd. v. R. T. Authority*, AIR 1966 Mad 8. The following few lines from that decision are useful, as succinctly stating the situation at law (at page 12)—

"If, in each one of these cases, a party, who might be affected by such a possible decision, can be permitted to come up to this court and ask for prohibition to go, though it might be perfectly probable that the inferior Tribunal would have jurisdiction, upon facts being established in a particular way, this would really imply that many proceedings quite within the competence of such authorities, or which may be ultimately found to be comprised in the jurisdiction, may be stifled at the outset...If there is jurisdiction over the matter before the Tribunal *prima facie*, and facts canvassed before it, one way or another, may affect the issue as to the boundary of that jurisdiction, we think, that, the Tribunal should be permitted to function, and to determine its own jurisdiction the writ should not issue to paralyse such an enquiry".

14. For the above reasons, we are clearly of the view that Art. 194(3) invests the Speaker of the Legislature, empowered by a Resolution of the Legislature, with the right to call upon a third party, like the writ petitioner, to show cause why he should not be held to have committed a breach of the privilege of the Legislature, by way of contempt. That is all that has happened, and a writ of prohibition need not be issued by this court to stifle the very exercise of that jurisdiction. We need not emphasise, both as a matter of caution and as a necessary corollary, that we are stating nothing whatever about the averments themselves in the notice, or the degree to which such facts will or will not constitute a contempt of the Legislature.

These are matters which it is quite premature for us to refer to, at this stage. This writ petition will, therefore, be dismissed in limine.

15. We must record our obligation to Mr. M. K. Nambiar, appearing with Mr. K. K. Venugopal, who has rendered us valuable assistance as amicus curiae.

GGM/D.V.C. Petition dismissed.

AIR 1969 MADRAS 14 (V 56 C 4)

ALAGIRISWAMI, J.

Kulandaiswami Madurai and others, Appellants v. Murugayya Madurar and others, Respondents.

Second Appeal No. 4 of 1964, D/- 4-8-1967, from decree of Dist. J., West Tanjore, in A. S. No. 238 of 1962.

Civil P. C. (1908), Sec. 9 — Madras Estates Abolition Act (26 of 1948), S. 56 — Jurisdiction of civil court to decide question of title to any ryotwari land is not taken away by any of provisions of the Act and much less by Sec. 56.

It is obvious from a reading of S. 56(1) of the Madras Estates Abolition Act, 1948 that the power of the Settlement Officer to decide who the lawful ryot in respect of any holding is, is only for the purpose of the other two clauses, that is, for the purpose of realisation of the arrears of rent and not for the purpose of issuing a ryotwari patta. The power of the Settlement Officer under the Act is only for the purpose of giving effect to the provisions of the Act and except to that extent, the power of the civil court to deal with matters which are within its jurisdiction is in no way affected. The question of title to any particular property is not a matter which the Settlement Officer is competent to deal with. It is essentially a matter for the civil court to decide. The fact that the Settlement Officer has, for the limited purpose of issuing a Patta, to decide who the owner of a holding is, does not mean that his decision on that point is final and that the civil court cannot decide that question. (Paras 2, 3)

The jurisdiction of a civil court to decide the question of title to any ryotwari land in an estate notified and taken away by the Government under the Act has not, therefore, been taken away either expressly or by necessary implication by any of the provisions of the Act and much less by S. 56. AIR 1959 Mad 447, Ref.; S. A. No. 607 of 1963 (Mad), Rel. on. (Para 4)

Cases Referred: Chronological Paras
(1963) Second Appeal No. 607 of 1963 (Mad) 3
(1959) AIR 1959 Mad 447 (V 46)= 1959-1 Mad LJ 314, Adakalathammal v. Chinnayyan Panipundar 3

GL/IL/D22/68

G. Ramaswami and T. S. Sundaresa Iyer, for Appellants; T. R. Ramachandran and K. Chandramouli, for Respondents.

JUDGMENT: Defendants 1 to 5 are the appellants. Their only contention is that a Settlement Officer appointed under the Madras Estates Abolition Act (Act XXVI of 1948) having issued a patta in their favour the Civil Court has no jurisdiction to go into the question of title. The finding of the courts below that the plaintiff alone has title to this property is not questioned. The argument is purely a technical one based on Sec. 56 of the Madras Estates Abolition Act. The patta in favour of the defendants was granted on 21-2-1957 and Sec. 56 was repealed only thereafter. The argument of the appellants in short is that under Sec. 56 sub-sec. (1) clause (c) of Act XXVI of 1948, the Settlement Officer has to decide the dispute as to who the lawful ryot in respect of any holding is and that therefore the Settlement Officer in this case having decided that the defendants are the lawful ryots in respect of this particular holding, it is not open to a civil court to entertain any suit with regard to the question as to who is the lawful ryot in respect of any holding.

2. Under Act XXVI of 1948 as soon as an estate is notified all rights which any person might own in the estate come to an end and the persons are entitled only to such rights as are recognised or conferred on them by or under that Act. Under Sec. 11 every ryot in an estate is entitled to a ryotwari patta in respect of all ryoti lands which immediately before the notified date were properly included or ought to have been included in his holding. Thus section 11 itself confers the power on the settlement officer to decide who is entitled to a ryotwari patta. Therefore, there was no need for Sec. 56 to provide separately for the right of the Settlement Officer to decide the questions as to who is entitled to a patta in respect of any ryotwari land. Section 56 was intended not to confer a power on the Settlement Officer to decide as to who was entitled to a ryotwari patta in respect of any particular ryotwari land but merely for the other purpose which are mentioned in sub-sec. (1) of Sec. 56; which reads—

"(1) Where after an estate is notified, a dispute arises as to (a) whether any rent due from a ryot for any fasli year is in arrear or (b) what amount of rent is in arrear or (c) who the lawful ryot in respect of any holding is, the dispute shall be decided by the Settlement Officer".

It would be obvious from a reading of this section that the power of the Settlement Officer to decide who the lawful ryot in respect of any holding is, is only

for the purpose of the other two clauses. that is, for the purpose of realisation of the arrears of rent and not for the purpose of issuing a ryotwari patta. There is therefore no room for the argument based on sub-sec. (2) of Sec. 56 that as the Settlement Officer has decided this question and issued a patta to the defendants, the civil court has no jurisdiction to consider who has got title to the property.

3. It is well established that a civil court has normally jurisdiction in respect of every civil matter except such matters as are taken away from its jurisdiction either expressly or by necessary implication. Decisions of this court have held that the power of the Settlement Officer under Act XXVI of 1948 is only for the purpose of giving effect to the provisions of Act XXVI of 1948 and except to that extent, the power of the civil court to deal with matters which are within its jurisdiction is in no way affected. The question of title to any particular property is not a matter which the Settlement Officer is competent to deal with. It is essentially a matter for the civil court to decide. The fact that the Settlement Officer has, for the limited purpose of issuing a Patta, to decide who the owner of a holding is does not mean that his decision on that point is final and that the civil court cannot decide that question. In fact Sec. 56 was omitted from the statute only because it was found to be superfluous and giving rise to unnecessary difficulties. See *Fort St. George Gazette* part IV-A Extraordinary dated 25-9-1958 in which the Bill was published. I do not think that the decision relied on by the appellants in *Adakalathammal v. Chinnayan Panipundar*, 1959-1 Mad LJ 314=(AIR 1959 Mad 447), really helps the appellants, because in that case Sec. 56 had been repealed and therefore the other discussion is merely in the nature of obiter. In any case, the question has not been considered from the point of view from which I have now considered it. I may also mention that I have taken the same view in another case decided by me in S. A. No. 607 of 1963 (Mad).

4. In the result I hold that the jurisdiction of a civil court to decide the question of title to any ryotwari land in an estate notified and taken away by the Government under Act XXVI of 1948 has not been taken away either expressly or by necessary implication by any of the provisions of Act XXVI of 1948 and much less by Sec. 56. The second appeal is therefore dismissed with costs. No leave.

MBR/D.V.C.

Appeal dismissed.

AIR 1969 MADRAS 15 (V 56 C 5)

M. ANANTANARAYANAN, C. J.
AND NATESAN, J.

Loganathan, Minor and others, Appellants v. Ponnuswami Naicker and others, Respondents.

Letters Patent Appeal No. 3 of 1964, D/- 23-1-1967, from judgment and decree of Venkatadri, J., reported in AIR 1964 Mad 327.

(A) Contract Act (1872), Sec. 23 — Principle behind section — Public policy — Test — Dropping of prosecution must be at least part of consideration for promissory note.

Agreements for stiffling prosecution are well known classes of agreements which the Court refuses to interfere as falling under Sec. 23. The section is based on principle that no one shall trade on felony. If the accused person is innocent, the law is abused for the purpose of extortion, and if he is guilty in fact, the law is eluded by a corrupt compromise screening the criminal for a consideration.

For Sec. 23 to apply the dropping of a criminal prosecution must be at least a part of the consideration for the promissory note. The test is, did the dropping of the criminal prosecution form a part of the bargain for the agreement or giving up of the prosecution need not necessarily be the sole consideration. There may be an antecedent obligation. It is enough if while giving security for the antecedent obligation the dropping of the criminal prosecution is made a part of the bargain. AIR 1936 Mad 656 and AIR 1930 PC 100 and AIR 1941 PC 95 and AIR 1963 SC 107, Rel. on. (Para 3)

(B) Hindu Law — Father — Avyavaharika debt — Liability of son to repay his father's debt — Son not liable for Avyavaharika debt — Meaning of Avyavaharika debt — Liability to be examined as on date when incurred — Origin of debt legal — Subsequent dishonesty does not absolve the son.

Under the Hindu Law a son is under a pious obligation to discharge his father's debts out of his ancestral property, even if he had not been benefited by the debts, provided the debts are not "avyavaharika".

Colebrooke's translation of the expression "Avyavaharika" as meaning debts for a cause repugnant to good morals has been generally accepted as the nearest approach to the true conception of the term.

The sons get exonerated from their obligation to discharge the debt of their father from the family assets only if the

debt was one tainted with immorality or illegality. The duty that is cast upon the son being religious and moral, the liability of the son must be examined with reference to its character when the debt was first incurred. If at the origin there was nothing illegal or repugnant to good morals, the subsequent dishonesty of the father in not discharging his obligation will not absolve the son from his liability for the debt. AIR 1943 PC 142 and (1893) ILR 16 Mad 99 and (1908) ILR 31 Mad 472 and AIR 1963 Andh Pra 425 (FB), Rel. on. (Para 5)

Cases Referred: Chronological Paras

- (1963) AIR 1963 SC 107 (V 50)=
 (1963) 3 SCR 687, Narasimharaju v. Gurusurthi Raju 3, 4
 (1963) AIR 1963 Andh Pra 425 (V 50)=(1963) 1 Andh W. R. 308 (FB), Venkateswara Temple v. Radhakrishna 5
 (1943) AIR 1943 PC 142 (V 30)= 70 Ind App 171, Hemraj v. Khemchand 5
 (1941) AIR 1941 PC 95 (V 28)= ILR (1941) Kar PC 141, Bhowani-
 pur Banking Corporation v. Dur-
 gesh Nandini 3
 (1936) AIR 1936 Mad 656 (V 23)= ILR (1937) Mad 471, Veerayya
 v. Sobanadri 3
 (1930) AIR 1930 PC 100 (V 17)= 57 Ind App 117, Kamini Kumar
 v. Birendranath 3
 (1908) ILR 31 Mad 472=8 Cri LJ 147, Gurunatham Chetty v. Raghavalu Chetty 5
 (1893) ILR 16 Mad 99=3 Mad LJ 1, Natesayyan v. Ponnusami 5
 (1892) 1 Ch 173=61 LJ Ch 138, Jones v. Marionethshire Perma-
 nent Benefit Building Society 3
 V. Vedantachari and G. C. Kanniah,
 for Appellants; Govt. Pleader, for Res-
 pondents.

NATESAN, J. :— This is an appeal under the Letters Patent from the decision of our learned brother Venkatadri, J., confirming the judgment of the court of first instance. Plaintiffs 1 and 2 are the appellants. The facts of the case are within a narrow compass. The suit statedly one for partition is in fact and substance an attempt by a Hindu son to free his share in the family properties from a debt incurred by his father. Defendants 1 and 2 in the suit are brothers and members of a joint Hindu family. The first plaintiff is the son and the second plaintiff, the daughter of the second defendant. The third plaintiff is the wife of the second defendant while the fourth plaintiff is the wife of the first defendant. A daughter of the first plaintiff figures as the fifth plaintiff. The tenth defendant in the suit is the Official Receiver in the insolvency of defendants

1 and 2 and the remaining defendants are creditors and decree-holders. The only debt that is really under challenge is the decree debt in O. S. 392 of 1955 on the file of the Subordinate Judge's Court, Coimbatore for a sum of Rs. 15000 in favour of defendants 3 to 5. These defendants are the sons of one Rangaswami Naicker, brother of the mother of defendants 1 and 2. It emerges from the evidence that on the death of Rangaswami Naicker in or about 1946 leaving defendants 3 to 5 minors defendants 1 and 2, in view of their close relationship, assumed the management of the properties of defendants 3 to 5 but failed duly to account for the income and profits from the properties of defendants 3 to 5. It is common ground that defendants 1 and 2 were in possession of the properties of defendants 3 to 5 for about six years. It is stated for these defendants that by unauthorised application of their funds defendants 1 and 2 added to their own wealth and acquired the suit house and improved their dry lands, sinking a well at a heavy cost. Later on defendants 3 to 5 coming of age and insisting upon an accounting for the assets handled by defendants 1 and 2 at a mediation it was decided that defendants 1 and 2 should take all the then standing crops, retain the cattle and moveables in their possession and pay defendants 3 to 5 a sum of Rs. 20000. It is this liability that formed the consideration of a promissory note which resulted in the decree of court in O. S. 392 of 1955. In the suit on the promissory note defendants 1 and 2 raised various contentions; but eventually settled the claim for a sum of Rs. 16000 taking three months' time to pay. The mediation was on 1-6-1962 and the promissory note for the sum of Rs. 20000 which defendants 1 and 2 had to pay was executed on 9-7-1962. It transpires that shortly after the mediation there was a criminal complaint by the third defendant charging the present second defendant with offences under Secs. 324, 325, 404 and 384 I.P.C. Actually the complaint was taken on file only under Secs. 404 and 384 I.P.C. In his sworn statement then recorded the third defendant stated that the accused the present second defendant, was managing his affairs and properties after the death of his father, and that he took over the stock of timber the deceased had left and made use of it for construction of his own house. The complaint set out that at a panchayat held on 1-6-1962 the accused had agreed to execute a security bond over his terraced house and dry land in a sum of Rs. 20000 the amount being payable to defendants 3 to 5 within a year. From the calendar and judgment of the criminal case in C. C. No. 837 of 1962, on the file of the Third City Sub-Magistrate, Coimbatore, it is

seen that the case was taken up for trial on 11-10-1952 and the accused discharged under Sec. 253(i), CrI. P. C. finding that no case was made out. The accused is shown to have been apprehended only on that date i.e. on 11-10-1952. The order shows that the complainant examined himself as P.W. 1 and deposed that the accused was his uncle, and that the matter being a family dispute the relatives were unwilling to take part in the case. The complainant deposed also about the panchayat. He stated that the panchayatdars were refusing to depose in the matter, and that he had no other witnesses to examine. It is in this background that the appellants question the validity of the debt under two counts; first it is contended that the promissory note came into existence while a prosecution had been launched against the second defendant, that the promissory note was intended to stifle the pending criminal prosecution, and that so it was vitiated as opposed to public policy. Secondly it is contended that the debt incurred was an *Avyavaharika* one and that therefore the debt cannot bind the son. The plaint of course, contains the usual reckless and meaningless allegations particularly in the context of the case that defendants 1 and 2 neglected their family, that they colluded with defendants 3 and 4, and that the suit O. S. 392 of 1955 was itself a collusive suit on a promissory note without any consideration. The Subordinate Judge found that the promissory note was binding on the plaintiffs, that the suit was not collusive, and that the decree was not vitiated in any manner. Our learned brother, Venkatadri, J., has on an elaborate consideration of the law applicable in the matter and in the light of the facts that emerged from the record, affirmed the decree of the trial court and dismissed the appeal. It is held that there is absolutely no evidence to connect the criminal prosecution with the execution of the promissory note. The only witness for the plaintiff in the suit, the mother of the plaintiffs as P.W. 1 does not even whisper a word about the circumstances under which the promissory note came into existence. It is pointed out by the learned Judge that she does not depose to any coercion, undue influence or pressure being brought upon the second defendant to get him execute the promissory note. The fourth defendant has spoken in detail about the management of the estate by defendants 1 and 2, the circumstances under which the promissory note came to be executed, the suit thereon and the compromise decree. One of the Panchayatdars had been examined as D. W. 4. Defendants 1 and 2 have not gone into the witness box. In these circumstances, our learned brother, remarked that there was no direct evi-

dence to connect the promissory note with the criminal prosecution.

2. Before us learned counsel for the appellants, the son and daughter of the second defendant, strenuously contended that as it has been made out that a criminal prosecution was pending against the second defendant and the promissory note had been executed pending the criminal prosecution, it was not only a legitimate but a necessary inference that the promissory note was executed in consideration of dropping the criminal prosecution, scuttling it by not prosecuting it. Learned counsel contended that the proper inference in this case should be that the launching of the prosecution and the execution of the promissory note related to each other as cause and effect. According to learned counsel the fact that the complainant had appeared at the trial of the criminal case and examined himself as P.W. 1, was not of much significance; nor the fact that the Sub-Magistrate had discharged the accused holding that no case was made out, as material factor in the examination of the question whether the promissory note was given in consideration of withdrawal of the prosecution. Learned counsel points out that in the very nature of things there will not be direct evidence, and that it is a matter for inference from circumstantial evidence. According to learned counsel the sequence of events and the bland admission of the complainant in the Criminal Court that his witnesses would not help him are tell-tale and indicative that the prosecution was not pressed for the reason that the complainant had consideration for the same.

3. Agreements for stifling prosecutions are well known classes of agreements which the court refuses to interfere as falling under Sec. 23 of the Contract Act. It is based on the principle that no man shall trade on a felony. If the accused person is innocent, the law is abused for the purpose of extortion, and if he is guilty in fact, the law is eluded by a corrupt compromise screening the criminal for a consideration. The offences for which the complaint was taken on file are under Secs. 384 and 404, I.P.C. which are not compoundable and an agreement made for the purpose of stifling the prosecution in the case, if made out, would certainly invalidate the promissory note. But for Sec. 23 of the Contract Act to apply the dropping of the criminal prosecution must be at least a part of the consideration for the promissory note. It is pointed out by Venkataramana Rao, J., in *Veerayya v. Sobanadri*, ILR (1937) Mad 471 at pp. 474, 475=(AIR 1936 Mad 656 at p. 658)—

"But I think the true rule is that where there is an existing debt or an

obligation, a creditor is not precluded from taking any security therefor by threat of a criminal prosecution and the security is not vitiated by the fact that he has induced to abstain from prosecuting the debtor. But if it is a part of the bargain that the creditor should not prosecute the debtor, the security taken for the debt will be invalid."

The test is, did the dropping of the criminal prosecution form a part of the bargain for the agreement or giving of the promissory note. The giving up of the prosecution need not necessarily be the sole consideration. There may be an antecedent obligation. It is enough if while giving security for the antecedent obligation the dropping of the criminal prosecution is made a part of the bargain. In *Kamini Kumar v. Birendranath*, AIR 1930 PC 100 at p. 102 where there was a dispute as to title to a property and there was also a pending criminal prosecution relating to the same, the Judicial Committee in invalidating a reference to arbitration observed thus:—

"The real question involved in this appeal on this part of the case is whether any part of the consideration of the reference or the ekrarnama was unlawful and.....if it was an implied term of the reference or the ekrarnama that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or the ekrarnama, as the case may be, is unlawful".

When there is no pre-existing obligation, the inference that the security or note was given in consideration of dropping the prosecution may in a given case be patent. But when there is a pre-existing legal obligation and the security or note is given for it, it must be made out from the evidence, true the evidence will normally be circumstantial and it may be by necessary implication that it is a part of the consideration to drop the criminal proceedings. In *Jones v. Mariontheshire Permanent Benefit Building Society*, (1892) 1 Ch. 173, at pp. 184, 185, Bowen L.J. points out that reparation for an obligation is a duty which the offender owes quite independently of his fear of prosecution or otherwise and that it would be absurd to lay down as an impossible counsel of perfection that the obligee or the relatives of an offender and his friends are not justified in making reparation to the party injured. The learned Lord Justice emphasises that the abstention from or the dropping of the criminal prosecution should not be made a matter of bargain. If reparation takes the form of a bargain the bargain is one which the court will not enforce. Lord Atkin refers again to this principle in *Bhowanipur Banking Corporation v.*

Durgesh Nandini, AIR 1941 PC 95 at pp. 96 and 98, 99 and points out—

"But it is also of course necessary that each party should understand that the one is making his promise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting".

Lord Atkins also points out that undue weight should not be given to the fact of the existence of a real obligation. It is observed—

"In this class of cases that fact seems irrelevant if the agreement to abandon a prosecution is part of the consideration for payment of the debt. In most cases of this kind there is a debt or a liability. Indeed if there were not, a demand and receipt of money in consideration of refraining from or withholding a prosecution would apparently in itself be a criminal offence".

These principles are again the subject of detailed restatement in the Supreme Court by Gajendragadkar, J., (as he then was) in *Narasimharaju v. Gurumurthi Raju*, AIR 1963 SC 107, at p. 110, where it has been pointed out that all that is required of the parties to impeach the validity of an agreement to settle the criminal proceedings is to give evidence from which the inference necessarily arises that part of the consideration was unlawful, and that the consideration for the agreement was withdrawal and non-prosecution of a criminal complaint.

4. Learned counsel for the appellants has not made out in this case circumstances so clinching as to necessarily warrant the inference that it is a part of the bargain when the promissory note was executed that the criminal prosecution should not be proceeded with. True the criminal complaint was filed on 10-6-1952, and the promissory note was executed on 9-7-1952. The case was heard only on 11-10-1952. The record shows that the accused was apprehended only on that date. It is not made out in the evidence that the second defendant was even aware of the fact that a criminal complaint had been filed and was pending when he executed the promissory note. To avoid the promissory note, it has to be established that it is a part of consideration that the criminal proceeding should be discontinued. That cannot be made out and there can be no consensus ad idem for a bargain if the second defendant had no knowledge of the pendency of the criminal proceedings. Unless he is aware of the pendency of the criminal proceedings, withdrawal of the same cannot be held to form part of the consideration for the promissory note. In the present case defendants 1 and 2 have remained ex parte and have not been examined. No attempt has been made

to show that the second defendant was aware of the pendency of the criminal proceedings when the promissory note was executed. There is another aspect of the matter and it has a material bearing on the question under consideration. The defence that the promissory note was unenforceable as secured in consideration at least partly for stifling a criminal prosecution was as much available to the second defendant as to the plaintiffs. It would have been, if tenable on the merits, a strong and powerful plea in defence to the action on the promissory note in the suit, O.S. 392 of 1955. The plaintiffs have attempted in the plaint to get round the reasonable inference following from the decree on the promissory note by pleading *inter alia* that defendants 1 and 2 had been prevented by defendants 3 to 5 in substantiating their defence in that suit by using wrongful means and pressure and threatening defendants 1 and 2 to consent to a decree. But these charges have not been made out in the evidence, and even the written statement in that case has not been placed on record now. Learned counsel strongly relied on an observation in the judgment of the Subordinate Judge, that it was clear that the complainant did not prosecute the complaint. The learned Subordinate Judge rejected the evidence of the 4th defendant as D.W. 1 that the complaint was dismissed because the complainant was not able to prove the same. For one thing the inference of the learned Subordinate Judge is not a necessary inference on the facts. No doubt the complainant had pleaded his inability to let in further evidence. It does not necessarily follow that the complainant abstained from proceeding further in the matter as a part of the bargain he had with the second defendant. Even assuming that the third defendant was lukewarm in the prosecution after having secured the promissory note, that would not be sufficient to vitiate the promissory note. His subsequent attitude or his motive in not proceeding further with the prosecution after launching it will not render the promissory note unenforceable if withdrawal of the prosecution was not a part of the bargain. In AIR 1963 SC 107 at p. 112 this distinction is noticed. It is observed—

"This is not a case where it can be reasonably said that the withdrawal of the criminal case may have been a motive and not the consideration by the impugned transaction".

The sequence of events in the present case is not so clear nor is the withdrawal of the prosecution so interlinked with the execution of the promissory note as to lead to a reasonable inference that one must have been the consideration at

least in part of the other. The first point therefore fails.

5. Coming to the plea that the debt is an *avyavaharika* debt and therefore not binding on the son, here again we see no reason to differ from the conclusion of our learned brother. When the father of defendants 3 to 5 died leaving them minors, defendants 1 and 2 took possession of the properties for the purposes of management. It has not been made out in the evidence nor is such a case pleaded in the plaint that the original entry on the properties by the defendants was unlawful and in trespass. They entered on the properties to manage the same on behalf of and for the benefit of the minors. Only they have failed to duly account for the proceeds from the properties and it is this liability that was settled at the Panchayat in a sum of Rs. 20,000. The promissory note was for this amount of Rs. 20,000. We can see nothing *Avyavaharika* in this liability. Colebrooke's translation of the expression "*Avyavaharika*" as meaning debts for a cause repugnant to good morals has been generally accepted as the nearest approach to the true conception of the term. Under the Hindu Law, a son is under a pious obligation to discharge his father's debts out of his ancestral property even if he had not been benefited by the debts, provided the debts are not *avyavaharika*. The sons get exonerated from their obligation to discharge the debt of their father from the family assets only if the debt was one tainted with immorality or illegality. The duty that is cast upon the son being religious and moral, the liability of the son for the debt must be examined with reference to its character when the debt was first incurred. If at the origin there was nothing illegal or repugnant to good morals, the subsequent dishonesty of the father is in not discharging his obligation will not absolve the son from his liability for the debt. In *Hemraj v. Khemchand*, AIR 1943 PC 142, at p. 145, the Judicial Committee observes—

"It also appears to be clear on principle and on authority, that examination of the nature or character of the debt should be made with reference to the time when it originated in other words, when the liability was first incurred by the father. If, on such examination, it is found that at the inception the debt was not tarnished or tainted with immorality or illegality, then it must be held that it would be binding on the son".

In *Natesayyan v. Ponnusami*, (1893) ILR 16 Mad 99 which finds approval in AIR 1943 PC 142, a decree was passed against a Hindu for money dishonestly retained by him from the plaintiff's family to which he was accountable in respect of it. The judgment debtor having died, the

decree-holder sought to attach in execution, property of the family which had passed into the hands of his sons by survivorship. The sons objected to the attachment challenging the debt as immoral and illegal in the suit to which the creditor was referred. While terming the action of the father in not accounting for the sums which he had collected as dishonest, it is observed in that case that dishonesty was not of such a nature as to absolve the defendants, that is, the sons, from their pious obligation to discharge their father's debts. The learned Judges observe in (1893) ILR 16 Mad 99,

"Upon any intelligible principles of morality a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation and for the non-disclosure of which punishment in a future state might be expected to be inflicted, if in any. The son is not bound to do anything to relieve his father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, viz., to restore to those lawfully entitled money he has unlawfully retained".

In AIR 1943 PC 142, at p. 146, above cited the Judicial Committee expressed their concurrence with the aforesaid view and with reference to the case before them their Lordships observe—

"The subsequent dishonest conduct of Danapal, which led to the suit and the decree so much relied upon by the courts in India and made the basis of their decision, cannot in their Lordships' view affect the nature of the father's debt which at its inception was a just and true debt. As no such immorality or illegality in the nature of the original debt as would absolve them from the obligation to discharge it has been shown by the respondents, the debt, sought to be realised is not an Avyavaharika debt..." In *Gurunatham Chetty v. Raghavalu Chetty*. (1908) ILR 31 Mad 472 at p. 474, a Bench consisting of Sir Arnold White, C. J. and Wallis, J., with reference to a case where an undivided Hindu father acted as the administrator of an estate and was made liable for moneys received by him and not properly accounted for, affirming the liability of the son for the debt, it is observed—

"The evidence is not in our opinion sufficient to warrant us in holding that the failure by the third defendant to account as an administrator amounted to a criminal offence".

The question has received a detailed consideration by a Full Bench of the Andhra Pradesh High Court in *Venkateswara Temple v. Radhakrishna*, AIR 1963 Andh Pra 425 at p. 427. Chandra Reddy, C. J.,

who delivered the judgment of the Bench, summarised the position thus:—

"What emerges from these rulings is that a son could claim immunity only where the debt in its origin was immoral by reason of the money having been obtained by the commission of an offence; but not where the father came by the money lawfully but subsequently misappropriated it. It is only in the former case that the debt answers the description of an Avyavaharika debt. If originally the taking was not immoral, i.e., if it did not have a corrupt beginning or founded upon fraud, it could not be characterised as an Avyavaharika debt and the son could not be exempted from satisfying that debt. The supervening event, namely, the misappropriation later on would not change the nature of the debt. The vices should be inherent in the debt itself".

When examined in the light of the abovesaid principles, it is impossible to hold that the liability evidenced by the decree debt in O. S. 392 of 1955 is avyavaharika in character. It is not even pleaded in the plaint that the original entry by defendants 1 and 2 on the properties of defendants 3 to 5 was trespass or otherwise unlawful and illegal. They had taken up management of the properties for all appearances and ostensibly bona fide in the interests of the defendants 3 to 5 who were minors, and closely related. They had been in management of the properties for over six years and their accountability for the management was settled at a panchayat. They were found liable to account for a sum of Rs. 20,000. Ex facie it is a civil liability to account, which was quantified and settled by a panchayat. The origin of the liability is not repugnant to good morals. The second defendant appears to have acted as a de facto guardian for the minors. As and when the second defendant assisted by the first defendant realised money from the estate, his obligation to account to the minors arose. His later failure to account may be dishonest, but that cannot alter the original character of the obligation and make it criminal even initially. We agree in the circumstances with the conclusion of our learned brother confirming the judgment of the trial court that the promissory note was executed for amounts lawfully due and payable by defendants 1 and 2 to defendants 3 to 5, that the debt at its inception was lawful and therefore binding on the plaintiffs. In the result the appeal fails and is dismissed with costs.

BDB/D.V.C.

Appeal dismissed.

AIR 1969 MADRAS 21 (V 56 C 6)

KAILASAM, J.

Workmen of Dalmia Cement (Bharat) Ltd. and others, Petitioners v. State Government of Madras and others, Respondents.

Writ Petitions Nos. 1721 of 1966 and 1929, 2900, 2901, 3817, 3436 and 3562 of 1967, D/- 16-2-1968.

(A) Industrial Disputes Act (1947), Sec. 2(k) — Dispute raised by Union — Mere fact that subsequently, the worker concerned requested reconsideration will not make the dispute any the less an industrial dispute. (Para 8)

(B) Industrial Disputes Act (1947), Ss. 10(1), 12(5) — Order passed under S. 10(1) read with S. 12(5) — Power of Court to interfere.

The Government in passing an order under S. 10(1) read with S. 12(5) is acting in an administrative character, and has an option to make the reference or not depending on the facts of each case. It is open to the Government in coming to a conclusion under S. 12(5) to take note of the relevant facts which may be brought to its notice and it need not confine itself to the report of the conciliation officer. The power of the Court in interfering with an order passed under S. 10(1), read with S. 12(5) of the Act is very limited and is confined to interference in cases where the Government in passing an order of reference is guided by matters which are extraneous and not germane to the questions. Case law Ref. (Para 10)

(C) Industrial Disputes Act (1947), Ss. 10(1), 12(5) — Refusal to make reference in the first instance — Subsequent order of reference — If competent.

On a reading of S. 10(1), it is clear that the power of the Government is unlimited and it can refer a dispute when it is of opinion that an industrial dispute exists or is apprehended. The opinion of the Government is subjective and the question whether a dispute exists or is apprehended is also for the Government to decide. Considering the various provisions of the Act, it is also clear that this power is exercisable at any time, that is, even after the Government had refused to make a reference at the first instance. It is unnecessary to consider the question whether the Government having once refused to make a reference and recorded its reasons under S. 12(5), it could make a fresh reference. The Government can always make a reference under S. 10(1) whatever action it might have taken under S. 12(5) earlier.

(Para 14)

Cases Referred:	Chronological	Paras
(1968) 1968 Lab IC 832=(1967) 2 Lab LJ 407 (Mad), Coimbatore District Textile Mills Staff Union v. State of Madras		10
(1966) 1966-1 Lab LJ 807=1966 All LJ 52, Shanker Flour, Rice and Dal Mills v. Labour Court		12
(1964) AIR 1964 SC 1617 (V 51)=(1964) 1 Lab LJ 351, Bombay Union of Journalists v. State of Bombay		10
(1964) 1964-1 Lab LJ 644=65 Pun LR 901, Rawalpindi Victory Transport Co. v. State of Punjab		12
(1963) 1963-1 Lab LJ 340 (All), L. H. Sugar Factories & Oil Mills v. State of U. P.		12
(1963) 1963-2 Lab LJ 717=(1963) 2 Mys LJ 230, Vasudeva Rao v. State of Mysore		12
(1962) AIR 1962 All 70 (V 49)=(1961) 1 Lab LJ 686, L. H. Sugar Factories and Oil Mills Ltd. v. State of U. P.		12
(1962) 1962-1 Lab LJ 555=(1961-62) 21 FJR 241 (Punj), Panipat Woollen & General Mills Co. Ltd. v. Industrial Tribunal		12
(1960) AIR 1960 SC 1223 (V 47)=(1960) 2 Lab LJ 592, State of Bombay v. Krishnan		10
(1958) AIR 1958 SC 1018 (V 45)=1959 SCR 1191, State of Bihar v. D. N. Ganguly		11, 12
(1958) AIR 1958 Andh Pra 276 (V 45)=(1958) 1 Lab LJ 20, Gurumurthi v. Ramulu		12
(1956) AIR 1956 Mad 113 (V 43)=(1956) 1 Mad LJ 280, Radhakrishna Mills v. State of Madras		12
(1956) AIR 1956 Mad 115 (V 43)=(1956) 1 Lab LJ 498, Sri Rama Vilas Service Ltd. v. State of Madras		12
(1953) AIR 1953 SC 53 (V 40)=1953 SCR 334, Madras State v. C. P. Sarathy		10

In W. P. No. 1721 of '66
Aiyar, Dolia, G. Venkataraman and A. L. Somayajulu, for Petitioners; Govt. Pleader, V. K. Thiruvenkatachari for King and Partridge, T. N. C. Rangarajan, for Respondents.

In W. P. No. 1929 of '67
S. Gopalaratnam, for Petitioner; Govt. Pleader and V. Venkataraman, for Respondents.

In W. P. Nos. 2900 and 2901 of '67
M. R. Narayanaswami, for Petitioner; Govt. Pleader and K. V. Sankaran, for S. Ramaswami, for Respondents.

In W. P. No. 3817 of '67
V. K. Thiruvenkatachari and T. N. C. Rangarajan, for King and Partridge, for Petitioners; Govt. Pleader, B. R. Dolia of Aiyar and Dolia and G. Venkataraman and A. L. Somayajulu, for Respondents.

In W. P. No. 3436 of '67

V. K. Thiruvengkatachari for King and Partridge, for Petitioners; Govt. Pleader, B. R. Dolia of Aiyar and Dolia, for Respondents.

In W. P. No. 3562 of '67

V. K. Thiruvengkatachari for King and Partridge and T. N. C. Rangarajan, for Petitioners; Govt. Pleader and B. R. Dolia of Aiyar and Dolia and G. Venkataraman and A. L. Somayajulu, for Respondents.

ORDER:— The question that arises in all these Writ Petitions is whether the Government having once declined to refer an industrial dispute for adjudication after consideration of a conciliation report, could, by a subsequent order, refer the same dispute for adjudication.

2. Writ Petitions Nos. 2900/67 and 2901/67 relate to a dispute between Best and Co. (P.) Ltd. and its workers. M/s Best & Co., was owning seven factories in Madras and each of these factories had its own licence issued under the Factories Act, and workmen had been recruited for each factory separately. One of the factories, namely, Bestonite Factory, had to stop production due to non-availability of sulphuric acid. The factory was closed on 9-1-1966 and thirty-four employees, (29 workers and 5 in the staff section) were given notice and paid closure compensation. Of the thirty-four persons, seventeen persons (12 workers and five staff) received the amount and settled the accounts. The other seventeen put forward a claim through the Union that they should be absorbed and provided with employment in the other factories owned by the petitioner. The company declined the request of the Union and conciliation proceedings were held by the Labour Officer, who by his report dated 25-5-66 intimated to the Government that no conciliation could be effected.

After considering the said report as well as the communication from the Commissioner of Labour dated 9-8-66, the Government acting under Section 12 (5) of the Industrial Disputes Act passed an order dated 3-9-1966 declining to refer the dispute for adjudication. The Government stated in the order that the Bestonite Factory was closed for bona fide reasons and that the other factories owned by the petitioner were separate entities and therefore, it was not possible to absorb the affected workers in any of them. The Union persisted in their claim and addressed a letter to the Deputy Secretary to Government, Department of Industries, Labour and Housing on 19-11-66 asking for reconsideration of the earlier order of the Government declining to make a reference for adjudication. A copy of the letter was served on the company. Subsequently, the Labour Offi-

cer requested a representative of the petitioner to go over to his office for discussion on 17-3-1967. The petitioner company explained their stand. Subsequently, by an order dated 11-7-1967 the Government, purporting to exercise the powers conferred on it under Sec. 10(1)(c) of the Industrial Disputes Act, referred the matter for adjudication to the Labour Court. W. P. No. 2900/67 is filed for the issue of a Writ of Certiorari for quashing the order of the Government referring the matter for adjudication on the ground that it is illegal, ultra vires and lacking in bona fides and opposed to principles of natural justice. W. P. No. 2901/67 is filed by the Company for the issue of a Writ of Prohibition restraining the Labour Court from proceeding with the trial and enquiry of the reference made to it by the Government.

3. W. P. No. 1929/67 relates to the dispute between the Kumbakonam City Union Bank Ltd., and the Secretary, Kumbakonam City Union Bank Employees Union, Kumbakonam. The Bank served a memo to S. Sivaraman, an employee of the Bank on 14-9-66 asking him to furnish his explanation as to why he should not be charged for certain offences. On 21-9-1966, Sivaraman furnished his reply. On receipt of the explanation, four charges were framed against the first respondent on 29-9-66 and he was notified that an enquiry would be conducted in accordance with the principles of natural justice on 5-10-66 at 4 P. M. On 5-10-66, an enquiry was held by a sub-committee when Sivaraman was present and evidence was recorded. On 13-10-66, the enquiry body arrived at a provisional conclusion that Sivaraman was guilty. Notice was given as regards the proposed punishment and on receipt of the written statement from Sivaraman, the sub-committee on 17-10-66 dismissed him from service. The staff Union of the Bank took up the matter and gave notice calling for reinstatement of Sivaraman. The Labour Officer opened conciliatory talks and subsequently on 18-3-67 the Labour Officer submitted his failure report to the Government under Sec. 12(4) of the Industrial Disputes Act. On 25-4-67, the Government declined to refer the dispute on the ground that Sivaraman was dismissed from service after proper enquiry, in which charges against him have been proved and that there was no violation of the principles of natural justice. Subsequently, the Government on a consideration of its order passed on 25-4-67, referred for adjudication the dispute between the Bank and the Union. W. P. No. 1929/67 is filed by the Bank for the issue of a Writ of Certiorari to quash the order of the Government revising its own order and referring the dispute for adjudication.

4. W.P. No. 3817/67 is filed by the Ennore Foundaries Limited, Ennore, for the issue of a Writ of Certiorari calling for the records in G. O. No. 2228 Department of Industries, Labour and Housing dated 4th November 1967 reviewing its earlier order and referring the dispute for adjudication. Ten workmen of the Welding Department had been suspended for misconduct for six days ending on 1st July 1966. On 2nd July 1966, the said ten workmen reported for duty, but refused to do any work that was allotted to them in spite of repeated appeals by the Management. They were suspended on the same day pending enquiry. The ten workmen continued to remain in the premises after the working-hours. On the 3rd July 1966, charges were framed on the ten workmen and they were asked to be present for an enquiry to be held in the office on the 4th July 1966. The workmen did not attend the enquiry, but continued to remain in the work spot without doing any work. The enquiry was duly held and the charges against the workmen were held to be proved. The workmen were thereupon dismissed from service. The Staff Union Secretary raised the dispute in respect of the dismissal of the workmen which was taken up by the Labour Officer. The Labour Officer sent a conciliation report on 14th December 1966 and on a consideration of the report, the Government passed an order in G. O. Rt. No. 750, Department of Industries Labour & Housing, D/- 25-4-1967 declined to refer the dispute for adjudication on the ground that the workmen were dismissed after an enquiry in which they refused to participate. Subsequently by G. O. Rt. No. 2229, Department of Industries, Labour and Housing dated 4th November, 1967, the Government referred the matter for adjudication. The legality of the said order is challenged in W. P. No. 3817/67. The petitioner has also prayed for the issue of a Writ of Prohibition restraining the Labour Court, Madras from proceeding with the reference.

5. Writ Petition No. 1721/66 and W. P. No. 3436/67 refer to the dispute between Dalmia Cement (Bharat) Ltd., and the Workmen of Dalmia Cement Ltd.; the dispute relates to the transfer of one Swaminathan, Cashier of Dalmia Cement Ltd., Dalmiapuram to M/s Orissa Cement Ltd., Rajganjpur, Orissa, a sister concern of Dalmia Cement (Bharat) Ltd., Dalmiapuram. The transfer order was made on 31st May, 1965. Swaminathan protested against the transfer by the company and did not join the Orissa Firm, but applied for leave on medical grounds. Subsequently, Swaminathan did not join Orissa Cement Ltd., and his name was struck off the rolls of the Orissa Cement Ltd., on the ground of abandonment of employment.

The matter was taken up for conciliation by the Labour Officer, Tiruchirapalli who sent a conciliation report to the Government on 7th October, 1965. On a consideration of the report, the Government passed G. O. Rt. No. 1079, Department of Industries, Labour and Housing dated 3rd June 1966 declining to refer the matter for adjudication on the ground that Swaminathan was transferred in accordance with the rules of the company and that there was no victimisation. The Union thereupon filed W. P. No. 1721/66 impleading Dalmia Cement (Bharat) Ltd., praying for the issue of Writ of Mandamus directing the Government to refer the dispute for adjudication. Subsequently the Government passed an order of reference on 6th September, 1967.

6. W. P. No. 3562/67 relates to a dispute between Bharat Heavy Electricals Ltd., Tiruverumbur and the Boiler Plant Employees' Union, Tiruverumbur. One Joseph a driver in the petitioner company, threatened and intimidated another worker by name Periaswami with serious consequences while on duty. A charge sheet was given to the worker on 7th May, 1966. The worker submitted an explanation on 13-5-66 denying the charges. The Management held an enquiry on 11th, 13th, and 15th June, 1966. The enquiry committee submitted its finding on 28th June, 1966 holding that the charge of threatening and intimidating Periaswami with dire consequences had been proved beyond a shadow of doubt. On the basis of the findings of the enquiry committee, the works Manager of the Petitioner Company came to the conclusion that the charge was made out and passed orders on 29th June, 1966 removing the worker from service from 1st July, 1966. The Union raised a dispute and the Labour Officer submitted a report to the Government on 27th February, 1967. The Government on a consideration of the report, on 25th April, 1967 declined to refer the dispute for adjudication on the ground that the workman was dismissed from service after an enquiry in which the charge against him was held proved. Subsequently, the Government passed an order on 29th August, 1967 in G. O. Rt. Ms. No. 1697 making a reference of the same dispute for adjudication. The order of reference is challenged in W. P. No. 3562/67 praying for the issue of a Writ of Certiorari quashing the order of reference.

7. In all the above Writ Petitions, the competency of the Government, to refer a dispute for adjudication, when once it was declined, is questioned.

8. Before considering the above question, a plea by the petitioner in W. P. No. 3436/67 that the dispute is not an indus-

trial dispute may be disposed of. The dispute was originally taken by the Union, but the petition for reconsideration was made by the aggrieved person. Therefore, it was submitted that the dispute would not continue to be an industrial dispute. This contention cannot be accepted, for, the dispute was raised by the Union and the mere fact that subsequently the worker requested reconsideration will not make the dispute any the less an Industrial dispute.

9. The Industrial Disputes Act, 1947 was enacted to make provision for the investigation and settlement of industrial disputes. The Act provides for the constitution of Works Committee, Conciliation Officers, Board of Conciliation, Courts of Inquiry, Labour Courts, Tribunals and National Tribunals for settlement of disputes. Section 10 provides for references of disputes to Boards, Courts or Tribunals. Section 10 (1-A) enables the Government when it is of opinion that any industrial dispute exists or is apprehended, to refer, by an order in writing at any time, the dispute to the Board or to the Court of Enquiry, or a Tribunal as the case may be. Chapter IV of the Act prescribes the procedure, powers and duties of the authorities. Section 12 enumerates the duties of conciliation Officers. Section 12(1) provides that where any industrial dispute exists or is apprehended, the Conciliation Officer may, or, where the dispute relates to a public utility service and a notice under Sec. 22 has been given, shall, hold conciliation proceedings in the prescribed manner. Under Sec. 12(2) the Conciliation Officer is empowered to investigate the dispute and all matters affecting the merits and the right settlement thereof, and do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute. If a conciliation has been effected the Conciliation Officer is required to send a report to the appropriate Government with a memo of settlement signed by the parties. If no such settlement is arrived at under sub-sec. (4) of Section 12 the Conciliation Officer is required to send a full report setting forth the steps taken by him and the circumstances and the reasons on account of which a settlement could not be arrived at. Sub-section (5) provides that if, on a consideration of the report referred to in sub-sec. (4), the appropriate Government is satisfied that there is a case for reference to a Board or Labour Court, Tribunal or National Tribunal, it may make such a reference, and where the Government does not make such a reference, it shall record and communicate to the parties concerned its reasons therefor.

10. The scope of Secs. 10 (1) and 12 (5) of the Act has been the subject matter of several decisions of the Supreme Court. In *Madras State v. C. P. Sarathy*, AIR 1953 SC 53 the Supreme Court held thus:—

"It must be remembered that in making a reference under section 10(1), the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi-judicial determination. But if the dispute was an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters." In *State of Bombay v. Krishnan*, (1960) 2 Lab LJ 592=(AIR 1960 SC 1223) the Supreme Court held that section 12(5) occurs in a chapter dealing with the procedure, powers and duties of the authorities under the Act, and it would be legitimate to hold that section 12 (5) which undoubtedly confers power on the appropriate Government to act in the manner specified by it, the power to make reference which it will exercise if it comes to the conclusion that a case for reference has been made, must be found in section 10 (1); and it would not be reasonable to hold that section 12 (5) by itself and independently of section 10 (1) confers power on the appropriate Government to make a reference. The Court further held that it could not be contended that the appropriate Government acting under section 12 (5) of the Act is bound to base its decision only on a consideration of the report made by the Conciliation Officer under Section 12 (4). It would be open to the Government to consider other relevant facts which may come to its knowledge, and in the light of all the relevant facts, it has to come to its decision whether a reference should be made or not. Regarding the functions of the Government, the Court held that the order passed by the Government may be an administrative order and may not be justiciable in the sense that their propriety, adequacy or satisfactory character may not be open to judicial scrutiny and that the Court hearing a petition for

mandamus is not sitting in appeal over the decision of the Government; nevertheless if the court is satisfied that the reasons given by the Government for refusing to make a reference are extraneous and not germane, then the Court can issue a writ. It is open to the Government in considering the question of expediency to enquire whether the dispute raises a claim which is very stale or which is opposed to the provisions of the Act, or is inconsistent with any agreement between the parties and if the Government comes to the conclusion that the dispute suffers from infirmities of this character, it may refuse to make the reference.

In *Bombay Union of Journalists v. State of Bombay*, (1964) 1 Lab LJ 351= (AIR 1964 SC 1617) the Court held that in considering an order made by the Government under Section 10 (1) read with Section 12 (5), the Court is not sitting in appeal over the order and is not entitled to consider the propriety or the satisfactory character of the reasons given by the Government. The decisions referred to above were considered by this Court in *Coimbatore District Textile Mills Staff Union v. State of Madras*, (1967) 2 Lab LJ 407=(1968 Lab IC 832) (Mad). The effect of these decisions is that the Government in passing an order under Section 10 (1) read with Section 12 (5) is acting in an administrative character, and has an option to make the reference or not depending on the facts of each case. It is open to the Government in coming to a conclusion under Sec. 12 (5) to take note of the relevant facts which may be brought to its notice and it need not confine itself to the report of the Conciliation Officer. It will thus be seen that the power of the Court in interfering with an order passed under Section 10 (1), read with Section 12 (5) of the Act is very limited and is confined to interference in cases where the Government in passing an order of reference is guided by matters which are extraneous and not germane to the questions.

11. The main contention on behalf of the petitioners is that the Government has no authority to cancel an order issued under Section 10 (1) of the Act. It is contended that if the legislature intended to confer on the appropriate Government a power to cancel an order made under Section 10 (1), the legislature would have made a specific provision in that behalf and would have prescribed appropriate limitation on the exercise of the said power. In support of this contention, a ruling of the Supreme Court in the State of Bihar v. D. N. Ganguly, 1959 SCR 1191=(AIR 1958 SC 1018) was strongly relied on. In that case, the Government after making a reference under Section

10 (1) of the Industrial Disputes Act, cancelled the reference in respect of which an industrial dispute was pending adjudication before the Tribunal. The Supreme Court held that the order cancelling the reference was illegal, and could not be sustained. Repelling the contention that a power to cancel or supersede a reference must be held to be included under Section 21 of the General Clauses Act, 1897, the Court held that the rule of construction embodied in Section 21 can apply to the provision of a statute only where the subject matter, context and effect of such provisions are in no way inconsistent with such application. The Court after referring to the various provisions of the Act observed that it is only when an order in writing is made by the Government referring an industrial dispute to the tribunal, proceedings commenced; but the scheme of the relevant provisions would prima facie seem to be inconsistent with any power in the appropriate Government to cancel the reference made under Section 10 (1). After referring to the provision of Section 12 (5) which makes it incumbent on the Government to communicate its reasons if it decides not to make a reference the Court observed that if the appellant's argument that the Government could withdraw the reference, it would mean that even after the order is made by the appropriate Government under Section 10 (1), the said Government can cancel the said order without giving any reasons. It proceeded to observe that this position is clearly inconsistent with the policy underlying the provisions of Section 12 (5) of the Act and that if the legislature had intended to confer on the Government the power to cancel an order under Section 10 (1), the legislature would have made a specific provision in that behalf and would have prescribed appropriate limitations for the exercise of the said powers.

12. The above quoted passage is relied on by the learned Counsel for the petitioner who submitted that the observations are equally applicable to an order by the Government making the statement in general terms and is not confined to that portion of Section 12 (5) which relates to the Government making a reference. On the other hand, on behalf of the Government and the respondents, it was strongly contended that the observations should be confined to the facts of that case in which the Government made a reference and the other provisions of the Act became operative, and not to a case where the Government had refused to make a reference. While the observations were made with reference to a case in which the Government sought to withdraw a reference already made, the statement that if the legislature had in-

tended to confer on the appropriate Government the power to cancel an order, it would have made a specific provision, cannot be said to be inapplicable to that part of Section 12 (5) where the Government had refused to make reference for, in that case also, there is no specific provision enabling the Government to pass an order directing a reference where it had already decided not to make a reference and recorded and communicated the parties the reasons therefor.

The learned Government Pleader referred to a decision of this Court in *Radhakrishna Mills v. State of Madras*, AIR 1956 Mad 113 and *Sri Rama Vilas Service Ltd. v. State of Madras*, AIR 1956 Mad 115 where Rajagopalan, J., held that an order under Section 12 (5) made on a consideration of the conciliation report is purely administrative in character and that the Government could pass any number of orders. To the extent, the decision rules that the Government can pass an order withdrawing a reference which had been made already, it is not in conformity with the decision of the Supreme Court, in 1959 SCR 1191=(AIR 1958 SC 1018). Several High Courts have taken the view that the Government after refusing a reference can subsequently make a reference: Vide the decisions in *Gurumurthi v. Ramulu*, (1958) 1 Lab LJ 20=(AIR 1958 Andh Pra 276), *Andhra Pradesh High Court*; *L. H. Sugar Factories and Oil Mills Ltd. v. State of U. P.*, (1961) 1 Lab LJ 686=(AIR 1962 All 70), *Allahabad High Court*; *Panipat Woollen & General Mills Co. Ltd. v. Industrial Tribunal*, (1962) 1 Lab LJ 555 *Punjab High Court*; *L. H. Sugar Factories & Oil Mills v. State of U. P.*, (1963) 1 Lab LJ 340, *Allahabad High Court*; *Vasudeva Rao v. State of Mysore*, (1963) 2 Lab LJ 717, *Mysore High Court*; *Rawalpindi Victory Transport Co. v. State of Punjab*, (1964) 1 Lab LJ 644, *Punjab High Court*; and *Shanker Flour, Rice and Dal Mills v. Labour Court*, (1966) 1 Lab LJ 807, *Allahabad High Court*. These decisions have not considered the effect of the decision of the Supreme Court in 1959 SCR 1191=(AIR 1958 SC 1018). They expressed the same view as expressed by this Court in AIR 1956 Mad 113 and AIR 1956 Mad 115. In (1966) 1 Lab LJ 807, in considering the question whether the State Government, when once it decided not to refer the dispute, it could subsequently exercise the power, the Court observed that if a reference is made, it is evident that a power had been exercised; but if no reference is made, it clearly showed that the power had not been exercised, and that only when a reference is made that the power conferred can be taken to have been exercised and the refusal to make a reference does not entail the exercise of any power. With

respect, I am unable to accept this reasoning, for, even in refusing to make a reference, the Government will have to exercise its power and give reasons for not making the reference. The decision also does not refer to the decision of the Supreme Court in the *Ganguly's case* referred to above, on which strong reliance was placed by the learned counsel for the petitioner.

13. The contention of the learned counsel, that applying the reasoning of the Supreme Court that the absence of a specific legislative provision enabling the Government to cancel an order withdrawing a reference would apply to an order under Section 12 (5) refusing to make a reference, cannot be said to be without basis.

14. Mr. Dolia, learned Counsel for the petitioner in W. P. No. 1721/66, submitted that whatever may be the position with regard to the power of the Government to revise an order refusing to make a reference, the Government has ample and unrestricted powers under Section 10 (1) of the Act which may be exercised at any time and the Court will not be competent to question it, unless the order is made for extraneous reasons. Section 10 (1) confers unlimited powers on the Government. The power to make a reference can be availed of by the Government, if it is of opinion that any industrial dispute exists or is apprehended by making a reference in writing at any time. This reference can be made either on a conciliation report under Section 12 (4) or directly under Section 10 (1). If it is made under Section 12 (5), it acts on the conciliation report and other materials that may be available to it. But when it acts under Section 10 (1), the Government may make a reference when it is of the opinion that an industrial dispute exists or is apprehended, and this reference can be made at any time. The opinion of the Government is subjective and cannot be questioned by this Court. Whether an industrial dispute exists or is apprehended is a matter for the Government to determine. The Government when making an order of reference is not under an obligation to give its reasons. The fact that the Government has refused to refer under Section 12 (5) will not bar the Government's right to make a reference under Section 10 (1).

The contention of Mr. Dolia is that the refusal of the Government to make an order of reference does not determine an industrial dispute. An industrial dispute is only settled under Section 12 (3) where the parties accepted the conciliation, or under Section 18 (1) when an award is passed. As the industrial dispute continues, it may be that the Government on

1969

the same matter subsequently come to the conclusion that it is desirable to make a reference. In this case, it is submitted that the Government has not only the power, but a duty to refer the matter for the purpose of keeping industrial peace. The learned Counsel submitted that after the refusal of the Government to make a reference, there may be a strike and the appropriate Government may then decide to make a reference under Section 10 (1), and then under Section 10 (3) of the Act, prohibit the continuance of any strike or lock-out in connection with such dispute which may be in existence on the date of the reference. Learned Counsel referred to the wide powers under Section 10 (1) and submitted that the powers are mainly conferred for the purpose of keeping industrial peace and no restriction should be placed on it.

On a reading of Section 10 (1), I am satisfied that the power of the Government is unlimited and it can refer a dispute when it is of opinion that an industrial dispute exists or is apprehended. The opinion of the Government is subjective and the question whether a dispute exists or is apprehended is also for the Government to decide. Considering the various provisions of the Act, I am satisfied that this power is exercisable at any time, that is, even after the Government had refused to make a reference at the first instance. It is unnecessary to consider the question whether the Government having once refused to make a reference and recorded its reasons under Section 12 (5), it could make a fresh reference. The Government can always make a reference under Section 10 (1) whatever action it might have taken under Section 12 (5) earlier.

15. On behalf of the petitioners an attempt was made to show that the Government did not invoke the aid of Section 10 (1), but only purported to revise an order which it passed under Section 12 (5). This argument may not help the petitioners, because the Government had some material subsequent to the passing of the order under Section 12 (5), and their power to make a reference under Section 10 (1) being unlimited, the reference cannot be said to be illegal.

16. It was contended on behalf of the petitioners that the Government having once refused to make a reference if it subsequently revised its views and made a reference, it would prejudice the interests of the petitioners, and that the rights of the petitioners could not be adversely affected without hearing them. It was submitted that if the Government revised its views and referred the matter to the Labour Court for adjudication, the management would be faced with

payment of arrears of salary and other liabilities. The question whether the management is liable to pay or not would depend upon the subsequent adjudication by the concerned authority. So far as the Government is concerned, it does not decide the liability of the parties, but only refers the dispute for adjudication as it is enjoined to refer the matter when it is of opinion that an industrial dispute existed or apprehended. The order being administrative in character and as the rights of parties will be only decided subsequently, the petitioner cannot complain that they have not been heard before the Government revised its views and made a reference. The submission of Mr. Dolia on the powers of the Government under Section 10 (1) of the Act will have to be accepted and the order of reference held valid. In this view of the matter, it is unnecessary to consider the facts of the various cases. The references in all these cases are held to be valid. The Writ Petitions are accordingly dismissed. There will be no order as to costs.

JHS/D.V.C.

Petitions dismissed

AIE 1969 MADRAS 27 (V 56 C 7)
NATESAN, J.

Veeraswami Mandiri, Appellant v.
K. Manicka Mudaliar and others, Respondents.

Second Appeal No. 1728 of 1963, D/-
3-11-1967, from decree of Sub. J., Vellore
in Appeal Suit No. 39 of 1963.

(A) T. P. Act (1882), Secs. 92, 95 — Mortgage by A and B of their joint property to C — B individually indebted to D on a pro-note — D obtaining decree against 'B', putting property to sale, purchasing the same and redeeming C's charge — D subrogated to rights of C — A is entitled to redeem his share by paying his dues on mortgage and expenses (Para 4) to D.

(B) Limitation Act (1908), Arts. 134, 148 — Suit for redemption — A and B mortgaging joint property to 'C' — D, a creditor of B in execution of a decree against B putting the property for sale, purchasing it and paying off charge of C — D who purchased the entire property openly selling it to others who also, to the knowledge of 'A', openly enjoying the property in full rights — Suit by A for redemption of his share is governed by Art. 134 and not by Art. 148. AIR 1937 Mad 451 and AIR 1954 Mad 650, Disting. AIR 1926 Mad 81 and AIR 1964 Mad 269 (FB) and AIR 1958 SC 706, Rel. on; AIR 1966 Mad 64, Ref. (Para 9)

HL/HL/D454/68

Cases Referred: Chronological Paras

- (1966) AIR 1966 Mad 64 (V 53)=
 (1965) 1 Mad LJ 614, Palanithurai
 Madikondar v. Veerappa Thevar
 (1964) AIR 1964 Mad 269 (V 51)=
 ILR (1963) Mad 1110 (FB), Valli-
 amma v. Sivathanu
 (1964) AIR 1964 Mad 281 (V 51)=
 ILR (1964) 1 Mad 530 (FB), Ruk-
 mini Ammal v. Venkatarama
 Iyer
 (1958) AIR 1958 SC 706 (V 45)=
 1959 SCR 479, Nani Bai v. Gita
 Bai
 (1954) AIR 1954 Mad 650 (V 41)=
 (1954) 2 Mad LJ 12, Karuppanan
 Servai v. Daivasigamania Pillai
 (1937) AIR 1937 Mad 451 (V 24)=
 45 Mad LW 300, Kelu v. Chek-
 kara Cheppan
 (1926) AIR 1926 Mad 81 (V 13)=
 ILR 49 Mad 29, Rukku Shetty v.
 Ramachandrayya
 (1919) AIR 1919 Mad 1097 (V 6)=
 34 Mad LJ 431, Muthaya Shetti
 v. Kanthappa Shetti

K. Sarvabhauman, T. R. Mani and S.
 Narayanaswami, for Appellant; P. R.
 Gopalakrishnan, P. Bhaskaran and K. N.
 Balasubramanian, for Respondents.

JUDGMENT:— This Second Appeal has been filed by the 2nd defendant in a suit for redemption of a possessory mortgage of the suit property made by the plaintiff along with his brother Venkataswami Mudaliar in favour of the 3rd defendant in the suit, and for partition and separate possession of a half share in the suit property. The Trial Court dismissed the suit holding that the contesting defendants in the suit have perfected their title by adverse possession against the plaintiff; but on appeal, the learned Subordinate Judge has overruled the defence of limitation and decreed the plaintiff's claim for a half share in the suit property.

2. A brief survey of the salient facts and findings in the case is necessary for appreciating the respective contentions of the parties on the question of limitation, the only question for consideration. The suit property, dry land of an extent of 3 acres 20 cents, in North Virinchipuram Village, North Arcot district, belonged to the plaintiff and his elder brother Venkataswami Mudaliar aforesaid. Under Ex-B-3 dated 9-2-1934 the two brothers usufructually mortgaged the property in favour of Subramania Mudaliar, 3rd defendant in the suit for a sum of Rs. 400/-. Venkataswami Mudaliar was indebted to one Muthuvelu Pillai under a promissory note, and Muthuvelu Pillai filed a small cause suit, S. C. No. 533 of 1935, on the file of the District Munsif's Court, Vellore. In execution of the dec-

ree thereon which had been transferred to the Original Side, Muthuvelu Pillai attached the entirety of the suit property and purchased the same in court-auction. Ex. B-1 dated 25-9-1936 is the sale certificate. It is seen from the sale certificate that the property had been sold subject to two agricultural loans of Rs. 150/- each and the suit usufructuary mortgagee Muthuvelu Pillai having taken formal delivery of the suit property through Court on 6-11-1936 discharged the usufructuary mortgage debt due to the 3rd defendant and redeemed the mortgage on 9-11-1936. Pursuant to the redemption which was on 9-11-1936 he entered on possession of the property. The deed of mortgage contains the relevant endorsement of discharge under dated 9-11-1936. There is also documentary evidence of actual possession and enjoyment of the suit property by Muthuvelu Pillai, till he sold the property to the 1st defendant in the suit and her sister one Rajammal under Ex. B-11 dated 24-1-1939. The 2nd defendant purchased the half share of Rajammal in the property under Ex. B-12 dated 19-11-1959 and B-13 dated 21-2-1960 for a total consideration of Rs. 6,000/- and the Courts below find that after Muthuvelu Pillai, the 1st defendant and Rajammal and after her, the 2nd defendant, had possession and enjoyment of the suit property in their own right as absolute owners. In fact, under Ex. B-9 dated 13-4-1942 the 1st defendant usufructually mortgaged the property in favour of one Abdul Azeez Sahib. The Trial Court has noticed that the evidence of D. Ws. 1 and 2, that is, Muthuvelu Pillai and the 2nd defendant, to the effect that Muthuvelu Pillai and his successors-in-title have been in possession and enjoyment of the suit property in their own right as absolute owners from 9-11-1936, the date of endorsement of discharge Ex. B-4, has not at all been challenged in cross-examination in any manner whatsoever by the plaintiff. It is observed by the Courts below, that the plaintiff has unequivocally admitted in evidence that he knew fully about Muthuvelu Pillai's possession of the suit property from the date of his purchase in court-auction and the possession and enjoyment of the property by the transferees from Muthuvelu Pillai, namely, the 1st defendant and her sister since 1939.

3. Another fact may be mentioned here, while Muthuvelu Pillai was in possession of the suit property, there was an attempt at trespass on the suit property by the plaintiff, his brother Venkataswami and his aunt Salammal and this led to a criminal complaint by Muthuvelu Pillai. The plaintiff admits that on this complaint of Muthuvelu Pillai for trespass, each of them was fined Rs. 5/-. Also

while it is seen that this Muthuvelu Pillai and subsequently his transferees have been in possession and enjoyment of the entire property asserting absolute title in themselves, it is found by the Courts below that under the Court auction sale in execution of the decree against Venkataswami Mudaliar, the interests of the plaintiff did not pass to the court-auction purchaser. The suit was on a promissory note executed by Venkataswami Mudaliar and the plaintiff clearly established that the promissory note debt was incurred by Venkataswami Mudaliar in his individual capacity. Muthuvelu Pillai had prayed only for a personal decree against Venkataswami Mudaliar and in the circumstances only the right, title and interest of Venkataswami Mudaliar in the suit property could pass to the court-auction purchaser Muthuvelu Pillai. The finding of the Courts below in this regard is that notwithstanding the fact that the decree-holder had proceeded to bring the entirety of the property to sale and purported to purchase the entirety of the property, the court-auction sale was not binding on the plaintiff and it could not pass the interests of the plaintiff to Muthuvelu Pillai. Of course, Muthuvelu Pillai had taken possession of the entirety of the property pursuant to the court-sale and had on redemption entered into possession of the entirety of the suit property.

4. On these facts, it is contended for the plaintiff that as he is not bound by the sale, his right of redemption is outstanding and he is entitled to redeem and secure possession of his share in the property. It is said that though Muthuvelu Pillai at the court-auction purchased the entire property subject to the usufructuary mortgage, in law, he acquired only the interests of his brother Venkataswami and stepping into his shoes, he became a co-mortgagor with the plaintiff. He acquired no higher right by the auction purchase. As a co-mortgagor he was entitled to redeem and get possession of the entire mortgaged property on 6-11-1936, his possession was in accordance with law in the right of a redeeming co-mortgagor and his possession could not be considered to be adverse to the plaintiff. His Court auction purchase secured to him only the right, title and interest of the judgment-debtor and nothing more, and his judgment-debtor had only the interests of a co-sharer in the equity of redemption. The stand for the plaintiff to this extent is perfectly justified and correct. Equally the charge and conviction for criminal trespass against the plaintiff, his brother and aunt by itself cannot make the possession of Muthuvelu Pillai hostile to the plaintiff. The attempted trespass was in 1937 and Muthuvelu Pillai's possession was in accord-

ance with law in the right of co-mortgagor who had paid off the entire mortgage amount. Muthuvelu Pillai was in the circumstances entitled to hold on to the property till he was paid as contribution the proportionate part of the mortgage debt and the expenses of redemption by the non-redeeming co-mortgagor-plaintiff. When Muthuvelu Pillai as a co-mortgagor redeemed the mortgage, the mortgage as to his half share in the property was extinguished and as to the share of the plaintiff, he stood in the shoes of the mortgagee he had redeemed, vis-a-vis, the co-mortgagor Muthuvelu Pillai stood subrogated to the rights of the mortgagee who was redeemed—see Sections 92 and 95 of the Transfer of Property Act. Learned Counsel contended that such being the character of Muthuvelu Pillai's possession the case is governed by Article 148 of the Indian Limitation Act and the plaintiff has 60 years from the date of the mortgage to redeem his half share in the suit property. It was submitted that there has been no redemption by him and that his right of redemption had not been extinguished by any act of his or by any decree of Court to bar him from suing for redemption.

5. Per contra, it was urged for the defendants that Muthuvelu Pillai and after him, his transferees have been openly and notoriously proclaiming against the plaintiff, rights in the entirety of the suit property and that therefore they have prescribed title to the entirety of the suit property by adverse possession. It is this argument that found acceptance at the hands of the learned District Munsif. The learned Subordinate Judge on appeal accepted the contention on behalf of the plaintiff that the plaintiff as one of the mortgagors had 60 years to redeem and he cannot be forced to redeem at an earlier date merely because Muthuvelu Pillai and his transferees were asserting rights putting forward adverse claims. The learned Subordinate Judge was of the view that the plaintiff was not legally bound to sue for possession merely because adverse claims were put forward by Muthuvelu Pillai and his transferees. Reliance was placed by the learned Subordinate Judge on the decision in *Kelu v. Chekkara Cheppan*, AIR 1937 Mad 451 and this decision is now again pressed for the plaintiff. It is observed in that case as below:—

"When a person who is not a mortgagor, under a mistaken claim, pays off a mortgage debt, he cannot extinguish it; for he has no right to do so. The only person who can extinguish a mortgage, is the person who is entitled to redeem that mortgage and merge the mortgage in his own rights of mortgagor or mortgagee."

Learned Counsel for the plaintiff lays considerable stress on this observation. But I fail to see its application to the facts of the present case. That is a case of a person in the bona fide belief that he was entitled to redeem, redeeming the mortgage. In that case it is observed that when a person believes that he was entitled to redeem the mortgage either under the impression that he was a mortgagor or that he had some other right in the property which would entitle him to redeem, on payment he would be entitled to the rights of the mortgagee by way of subrogation or a like equitable principle. But on such payment the mortgage debt as such was not extinguished. It is also observed examining the question of adverse possession by the person so redeeming, that the mere assertion by a person in possession of the property when the mortgagor had no immediate right to possession, which was not coupled with some act definitely interfering with the rights of the mortgagor, would not amount to an ouster of the mortgagor, that would force him to take some immediate action under pain of losing rights to the property by adverse possession. It was held in that case that a mortgagor who had 60 years to redeem could not be forced to redeem at an earlier date, merely because some one was asserting adverse claims to the property. It is said that the correct test applicable in these cases is whether the possession and acts of the person claiming adversely can be referred to any legal right that he possessed. Submissions were made based on this decision and other decisions were also referred to for contending that Muthuvelu Pillai and the transferees from him must be looked upon only as mortgagees.

6. The facts of this case are not so simple for the application of the decision in AIR 1937 Mad 451. It may be that if possession had continued in Muthuvelu Pillai, the plaintiff could rely on Article 148 of the Limitation Act and claim full 60 years, from the date of the mortgage. But here Muthuvelu Pillai had conveyed the entirety of the property, as absolute owner even in 1939 under Ex. B-11 dated 24-1-1939 in favour of Unnamalai Ammal, the first defendant and her sister Rajammal. Unnamalai Ammal and Rajammal had entered on the property as absolute owners and admittedly to the knowledge of the plaintiff they have been asserting rights in the property as owners. The suit was filed only on 22-11-1960. From 1939 the 1st defendant and her sister have been enjoying the property as owners. After 20 years of enjoyment, Rajammal conveys her half share in the property under two sale deeds Exts. B-12 and B-13, one in 1959 and another in 1960 to the present 2nd

defendant. In my view whether Article 144 of the Limitation Act could be availed of or not by the defendants, clearly Article 134 of the Indian Limitation Act will apply. Under Article 134 of the Limitation Act, a period of 12 years is provided for a suit to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for valuable consideration, the period commencing to run from the date when the transfer becomes known to the plaintiff. The decision in AIR 1937 Mad 451 distinguishes the case therein under consideration from cases to which Article 134 is applicable. My attention was drawn by the learned Counsel for the plaintiff to the decision in Karuppanan Servai v. Daivasigamania Pillai, 1954-2 Mad LJ 12 = (AIR 1954 Mad 650). This again does not help the plaintiff, but on the contrary it is a decision directly in favour of the defendant. Learned Counsel for the plaintiff relied on the observations in that judgment to the effect:

"The transfer by the mortgagee as owner does not operate as a discharge of the mortgage by the mortgagor and the transferee is entitled as against the mortgagor at least to what his transferor was entitled. If he is then entitled as against the mortgagor to the rights of the original mortgagee, is he not also subject to the obligations of his transferor in favour of the mortgagor? The real question in such cases is not what the transferee purported to acquire, but what in fact he did acquire and if what he did acquire was only the interest of the mortgagee, he is liable under the law to be redeemed as a mortgagee and Article 148 will apply."

But proceeding, their Lordships have discussed the relative scope of Articles 134 and 148 and it is observed:—

"If the defendant is under liability to be redeemed under Article 148, he is also entitled to the protection afforded by Article 134."

The question now under consideration is whether the defendants could claim the benefit of Article 134 and whether the requirements of that Article are satisfied. As pointed out in the said decision at page 20,

"To understand the true scope of Article 134 it is necessary to read it along with Article 148. Article 148 provides a period of 60 years for redemption of a mortgage and Article 134 cuts down that period to 12 years when there is a transfer by the mortgagee. Article 134 is therefore, an exception to Article 148. In both the Articles the same word mortgagee is used. It must clearly have the

same meaning in both the Articles. If 'mortgagee' in Article 148 should mean only the original mortgagee, then the present action for redemption of Exhibit P-1 would not be maintainable as against the defendant who is purchaser from Balaguru. But if 'mortgagee' in Article 148 includes all persons who succeed to the interest of the mortgagee, it must bear that meaning under Article 134 as well and the appellant will be entitled to its benefit. If the defendant is under liability to be redeemed under Article 148, he is also entitled to the protection afforded by Article 134. Likewise, the right of a mortgagor to redeem under Article 148 is subject to the bar enacted in Article 134 in favour of a transferee."

In that case while the Court auction purchase by which Balaguru Naidu became entitled to the property was held not to confer the protection of Article 134, the transfer under Exhibit D-14 by Balaguru which purported to convey the full title with land to the purchaser was held to be a transfer within the meaning of Article 134, and a finding was called for whether the plaintiff or his predecessor-in-title who had instituted the suit for redemption had knowledge of the conveyance by Balaguru and, if so, was it more than 12 years prior to the suit. It was held that the conveyance in question which purported to transfer all the property absolutely and not a mere assignment of the mortgage would fall within the scope of Article 134 and on the finding received that the plaintiff and his predecessor-in-title had knowledge of the transfer more than 12 years prior to the institution of the suit, the claim for redemption was dismissed.

7. If the plaintiff in this case would look upon Muthuvelu Pillai as in the position of a mortgagee and rely on Article 148, the defendants could well plead, as held in the above decision, on the facts of the case, that the period provided under Article 148 was cut down by Article 134. The learned Judges in the above case referred with approval to the observations of Seshagiri Ayyar, J., in *Muthaya Shetti v. Kanthappa Shetti*, 34 Mad LJ 431=(AIR 1919 Mad 1097) that Article 134 is really a branch of the law of prescription and the reason for giving the protection of the statute of repose is weightier in the case of the transferees from representatives of the mortgagee than in the case of transferees from the original mortgagee. The defendants referred in this connection to the decision in *Rukku Shetty v. Ramachandrayya*, ILR 49 Mad 29=(AIR 1926 Mad 81) which is referred to in 1954-2 Mad LJ 12=(AIR 1954 Mad 650). In this case Article 134 was applied to a case where a mortgagee in possession transferred the property

under a sale deed for consideration to another and put him in possession and what was bargained for by the transferee was an absolute sale though he knew that the transferor had only a mortgagee's interest, on a suit instituted by the mortgagor. In *Nani Bai v. Gita Bai*, AIR 1958 SC 706 it is said by the Supreme Court:

"Article 134 of the Limitation Act contemplates a sale by the mortgagee in excess of his interest as such. The legislature, naturally, treats the possession of such transferees as wrongful, and therefore, adverse to the mortgagor, if he is aware of the transaction. Hence the longer period of 60 years for redemption of the mortgaged property in the hands of the mortgagee or his successors-in-interest, is cut down to the shorter period of 12 years' wrongful possession, if the transfer by the mortgagee is in respect of a larger interest than that mortgaged to him. In order, therefore, to attract the operation of Article 134, the defendant has got affirmatively to prove that the mortgagee or his successor-in-interest has transferred a larger interest than justified by the mortgage. If there is no such proof, the shorter period under Article 134 is not available to the defendant in a suit for possession after redemption."

The requisite proof is clearly available to the defendants before me. For the defendants, reliance is also placed on the decision in *Palanithurai Madikondar v. Veerappa Thevar*, (1965) 1 Mad LJ 614=(AIR 1966 Mad 64) where Article 134 was applied to a case where the successors-in-interest of the original mortgage claiming absolute interest in the properties mortgaged purported to transfer full ownership thereof to the transferee. It is not necessary to refer to all the decisions relied on by the plaintiff or for the defendants. Learned Counsel for the plaintiff drew my attention also to the decision of a Full Bench of this Court in *Valliamma v. Sivathanu*, AIR 1964 Mad 269 (FB) where again it is pointed out that while a redeeming co-mortgagor has a period of 12 years under Article 132 of the Limitation Act for recovery from his other co-mortgagors, the aliquot share of the mortgage money, there should be a corresponding right in a non-redeeming co-mortgagor to obtain possession of the properties on payment of their share of the mortgage money within that period. The following observations in the Full Bench were referred to:—

"It will be plain that there will be two periods within which a non-redeeming mortgagor can obtain his property from his co-mortgagor who had redeemed, the first is based on the rule of subrogation and the second is correlative obligation

in the redeeming co-mortgagor to give up the property belonging to his co-mortgagor on being paid the money due by him. In the former case where the mortgage is possessory the period of limitation will be governed by Article 148and the starting point for limitation will be same as for the original mortgage redeemed. In the latter case, the non-redeeming co-mortgagor will have a period of 12 years from the date of redemption of the original mortgage by the other co-mortgagor. It will be open to the non-redeeming co-mortgagor to take advantage of any one of these periods whichever is to his advantage."

These observations cannot help the plaintiff in this case as the persons in possession who have to be dispossessed by the plaintiff are not redeeming co-mortgagors but transferees from him who claim under conveyances by the redeeming co-mortgagor of the entirety of the property as if he had absolute title to the property. It is this transfer in this case that attracts Article 134 of the Limitation Act.

8. Reference may be made to the Full Bench decision of our High Court in *Rukmini Ammal v. Venkatarama Iyer*, AIR 1964 Mad 281 (FB). In that case one of the co-mortgagors in two other mortgages purported to sell the entire mortgagor's interest to a third party who filed the suit for redemption and after he secured possession, the other co-mortgagor filed a suit for redemption, partition and separate possession of his half share in the properties and the question that arose for consideration was the plea of limitation. The purchaser who redeemed the entirety of the properties relied on Article 144 of the Limitation Act. There was no further transfer in that case and the person in possession who was sought to be redeemed had acquired possession of the property only on redemption. It was observed:

"A claim by a non-redeeming co-mortgagor to recover his share of the mortgage property from the redeeming co-mortgagor who came into possession of it on redemption can be made on payment of his share of mortgage amount, costs of redemption etc. No right to possession exists without such payments as under the law the redeeming co-mortgagor is subrogated to the rights of the original mortgagee; the co-mortgagor's suit even if it be for possession will in substance be only for redemption.....Therefore, the period of limitation applicable for redemption by the non-redeeming co-mortgagor of his share of the property will be the same as that for redemption of the original mortgage."

In that decision the Court did not rule out the possibility of adverse possession

and the applicability of Article 144 even in such cases, but on the facts of the case, held that there was no ouster of the non-redeeming co-mortgagor by the other party. In fact they observed:—

"This does not mean that there could be no adverse possession with regard to a share in an equity of redemption. What all we say is that there is nothing in the present case beyond the notice dated 23-9-1934 to show that the first respondent's father had prescribed any title by adverse possession to a half share in the equity of redemption possessed by the other mortgagor."

In the absence of ouster or adverse possession, a preliminary decree for redemption was granted.

9. In the present case, if the plaintiff would have the suit as one for possession on redemption and rely on Article 148, in its wake, it will draw in Article 134. If the plaintiff would look upon Muthuvelu Pillai as mortgagee for purposes of Article 148, the persons claiming under him, would be transferees from him for purposes of Article 134. There is no dispute that in this case Muthuvelu Pillai had transferred a larger interest than what he acquired in law under the Court auction purchase in execution of the decree against his mortgagor. As a matter of law, the Courts below have found that the interest of the plaintiff in the property had not been transferred by the court auction sale to Muthuvelu Pillai. It is admitted by the plaintiff that he has been aware of the transfer by Muthuvelu Pillai and the possession of the defendants following such transfer. On the evidence it is clearly made out that for over 20 years to the knowledge of the plaintiff, the transferees from Muthuvelu Pillai have been in enjoyment of the property in assertion of ownership of the entirety of the property. It follows that the plaintiff's suit for redemption has to fail under Article 134. It is not necessary to consider the defence based on Article 144 of the Limitation Act. If Article 144 is applied, even then clearly, the action is barred.

10. In the result, the second appeal is allowed, the decree and judgment of the lower Appellate Court are set aside and that of the Trial Court dismissing the suit restored. Having regard to all the circumstances, the parties will bear their respective costs throughout.

11. No leave.

BDB/D.V.C.

Appeal allowed.

THE

All India Reporter

1969

Manipur J. C.'s Court

IR 1969 MANIPUR I (V 56 C 1)

C. JAGANNADHACHARYULU, J. C.

Khundrakpam Yaima Singh, Appellant
v. Mayengbam Tomchou Singh, Respondent.

Second Misc. Civil Appeal Cases Nos. 2 and 3 of 1965, D/- 2-12-1967, against judgment of Dist. J., Manipur, D/- 17-2-1965.

(A) Civil P. C. (1908), O. 21, R. 35 — Decree giving option to decree-holder for possession of land with or without improvements made by judgment-debtor — Decree-holder electing to possession without improvements — Executing Court cannot go behind decree and has to get the improvements removed. (Para 5)

(B) Civil P. C. (1908), O. 21, R. 10 — Execution petition filed within three years of decree — Execution petition is step in aid of execution and saves limitation — Limitation Act (1908), Art. 182. AIR 1957 Trav-Co 293, Distinguished.

(Para 7)

Cases Referred: Chronological Paras
(1957) AIR 1957 Trav-Co 293 (V 44)

=ILR 1956 Trav-Co 980, Krishna Pillai Narayana Pillai v. Neelakanta Pillai 7

(1954) AIR 1954 Trav-Co 1 (V 41)

=ILR 1953 Trav-Co 858 (FB), Krishna Panicker v. Kunchu 7

A. Ibopishak Singh, for Appellant; B. B. Sen, for Respondent.

JUDGMENT:— These are two appeals filed by Khundrakpam Yaima Singh of Terakeithel against the common judgment and decrees in Misc. Civil Appeals Nos. 14 of 1963 and 15 of 1963 disposed of by the District Judge, Manipur on

17-2-1965, affirming the orders of the Munsiff, Manipur in Misc. Cases Nos. 110 of 1962 and 111 of 1962 in Title Suit No. 350 of 1950 and Money Suit No. 48 of 1955 respectively.

2. Both the matters are connected and were disposed of by common judgment by the Munsiff as well as the District Judge. So, both the appeals are disposed of by a common judgment here also.

3. The facts of the cases are very simple. Tomchou Singh of Terakeithel, Yengkhom Leirak, (the respondent in both the appeals) filed Title Suit No. 350 of 1950 on the file of the Munsiff's Court, Manipur, for pre-emption of certain piece of land against Yaima Singh, (the appellant in both the appeals). The suit was decreed on 29-6-1954. He filed E. P. No. 65 of 1954 for execution of the decree. But, it was dismissed on 6-12-1958. Again, within 3 years therefrom he filed Second Execution Petition No. 27 of 1959. It was dismissed on 7-9-1959. Then, he filed a third Execution Petition No. 16 of 1962 on 22-2-1962 within 3 years. The appellant filed an objection petition Civil Misc. Case No. 111 of 1962, objecting to the execution. The Munsiff dismissed the objection petition. The appellant herein carried the matter in appeal to the District Judge in Civil Appeal No. 15 of 1962. The District Judge also dismissed it. So, the appellant filed Second Misc. Civil Appeal No. 3 of 1965 on the ground that the decree dated 29-6-1954 passed in Title Suit No. 350 of 1950 is barred by limitation.

4. The appellant Yaima Singh, also filed Money Suit No. 48 of 1965 in the Munsiff's Court against the respondent Tomchou Singh for recovery of Rs. 500/- in respect of improvements made by him and structures constructed by him on the land covered by the decree in Title

Suit No. 350 of 1956. The suit was decreed by the Munsiff on 24-2-1956. The respondent herein, namely, Tomchou Singh carried the matter in appeal to the District Judge in Civil Appeal No. 64 of 1956. The District Judge confirmed the judgment and decree of the Munsiff. Tomchou Singh carried the matter in second appeal to this Court in Civil Appeal No. 29 of 1957. This Court held that Yaima Singh, the appellant herein would be entitled to recover Rs. 500/- from Tomchou Singh, the respondent, only if the respondent Tomchou Singh wanted to recover possession of the land along with the improvements and structures, but that the appellant Yaima Singh would not be entitled to recover that amount in case the respondent Tomchou Singh did not want the improvements and structures. Vide Ext. B. Subsequently, the appellant Tomchou Singh filed execution Petition (E. P. No. 96 of 1959) for recovery of Rs. 500/-.

The matter came up before this Court in Misc. Civil Appeal No. 3 of 1961. This Court dismissed the E. P. reiterating the point that was decided in Civil Appeal No. 29 of 1957 (Vide Ex. C). Still, the appellant filed E. P. No. 61 of 1962 on 23-5-1962, for recovery of Rs. 500/- to execute the decree in Money Suit No. 48 of 1955. The respondent Tomchou Singh filed an objection petition in Misc. Case No. 110 of 1960 stating that there was no executable decree, as he wanted to take the land without the improvements and structures. The Munsiff upheld his objection and struck off the E. P. The appellant Yaima Singh filed Misc. Civil Appeal No. 14 of 1963 before the District Judge. The District Judge dismissed it, upholding the judgment of the Munsiff. So, the appellant Yaima Singh filed Civil Second Misc. Appeal No. 2 of 1965 against the judgment and decree of the District Judge in Civil Appeal No. 14 of 1963.

5. The only point that was argued in Second Misc. Civil Appeal No. 2 of 1965 and which arises for determination is whether the two Courts below were correct in upholding the objection of the respondent Tomchou Singh in Misc. Case No. 110 of 1962 and dismissing the E. P. No. 61 of 1962 in Money Suit No. 48 of 1955. A perusal of Exts. B. and C. shows that this Court held on two previous occasions in the Second Civil Appeal No. 29 of 1957 as well as in Misc. Civil Appeal No. 3 of 1961 that the decree in Money Suit No. 48 of 1955 is executable only if the respondent Tomchou Singh wants to recover the improvements and structures also along with the land. But, he does not want to take possession of the improvements and structures. He wants to take delivery of the land only.

The learned Counsel for the appellant contended that the improvements and structures formed part of the corpus, that they cannot be separated and that, therefore, the decrees passed by this Court are inexecutable. The executing Court cannot go behind the decree, which is bound by it. No doubt, the appellant Yaima Singh would be put to loss because, when the structures and the improvements are removed, they would be of no avail on their removal from the land. But, the Court cannot help the position. He has got to remove the super structures and the improvements made by him as the respondent does not want them. So, both the Courts are correct in interpreting the decrees evidenced by Exts. B. & C. Misc. Civil Second Appeal No. 2 of 1965 is, therefore, liable to be dismissed.

6. The only point, which was argued and which arises for determination in Misc. Second Civil Appeal No. 3 of 1965, is whether the decree dated 29-6-1954 in Title Suit No. 350 of 1950 is barred by limitation. As already stated E. P. No. 65 of 1954 was filed within 3 years, namely, on 6-12-1958. E. P. No. 27 of 1959 was also filed within 3 years therefrom and was dismissed on 7-9-1959. The third E. P. No. 16 of 1962 was filed within 3 years on 22-2-1962. The period of 12 years also did not expire from 29-6-1954 when the said E. P. No. 16 of 1962 was filed by the respondent.

7. The contention of the learned Counsel for the appellant is that E. P. No. 65 of 1954 and E. P. No. 27 of 1959 do not save limitation, that they were not filed in revival and continuation of each other and that, therefore, E. P. No. 16 of 1962 is barred by limitation. He relied on Krishna Panicker v. Kunchu, ILR 1953 Trav-Co 858=AIR 1954 Trav-Co 1 (FB) and Krishna Pillai Narayana Pillai v. Neelakanta Pillai Velayudhan Pillai, ILR 1956 Trav-Co 980=AIR 1957 Trav-Co 293. The former case arose under Section 48, Civil Procedure Code and it was held that a fresh application after the expiry of the period of 12 years from the date of the decree would not save the decree from the bar of limitation. The second case referred to the first one and followed it. These cases have no bearing on the facts of the present case at all. E. P. No. 65 of 1954 and E. P. No. 27 of 1959 are steps-in-aid of the execution. They do save limitation. There is no need for revival or continuation of the same prayers in the E. Ps. Nor is there any need that the prayer in the E. Ps. must be the same. It is sufficient if an E. P. is filed properly within 3 years from the date of the decree asking the Court to take steps in execution of the decree. Then, such an E. P. will be a step-in-aid of the execution and saves limitation, even though

it is not subsequently prosecuted and is dismissed. E. P. No. 16 of 1962 was filed on 22-2-1962 within 8 years from 29-6-1954. So, it was in time. Now, certainly there will be a bar under Section 48, Civil Procedure Code if a fresh E. P. is to be filed. But, it was filed within 8 years and is still pending and the Munsiff will have to execute the decree. It is not barred by limitation.

8. There is no substance in either of the two appeals. Accordingly, both the appeals are dismissed with costs.
BNP/D.V.C. Appeals dismissed.

AIR 1969 MANIPUR 3 (V 56 C 2)

C. JAGANNADHACHARYULU, J. C.

Leitanthem Bidhu Singh and others, Petitioners v. Khangjrakpam Ibobi Singh and others, Respondents.

Criminal Ref. Case No. 2 of 1965, D/- 8-9-1967.

Criminal P. C. (1898). Ss. 145, 510A, 539, 539A and 539AA — Oaths Act (1873), S. 4 — In order that affidavit should be valid evidence in proceeding under S. 145, it may be sworn before any Magistrate who is otherwise competent to administer oath under S. 4 of Oaths Act and receive evidence — Words 'having authority to receive evidence' in S. 4 cannot be restricted to authority of Court to receive evidence in any particular case to which evidence relates but can be extended to receive evidence in any case.

The provision relating to affidavits under sub-secs. (1) and (4) of S. 145, Cr. P. C. was made by the Code of Criminal Procedure (Amendment Act XXVI of 1955), so that the enquiry relating to the question of possession might be a summary one. The provisions in Ss. 499 (3), 510A and 539A were made by the same Amendment Act (Act XXVI of 1955). An affidavit is a declaration as to the facts made in writing before a person having authority to administer oath. The two provisions in the Cr. P. C. which lay down the authorities before whom affidavits may be sworn, are Ss. 539 and 539AA. Section 539 applies only to the affidavits filed in the High Court. But, affidavits filed in the other Courts are governed by S. 539AA, which lays down that an affidavit to be used under S. 510A or S. 539A Cr. P. C. may be sworn or affirmed either in the manner prescribed in S. 539 or before any Magistrate. The authorities, who can administer oaths and affirmations, are enumerated by S. 4 of the Oaths Act (Act No. X of 1873), and any Court or any person having by law or consent of parties authority to receive evidence is com-

petent to administer oath or affirmation. Section 145 (1) Cr. P. C. does not lay down before which authorities affidavits, filed thereunder, should be sworn. But, S. 510A Cr. P. C., which was inserted by the same Amendment Act (Act XXVI of 1955), is the general section which applies to all such formal affidavits filed in any inquiry or trial or other proceeding under the Cr. P. C. Therefore an affidavit filed in the proceedings under Sec. 145 (1), Cr. P. C. can be affirmed or sworn before any Magistrate who is competent to take evidence. (Paras 5 & 6)

The words "having authority to receive evidence" in Clause (a) of S. 4 of the Oaths Act cannot be restricted to the authority of the Court to receive evidence in the particular case, to which the evidence relates. But, it refers to the jurisdiction and power of the Court to receive evidence in any case, which jurisdiction or authority must be conferred upon the Court either by law or by consent of the parties. If a third class Magistrate has by law the authority to receive evidence, he is competent to administer oaths and affirmations to everyone under S. 4 of the Indian Oaths Act. AIR 1966 Punj 528 Rel. on; AIR 1966 Raj 5 and AIR 1963 All 256, Dissent. from.

(Paras 7, 8)

Cases Referred: Chronological Paras

(1966) AIR 1966 Punj 528 (V 53)=
1966 Cri LJ 1479, Ahmad Din v. Abdul Salem 7

(1966) AIR 1966 Raj 5 (V 53)=1966
Cri LJ 60, Hemdan v. State of Rajasthan 2, 7

(1963) AIR 1963 All 256 (V 50)=
1963 (1) Cri LJ 722, Wahid v. State 6

Bhubon Singh, for Petitioners, Except Nos. 8, 7, 10, 20, 27 and 55; Y. Imo Singh, for Respondents Nos. 1 to 61 and N. Ibotombi Singh, Public Prosecutor for Respondent No. 62. (In Cr. Ref. No. 2 of 1965).

Y. Imo Singh, for Petitioners; T. Bhubon Singh, for Respondents. (In Cri. Revn. No. 14 of 1965).

T. Bhubon Singh, for Petitioners. (In Cri. Ref. No. 29 of 1966).

R. K. Manisana Singh, for Petitioner; B. B. Sen and J. B. Paul, for Respondents No. 1, 2 and 3.

N. Ibotombi Singh, Public Prosecutor, for Respondent No. 10. (In Cri. Ref. No. 31 of 1966).

R. K. Dorendra Singh, for Petitioner; Ch. Nodiachand Singh, for Respondent (in Cri. Ref. No. 35 of 1966).

Ch. Nodiachand Singh, (for No. 1), N. Ibotombi Singh, Public Prosecutor (for No. 3), for Respondents. (In Cri. Ref. No. 9 of 1967).

Ch. Nodiachand Singh, for Respondent. (In Cri. Ref. No. 11 of 1967).

R. K. Dorendra Singh, for Petitioner;
T. Bhubon Singh, for Respondent. (In
Cri. Ref. No. 23 of 1967).

ORDER:— In all the above cases referred to this Court either by the Additional Sessions Judge or by the Principal Sessions Judge, Manipur, under Section 438 Cr. P. C., the common question which arises for determination is whether the affidavits, sworn before any Magistrate, other than the concerned District Magistrate or S. D. M. or Magistrate First Class, before whom proceedings under Section 145 Cr. P. C. are pending, should not be considered by him in coming to a conclusion under Section 145 (4), Cr. P. C.

2. In the above cases, affidavits, sworn before Magistrate, either First Class or Second Class in Manipur, were filed in the proceedings under Section 145 Cr. P. C. before the S. D. Ms. in the various cases. They were not sworn before the concerned S. D. Ms. before whom the proceedings were pending. The S. D. Ms. relied on them and passed orders under Section 145 (4) Cr. P. C. The aggrieved parties assailed the orders in revision before the Sessions Court, Manipur. The Additional Sessions Judge relied upon the decision reported in *Hemdan v. State of Rajasthan*, AIR 1966 Raj 5 and held that the affidavits, which were sworn before some other Magistrates, could not be received as evidence under Section 145 (4) Cr. P. C. and referred the cases to this Court for quashing the orders of the S. D. M. In the cases referred to this Court by the Principal Sessions Judge, the counsel for the revision petitioners also raised the same point in this Court.

3. The question for determination is whether affidavits sworn before Magistrates, other than the concerned District Magistrate or S. D. M. or Magistrate of the First Class before whom proceedings under Section 145 Cr. P. C. are pending, cannot be admitted as evidence and perused by him under Section 145(4) Cr. P. C.

4. There are some provisions in Criminal Procedure Code which permit parties to file affidavits in certain cases:

(a) Under Section 74, when a summons issued by a Court is served outside the local limits of its jurisdiction, and in any case where the Officer who has served a summons is not present at the hearing of the case, an affidavit purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in the manner provided by Section 69 or Section 70) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made

therein shall be deemed to be correct unless and until the contrary is proved.

(b) Under Section 145 (1), whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the First Class makes an enquiry regarding a dispute concerning land etc., which is likely to cause a breach of the peace, he shall make an order in writing inter alia directing the parties to put in written statements and send documents or to adduce, by putting in affidavits, the evidence of such persons as they rely upon in support of their claims. Under sub-section (4) of Section 145 Criminal Procedure Code he should, without reference to the merits or the claims of the parties to a right to possess the subject of dispute, peruse the statements, documents and affidavits, if any, so put in, hear the parties and conclude the inquiry, as far as may be practicable, within a period of two months from the date of the appearance of the parties before him.

(c) Under Section 499 (3), for the purpose of determining whether the sureties are sufficient under Section 499 (1), Criminal Procedure Code, when an accused is released on bail on his own bond and the bond of sureties, the Court may, if it so thinks fit, accept affidavits in proof of the facts contained therein, relating to the sufficiency of the sureties or may make such further inquiry as it deems necessary.

(d) Under Section 510A, the evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under the Code. The Court may, however, if it thinks fit and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit.

(e) Under Section 526 (4) every application for the exercise of the power conferred by Section 526, for transfer of a case shall be made by motion, which shall, except when the applicant is the Advocate-General, be supported by affidavit or affirmation.

(f) Under Section 539A, when any application is made to any Court in the course of any enquiry, trial or other proceedings under the Criminal Procedure Code, and allegations are made therein respecting any public servant, the applicant may give evidence on the facts alleged in the application by affidavit, and the Court may, if it thinks fit, order that the evidence relating to such facts be so given.

5. It may be noted that, out of the various provisions relating to the affidavits mentioned above, the provision relating to affidavits under sub-sections (1)

and (4) of Section 145 Criminal Procedure Code was made by the Code of Criminal Procedure (Amendment Act XXVI of 1955), so that the enquiry relating to the question of possession might be a summary one. Affidavits are allowed to be put in to avoid undue delay in the disposal of the matter, which should be done as far as may be practicable, within two months from the date of appearance of the parties. The provisions in Sections 499 (3), 510A and 539A were made by the same Amendment Act (Act XXVI of 1955). An affidavit is a declaration as to the facts made in writing before a person having authority to administer oath. The two provisions in the Criminal Procedure Code which lay down the authorities, before whom affidavits may be sworn, are Secs. 539 and 539AA. Section 539 applies only to the affidavits filed in the High Court. But, affidavits filed in the other Courts are governed by Section 539AA, which lays down that an affidavit to be used under Section 510A or Section 539A Criminal Procedure Code may be sworn or affirmed either in the manner prescribed in Section 539 or before any Magistrate. The authorities, who can administer oaths and affirmations, are enumerated by Section 4 of the Indian Oaths Act (Act No. X of 1873), which runs as follows:

"4. The following Courts and persons are authorised to administer, by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law:

(a) all Courts and persons having by law or consent of parties authority to receive evidence;

(b) the Commanding Officer of any Military, Naval, or Air Force Station or Ship occupied by troops in the service of Government.

Provided—

(1) that the oath or affirmation be administered within the limits of the station, and

(2) that the oath or affirmation by such as a Justice of the Peace is competent to administer".

So, any Court or any person having by law or consent of parties authority to receive evidence is competent to administer oath or affirmation. Section 145 (1) Criminal Procedure Code does not lay down before which authorities affidavits, filed thereunder, should be sworn. But, S. 510 (510A ?) Criminal Procedure Code, which was inserted by the same Amendment Act (Act XXVI of 1955), is the general section, which applies to all such formal affidavits filed in any inquiry or trial or other proceeding under the Criminal Procedure Code. So, no special

provision was made in Section 145 (1) Criminal Procedure Code as to the authorities, before whom affidavits filed in the inquiry under Section 145 (1) Criminal Procedure Code should be sworn. It therefore follows that an affidavit filed in the proceedings under Section 145 (1), Criminal Procedure Code can be affirmed or sworn before any Magistrate who is competent to take evidence. This is also the general practice in several Courts in India.

6. There are however two decisions one of the Allahabad High Court and another of the Rajasthan High Court — which took the contrary view. In *Wahid v. State*, AIR 1963 All 256, it was held that an affidavit under Section 145, Criminal Procedure Code cannot be sworn or affirmed before a Commissioner or Oath Officer appointed by the High Court, in as much as, such an affidavit can be filed only in the High Court under Section 539 Criminal Procedure Code. This is a correct proposition of law. But, it was further held that the affidavits, which have to be filed in the proceedings under Section 145 Criminal Procedure Code can be sworn by the Magistrate before whom the proceedings are pending decision. If this ruling implies that the affidavits should not be sworn before any other Magistrate, with due respect, I am unable to agree, for reasons already stated. The language of Sections 510A and 539AA, Criminal Procedure Code is wide enough to include any other Magistrate (legally competent to take evidence) as an authority before whom an affidavit may be sworn.

7. Then there is the decision of the Rajasthan High Court in AIR 1966 Raj 5, relied on by the Additional Sessions Judge, who made some of the references in question. Bhargava, J., held that the affidavits for proceedings under Section 145, Criminal Procedure Code cannot be sworn before a Third Class Magistrate or any other Magistrate except by the Sub-Divisional Magistrate, before whom the proceedings are pending or by an Officer empowered by him in that behalf. He further held that Section 510A, Criminal Procedure Code, which is a general section in the Criminal Procedure Code applicable to affidavits to be filed in Courts other than the High Courts, applies to a case where the evidence is of a formal character, that evidence in the proceedings under Section 145 Criminal Procedure Code regarding possession of immovable property cannot be said to be of formal character but that, on the other hand, the evidence is of a substantive nature and that therefore Section 510A Criminal Procedure Code and consequently Section 539AA do not apply. With due respect I am unable to agree with this reasoning.

Prior to the amendment of Section 145 (4) by the Amendment Act (Act XXVI of 1955), it required the Magistrate *inter alia* to receive all such evidence as might be produced by the parties. But, as it was sought to be made summary and speedy, the Amendment Act (Act XXVI of 1955) replaced the provision for taking evidence by affidavits. The dictionary meaning of "formal" is "according to form or established mode"; "relating to form"; "ceremonious, punctilious, methodical" "having the form only"; "having the power of making a thing what it is"; "essential" "proper". Vide Chamber's Twentieth Century Dictionary. What is substantive in the case is the written statement of the claim, as regards the fact of actual possession of the subject of dispute, put in by each party. It is formally proved by affidavits and supported by documents. So, the affidavits are formal. As such, Section 510A, Criminal Procedure Code and consequently Section 539AA apply. The other ground, on which Bhargava, J., held that an affidavit cannot be sworn before a Third Class Magistrate or any other Magistrate, who has no jurisdiction to enquire into the case under Section 145, Criminal Procedure Code, is that, under Section 4 of the Indian Oaths Act, it is only in the discharge of the duty or in exercise of the powers imposed or conferred on them respectively by law that Courts as well as persons are authorised to administer oath and affirmation and that, therefore, a Magistrate, who has no authority to receive evidence in any matter or upon whom no power is imposed or conferred by law, has no authority to administer oath or affirmation. With great regard to the learned Judge I am unable to agree with this interpretation put by him. The words "having authority to receive evidence" in Clause (a) of Section 4 of the Oaths Act cannot be restricted to the authority of the Court to receive evidence in the particular case, to which the evidence relates. But it refers to the jurisdiction and power of the Court to receive evidence in any case, which jurisdiction or authority must be conferred upon the Court either by law or by consent of the parties. If a Third Class Magistrate has by law the authority to receive evidence, he is competent to administer oaths and affirmations to everyone under Section 4 of the Indian Oaths Act. If the parties are directed to swear before the concerned First Class Magistrate, who is enquiring into the case, then it will only be a needless waste of time for him and the proceedings are bound to drag on. The witnesses, who are out of station and who cannot be conveniently called to the Court, will have to be compelled to appear before the concerned Magistrate

or a Magistrate authorised by the concerned Magistrate to administer the oath. The Learned Counsel for the petitioners argued that if the inquiring Magistrate himself administers the oath, he can remember the facts sworn to and that this will facilitate a speedy enquiry. But, this argument does not hold good, if the inquiring Magistrate authorises another Magistrate to administer the oath, as he is competent to authorise another to do so. I am in full agreement with the decision of the Punjab High Court in Ahmad Din v. Abdul Salem, AIR 1966 Punj 528, in which the above decisions were also considered. I hold that in order that an affidavit should be a valid one, to be used as evidence in a proceeding under Section 145 Criminal Procedure Code, it may be sworn before any Magistrate, who is otherwise competent to administer oath under Section 4 of the Indian Oaths Act and receive evidence.

8. So, the references made by the Courts below that the proceedings before the Sub-Divisional Magistrate should be set aside on the ground that the affidavits were not sworn either before the Sub-Divisional Magistrate inquiring into the matters or before some other Magistrates authorised by him are rejected. Such of the cases, which were disposed of by the Lower Courts on the preliminary objection only are remanded to the principal Sessions Judge for disposal on merits.

AKJ/D.V.C.

References rejected.

AIR 1969 MANIPUR 6 (V 56 C 3)

C. JAGANNADHACHARYULU, J. C.

Ngangom Iboton Singh and another, Petitioners v. Union Territory of Manipur, Respondent.

Criminal Misc. Appln. Case No. 15 of 1967, D/-1-4-1967, against order of S. J., Manipur, D/- 8-3-1967.

Criminal P. C. (1898), Ss. 498 and 497 — Grant of bail — Principles — (Penal Code (1860), Ss. 302, 304 and 307).

Generally it is the rule to allow bail rather than to refuse bail and bail ought not to be held as punishment. Since the law presumes an accused to be innocent till his guilt is proved, he must be allowed opportunity to look after his own case unless the circumstances are such that he should not be released on bail. Further, the fact that an offence is a serious one does not afford a sufficient ground to refuse bail. For, the principle to guide

FL/GL/B573/67

the Court is the probability of the accused appearing to take his trial and not his supposed guilt or innocence. Hence, there is no hard and fast rule as to when bail should be granted and though the discretion of the Court is unfettered, it must be exercised judicially. AIR 1924 Cal 476 and AIR 1925 Lah 510 and AIR 1952 Madh Bha 203 and AIR 1952 J & K 28 and AIR 1929 Lah 284 and AIR 1948 All 26 and AIR 1952 Madh Bha 189 and AIR 1955 Raj 141 and AIR 1925 Oudh 489 and AIR 1952 Hyd 30 and AIR 1925 Mad 1224 and AIR 1958 Punj 123 and AIR 1951 Him Pra 13, Rel. on. (Para 6)

Where the petitioners, along with some others were prosecuted under Ss. 302, 304 and 307 Penal Code, while some of the accused, whose names were mentioned in the F. I. R. and by the injured persons, were released on bail, the petitioners, whose names were also mentioned, were refused bail. Held, that since the name of first petitioner was also mentioned in the F. I. R. and by the injured persons, he should be released on bail like others. However, regarding the second petitioner as there was reasonable ground to believe him to be guilty of an offence punishable with death, bail should not be granted to him. (Paras 4, 5 & 7)

Cases Referred: Chronological Paras

(1958) AIR 1958 Punj 123 (V 45)=

1958 Cri LJ 563, Rao Harnarain Singh Sheoji Singh v. State

(1955) AIR 1955 Raj 141 (V 42)=

1955 Cri LJ 1205, The State v. Shantilal

(1952) AIR 1952 Hyd 30 (V 39)=

1952 Cri LJ 873, Fazal Nawaz Jung v. State of Hyderabad

(1952) AIR 1952 J & K 28 (V 39)=

1952 Cri LJ 1223, Sant Ram v. State

(1952) AIR 1952 Madh Bha 189 (V 39)

=1953 Cri LJ 12 (FB), Champalal v. State

(1952) AIR 1952 Madh Bha 203 (V 39)

=1953 Cri LJ 17, Ramchandra v. The State

(1951) AIR 1951 Him Pra 13 (V 38)

=51 Cri LJ 1573, Paras Ram v. The State

(1948) AIR 1948 All 26 (V 35)=

48 Cri LJ 941, Kripa Shankar v. Emperor

(1929) AIR 1929 Lah 284 (V 16)=

30 Cri LJ 1129, Ramchand v. Emperor

(1925) AIR 1925 Lah 510 (V 12)=

27 Cri LJ 302, Emperor v. Gulam Mohammad

(1925) AIR 1925 Mad 1224 (V 12)=

26 Cri LJ 1593, Public Prosecutor v. M. Sanyasaya Naidu

(1925) AIR 1925 Oudh 489 (V 12)=

26 Cri LJ 1286, Abraham Bali v. Emperor

(1924) AIR 1924 Cal 476 (V 11)=

25 Cri LJ 732, Nagendra Nath v.

Emperor

A. K. Roy, for Petitioners; N. Ibotombi Singh, Public Prosecutor, for Respondent.

ORDER:— This is an application filed by the petitioners under Section 498 Criminal Procedure Code to release them on bail.

2. The case of the prosecution is that one Thoppa Singh of Sekta Village lodged a complaint in Lamlai Police Station in Manipur District alleging that at about 9 P. M. on 27-8-1966 the petitioners and some more persons armed with fire-arms, daos, lathis and other deadly weapons entered into his house to commit murder, dacoity and other offences, that he raised alarm, that on hearing the alarm the villagers rushed to the spot and surrounded the culprits and that, having no passage for their escape, the culprits opened fire continuously upon the villagers resulting in the death of one villager by name Salam Komol Singh and injuries to 3 other villagers.

It is also the case of the prosecution that on the following day one Pakchao Singh, one of the dacoits was found lying dead, that the first petitioner Ngan-gom Iboton Singh was arrested on 18-9-1966 and that the second petitioner Sago-sem Chaoba Singh was arrested on 30-8-1966 when a sten-gun and 2 live bullets were also seized from his house and that on the day next after the occurrence 10 empty cases of 9 M.M. bullets were seized from the scene of offence. The case is said to be under investigation in F. I. R. case 98(8)66 under Sections 302, 307 and 398 Indian Penal Code, as the seized fire-arms ammunition etc. were sent to the Arms Expert for examination.

3. 4 more accused were also impleaded in the case. Out of them, 3 were released on bail by the Magistrate First Class, Imphal. One was released on bail by the Sessions Judge, Manipur, by his order dated 8-3-1967 in his Criminal Misc. Case 75/1967. The Learned Sessions Judge refused to release the petitioners on bail. So, the petitioners filed the present petition for bail.

4. The Learned Sessions Judge states in his order that the first petitioner's name was mentioned in the F. I. R., that his name was also mentioned by 3 injured persons and that though he was arrested about one month after the occurrence, there are no grounds for releasing him on bail. But, the Learned Sessions Judge released another person whose name was also mentioned in the F. I. R. and whose name was also mentioned by some of the injured persons. So, the case of the first petitioner stands on the same footing as the case of other accused persons, who were released on bail.

5. So far as the second petitioner is concerned, besides the fact that his name was mentioned in the F.I.R. there is prima facie incriminating material against him. A sten-gun and 2 live bullets were seized from his possession. So, there is reasonable ground for believing that he was one of the participants in the daring dacoity and murder committed in the night of 27-8-1966. As such, he cannot be released on bail.

6. The Learned Counsel of the petitioners urged vehemently that both the petitioners are entitled to be released on bail and relied on a number of decisions, which lay down the principles which should guide the Court in dealing with an application for bail. One of the principles is that generally it is the rule to allow bail, rather than to refuse bail and bail ought not to be held as punishment.

Vide Nagendra Nath v. Emperor, AIR 1924 Cal 476, Emperor v. Gulam Mohammad, AIR 1925 Lah 510, and Ram Chandra v. The State, 1953 Cr. LJ 17= (AIR 1952 Madh Bha 203). In Sant Ram v. State, AIR 1952 J & K 28=1952 Cr LJ 1223. it was held that the law presumes an accused person to be innocent till his guilt is proved and that he should be allowed opportunity to look after his own case, unless the circumstances are such that he should not be released on bail.

In Ram Chand v. Emperor, 30 Cr LJ 1129=(AIR 1929 Lah 284), Kripa Shankar v. Emperor, 48 Cr LJ 941=AIR 1948 All 26, Champalal v. State, AIR 1952 Madh Bha 189 (FB) and The State v. Shantilal AIR 1955 Raj 141 it was held that the High Court can exercise its powers under Section 498, Criminal Procedure Code uncontrolled by the restrictions mentioned in Section 497 Criminal Procedure Code. But, it was also held that the High Court should exercise its powers under Section 498 Criminal Procedure Code judicially and not arbitrarily. There are some rulings which held that the fact that an offence is a serious one does not afford a sufficient ground to refuse bail. Vide Abraham Bali v. Emperor, AIR 1925 Oudh 489=26 Cr LJ 1286 and Fazal Nawaz Jung v. State of Hyderabad, 1952 Cr LJ 873=(AIR 1952 Hyd 30).

It was held in some others that the principles to guide the Court is the probability of the accused appearing to take his trial and not his supposed guilt or innocence. Vide Public Prosecutor v. M. Sanyasayya Naidu, AIR 1925 Mad 1224 and Rao Harnarain Singh Sheoji Singh v. The State, AIR 1958 Punj 123. In Paras Ram v. The State, AIR 1951 Him Pra 13 it was held that there is no hard and fast rule as to when bail should be granted and that though the discretion of the High Court is unfettered, it must be exercised judicially.

7. In the light of the various principles enunciated by the decisions it should be noted that so far as the first petitioner is concerned, there is only the fact that his name was mentioned by the complainant and the three injured persons. But, some other accused who were similarly mentioned by the complainant were released on bail. So, there is no reason for discriminating him. He is entitled to be released on bail subject to the condition that he should execute a bond for a sum of Rs. 3,000/- with two sureties for a like sum to the satisfaction of the Munsiff-Magistrate (I), Manipur. He should not tamper with any witness. If he violates any condition, then the bail will be cancelled. So far as the second petitioner is concerned, there is reasonable ground for believing that he is guilty of the offence punishable with death. So, he cannot be released on bail. It is said that he is a student and that his studies will be spoiled if he is to continue in the Jail. This cannot be helped in view of the prima facie evidence against him.

8. In the result, the first petitioner viz., Ngangom Iboton Singh is enlarged on bail subject to the conditions mentioned above. Bail is refused to the second petitioner viz., Sagolsem Chaoba Singh.

NRK/D.V.C.

Petition partly allowed.

AIR 1969 MANIPUR 8 (V 56 C 4)

C. JAGANNADHACHARYULU, J. C.

Ngounipu Kabui, Petitioner v. Lungbujel Kabui and others, Respondents.

Criminal Ref. Case No. 24 of 1966, D/- 27-2-1967, made by S. J., Manipur, D/- 1-1-1966.

Criminal P. C. (1898), Ss. 256(1) and 540 — Examination of remaining witnesses — "Any remaining witnesses" — Meaning — Examination of new witnesses not mentioned in complaint petition — Admissibility.

The expression "any remaining witness" relates to the witnesses mentioned in the complaint petition who were not examined before the framing of the charges. The provisions of S. 256 (1) are mandatory and as there is no estoppel in a criminal case, the prosecution is not estopped from examining the witnesses, who are mentioned in the complaint but are not examined before framing of charges. AIR 1945 Nag 286 and AIR 1950 Orissa 245 and AIR 1955 Raj 113 (Overruling AIR 1952 Raj 55) and AIR 1959 Mys 238 and AIR 1960 J & K 44 and AIR 1962 Andh Pra 11 and AIR 1950 Orissa 245, Rel. on; AIR 1937 All 189 and AIR 1942 Bom 214, Ref. (Paras 7 to 9)

Even new witnesses whose names have not been mentioned in the complaint petition, can be examined under S. 256 (1), pro-

vided their evidence is material. They can be examined under S. 540 also, which empowers the Court to examine any witness, at any stage of any enquiry, trial or other proceedings under the Code, provided the evidence appears to the Court essential to the just decision of the case. 1964 (1) Cri LJ 100 (Ker) and AIR 1964 Bom 165 and AIR 1965 Mad 31, Rel. on; (1957) 61 Cal WN 192 and AIR 1957 Cal 332, Ref. (Para 10)

Cases Referred: Chronological Paras

- (1965) AIR 1965 Mad 31 (V 52) = 10
 1965 (1) Cri LJ 53, Public Prosecutor v. M. Sambangi Mudaliar
 (1964) AIR 1964 Bom 165 (V 51) = 10
 1964 (2) Cri LJ 15, Shreelal Kajaria v. State
 (1964) 1964 (1) Cri LJ 100 = 1963
 Ker LT 441, Syed Mohammed v. K. C. Raman 10
 (1962) AIR 1962 Andh Pra 11 (V 49) = 10
 = 1962 (1) Cri LJ 10, Gangama Naidu v. Siddaiah Naidu
 (1960) AIR 1960 J & K 44 (V 47) = 7
 1960 Cri LJ 347, Asadullah Patwari v. State
 (1959) AIR 1959 Mys 238 (V 46) = 7
 1959 Cri LJ 1196, State of Mysore v. Babasaheb Syadsaheb Shet-sanadi
 (1957) AIR 1957 Cal 332 (V 44) = 11
 1957 Cri LJ 630, Ali Jan v. Amir Khan
 (1957) 61 Cal WN 192 = ILR (1958) 1 Cal 242, Syama Charan Saha v. Nagendra Nath Rakshit 11
 (1955) AIR 1955 Raj 113 (V 42) = 11
 1955 Cri LJ 1106, Rewa Chand v. State
 (1952) AIR 1952 Raj 55 (V 39) = 7, 8
 1952 Cri LJ 595, Premraj v. State
 (1950) AIR 1950 Orissa 245 (V 37) = 7, 8
 = ILR (1950) Cut 129, Hadibandhu Misra v. King
 (1945) AIR 1945 Nag 286 (V 32) = 7, 9
 ILR (1945) Nag 995, Abdul Razake v. Haji Hussain Server
 (1942) AIR 1942 Bom 214 (V 29) = 10
 43 Cri LJ 761, Emperor v. Nagindas Narottamdas Gandhi
 (1937) AIR 1937 All 189 (V 24) = 8
 38 Cri LJ 394, Raghubir Sahai v. Wali Husain Khan 8

A. Nilamani Singh, for Petitioner; R. K. Manisana Singh and Y. Imo Singh, for Respondents.

ORDER: This is a reference made by the Sessions Judge, Manipur, under Sec. 438, Criminal P. C., to set aside the order of the First Class Magistrate, Manipur, dated 1-1-1966, passed by him in Criminal Case No. 130 of 1965 refusing to examine three witnesses, who were cited by the deceased complainant in the complaint petition filed by him and to examine another witness, who is the brother of the deceased complainant.

2. One Ngounipu Kabui filed a criminal case on the file of the First Class Magistrate, Manipur, against the respondents under Sections 447, 427 and 143, I.P.C., on 18-1-1965 alleging that the respondents committed offences of criminal trespass on the land in his actual possession and criminal mischief by dismantling his shed and fencing and by destroying vegetables grown by him. He cited seven witnesses including himself in the complaint petition. He died during the pendency of the criminal case and his widow (the petitioner herein) continued the proceedings. The Magistrate examined three witnesses out of the list and the petitioner. On the ground that the prosecution closed the evidence on 1-10-1965 the Magistrate heard arguments and framed charges against the respondents on 21-10-1965. The respondents pleaded not guilty to the charges. They wanted to cross-examine all the four prosecution witnesses, who were previously examined before the charges were framed.

Accordingly, the Magistrate recalled all the four prosecution witnesses and allowed the respondents to further cross-examine them. Thereupon, the petitioner filed an application on 3-11-1965 under Sec. 540, Criminal P. C., to permit her to examine her brother-in-law (whose name was not mentioned in the complaint petition) and to direct him to produce the relevant documents regarding the deceased's title to and possession of the disputed land. She filed another application on 23-11-1965 under Section 256 (1), Criminal P. C., to permit her to examine the three remaining witnesses whose names were mentioned in the complaint petition and who were not examined before the charges had been framed. But, the Magistrate rejected both the applications by his order dated 1-1-1966.

3. The petitioner moved the Sessions Court in Criminal Revision Case No. 12 of 1965 under Section 437, Cr.P.C., to make a reference to this Court to set aside the order of the Magistrate in question. The learned Sessions Judge was of the opinion that the Magistrate should have examined the remaining witnesses (who were cited in the complaint petition and not examined before the charges were framed) under Section 256 (1), Cr.P.C. He was also of the opinion that the Magistrate should have examined the petitioner's brother-in-law under Section 540, Cr.P.C. (though he was not cited as witness in the complaint petition) for the just decision of the case. So he made the reference to this Court.

4. With regard to the first aspect of the case that the Magistrate should have examined the remaining three witnesses under Section 356 (1), Cr.P.C., at the request of the petitioner, the contention of the petitioner's counsel is that the Magistrate went wrong in rejecting the petition of the petitioner. The Magistrate states in his order that the remaining witnesses (mentioned in the complaint petition and who were not

examined) could not be examined, because the prosecution closed its evidence once for all, that there is no provision in the Criminal Procedure Code, which enables the prosecution to reopen its side and that though the petitioner's counsel relied on a number of rulings in support of his contentions that they can be examined, still the rulings have no bearing on the point urged by him. The Magistrate did not mention the rulings at all in his order. To say the least, his order is perverse.

5. The case is one triable as a warrant case under Chap. XXI of the Criminal Procedure Code. As the case was filed by a private party and not by the police, the procedure laid down by Section 252, Criminal P.C., is applicable. It runs as follows:

"252. Evidence for prosecution.—(1) In any case instituted otherwise than on a police report, when the accused appears, or is brought before a Magistrate, such Magistrate shall proceed to hear the complaint, if any, and take all such evidence as may be produced in support of the prosecution:

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary."

Thus, it is the duty of the Magistrate under Section 252(2), Cr.P.C., to ascertain from the complainant or otherwise the names of persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution. He should summon such of them as he thinks necessary.

6. Under Section 253, Cr.P.C., the Magistrate shall discharge the accused, if, upon taking all the evidence referred to in Section 252, Cr.P.C., and on making such examination, if any, of the accused as he thinks necessary, he finds that no case against the accused has been made out, which, if un rebutted, would warrant his conviction. He can also discharge the accused even at an earlier stage of the case, if, for reasons to be recorded by him, he considers the charge to be groundless.

7. But, if the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under Chapter XXI of the Criminal Procedure Code, which he is competent to try, after such evidence and examination have been taken and made under Section 252, Cr.P.C., he should frame in writing a charge against the accused. Section 254, Cr.P.C., empowers him to frame the charge even at any previous stage of the case, if he is of such opinion. Under Section 255, Cr.P.C., the charge shall be read and explained to the accused and he shall be asked

whether he is guilty or has any defence to make. If the accused pleads guilty, the Magistrate should record his plea and he may convict him thereon in his discretion.

Section 255-A, Cr.P.C., lays down the procedure to be adopted in the case of previous convictions. Then follows Section 256, Cr.P.C. As the case depends upon the interpretation of the words 'any remaining witness', it will be useful to extract the section. It runs as follows:—

"256. Defence.—(1) If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state (at the commencement of the next hearing of the case, or, if the Magistrate, for reasons to be recorded in writing, so thinks fit, forthwith), whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence.

(2) If the accused puts in any written statement, the Magistrate shall file it with the record."

Thus, under Section 256(1), Cr.P.C., the evidence of "any remaining witnesses" for the prosecution shall next be taken after the witnesses, who were previously examined before the framing of the charges are cross-examined and re-examined, if any. So, it is the duty of the Magistrate to examine 'the remaining witnesses'. There is general consensus of opinion among the major number of High Courts that this expression "any remaining witnesses" relates to the witnesses mentioned in the complaint petition, who were not examined before the framing of the charges.

The Nagpur High Court held in *Abdul Razake v. Haji Hussain Server*, AIR 1945 Nag 286, that where all the witnesses cited in the list have not been examined and although the complainant has announced the closure of his case after some of the listed witnesses were examined, it is open to him to have the remaining witnesses also examined and to the Magistrate to accede to the application. But, it was further held that, in respect of the new witnesses not mentioned in the list, they cannot be allowed to be examined, as they cannot be said to be "remaining witnesses" under Sec. 250(1), Cr.P.C.

The Orissa High Court held in *Hadibandhu Misra v. King*, AIR 1950 Orissa 245, that the expression "any remaining witnesses" in Section 256(1), Cr.P.C., includes those who had not been examined but who could be examined under Section 252, Cr.P.C., as per the list of witnesses or

whose names had not been disclosed before the charge was framed. The Rajasthan High Court held the same view in *Rewa Chand v. State*, AIR 1955 Raj 113. It was further held that the words 'any remaining witnesses' are wide enough to include any witness, who, according to the prosecution, is able to support its case, though he has not been summoned, provided that he is not sprung upon the defence all of a sudden and sufficient opportunity is given to the latter to prepare for the cross-examination of the witnesses.

The earlier decision of the same High Court in *Premraj v. State*, AIR 1952 Raj 55, which held the contrary view was overruled. The Mysore High Court is also of the same opinion. *Vide State of Mysore v. Babasaheb Syad-saheb Shetsanadi*, AIR 1959 Mys. 238. The Jammu and Kashmir High Court is also of the same view. *Vide Asadullah Patwari v. State*, AIR 1960 J and K 44. The High Court of Andhra Pradesh also held the same view. *Vide Gangama Naidu v. Sid-daih Naidu*, AIR 1962 Andh Pra 11.

8. The learned counsel for the respondents contended that as the prosecution closed its evidence on 1-10-1965 and as the Magistrate framed charges against the respondents, the petitioner was estopped from examining the remaining witnesses who were mentioned in the list and who were not examined before the charges were framed. They relied on *Raghubir Sahai v. Wali Husain Khan*, AIR 1937 All 189. It was held that under Section 254, Cr.P.C., the Magistrate may examine all the witnesses mentioned in the list under Section 252 (2), Cr.P.C., and frame a charge or that he may frame a charge before he has examined all those witnesses, that if he adopts the latter course, then the witnesses who remained and who were not examined are "any remaining witnesses" under Section 256 (1), Cr.P.C., and that the complainant has right to produce them, after the cross-examination of those witnesses, who had been previously examined, is over.

It was further held that, on the other hand, the Magistrate has examined all the witnesses for the prosecution as per the list under S. 252 (2) Cr. P. C. and framed the charge, then there are no witnesses remaining, who can come under description in Section 256 (1) Cr. P. C. The respondents also relied on *Emperor v. Nagindas Narot-tamdas Gandhi*, AIR 1942 Bom 214. That decision lays down that Sec. 256 Cr. P. C. enables the prosecution to examine witnesses, who have not been examined and whose names have not been disclosed before the charge was framed.

In AIR 1952 Raj 55 (relied on by the respondents' counsel) the decision reported in AIR 1937 All 189, was followed. But, this decision of the Rajasthan High Court was subsequently overruled by the same High Court in AIR 1955 Raj 113, already referred

to. Even these decisions do not preclude the prosecution from examining the 3 witnesses mentioned in the complaint petition, who were not examined before the charges were framed.

9. Another contention of the learned counsel for the respondents is that, if the 3 witnesses are now allowed to be examined, the respondents will be prejudiced in their defence, since they did not cross-examine the other witnesses, who were already examined, with reference to the witnesses, who are now to be examined and that, therefore, the respondents will be prejudiced. This argument was met in AIR 1950 Orissa 245, wherein it was held that the prejudice can be early avoided by directing the Magistrate to give the respondents every facility to recall the prosecution witnesses, who had already been examined, for further cross-examination.

Thus, the provisions of Section 256 (1) Cr. P. C. are mandatory. The view of the various High Courts viz., Nagpur, Orissa, Rajasthan, Mysore, Jammu and Kashmir and Andhra Pradesh is also the same. There is no question of estoppel in a criminal case and the prosecution is not estopped from examining the three remaining witnesses. So, the Magistrate is bound to examine the 3 witnesses mentioned in the list, who had not been previously examined.

10. Regarding the new witness, whose name was not mentioned in the complaint petition (and could not be), the contention of the petitioner's counsel is that the necessity for the examination arose on account of the death of the complainant. It was said by the petitioner's counsel that the documents evidencing the deceased's title to and possession of the land in dispute are now with the brother of the deceased and that they are required for the just decision of the case. He too can be examined under S. 256 (1) Cr. P. C. according to the view of the High Courts of Orissa, Rajasthan, Mysore, Jammu and Kashmir and Andhra Pradesh mentioned above, even though his name was not mentioned in the complaint petition, provided his evidence is material.

Even otherwise, he can be examined under Section 540 Cr. P. C. also. Sec. 540 Cr. P. C. gives ample power to the Court to examine any witness, at any stage of any enquiry, trial or other proceedings under the Criminal Procedure Code, provided his evidence appears to the Court essential to the just decision of the case. *Vide also Syed Mohammed v. K. C. Raman*, 1964 (1) Cri LJ 100 (Ker). The Kerala High Court held that the prosecution is not estopped from examining any witness, who had been previously given up, before it closes its case and the Court can also examine such a witness as the Court witness under Sec. 540 Cr. P. C.

In *Shreelal Kalaria v. State*, AIR 1964 Bom 165, it was held that S. 540 Cr. P. C. is in the widest possible terms, and calls for no limitation either with regard to the stage

at which the powers of the Court should be exercised or with regard to the manner in which they should be exercised. It was held that a witness can be examined under that section even after the case for the defence had been closed. Vide also Public Prosecutor v. M. Sambangi Mudaliar, AIR 1965 Mad 31, which is to the same effect. So, the new witness can be examined under Section 540 Cr. P. C., if his evidence is necessary for a just decision of the case. As such he can be examined both under Section 256 (1) Cr. P. C. as well as under Section 540 Cr. P. C.

11. The contention of the learned counsel for the respondents with regard to the examination of the new witness is twofold. Firstly, they urged that sub-section (1-A) of Section 204 Cr. P. C. was introduced by the Criminal Procedure Code Amendment Act (Act 26 of 1955) that no summons or warrant shall be issued against the accused under sub-section (1) of Sec. 204 Cr. P. C. until the list of the prosecution witnesses has been filed, that the above decisions did not notice this provision of law and that as warrants were already issued after the magistrate took cognizance of the case, the new witness cannot be examined under Section 256 (1) Cr. P. C. Their contention has no force.

Sections 204 and 205 Cr. P. C. are the two sections in Chapter 17 Cr. P. C. Section 204 Cr. P. C. lays down inter alia that the magistrate should issue summonses or warrants after taking cognizance of the offence and after he thinks that there is sufficient ground for proceeding. The list of the prosecution witnesses is insisted to be filed before the issue of summonses or warrants to enable the accused to know the allegations against him and also who are the witnesses who are likely to give evidence against him. But the prosecution is not pinned down to that list. Otherwise, Sections 244 and 252 Cr. P. C., which direct the Magistrate to take all such evidence which may be produced by the prosecution either in a summons case or a warrant case would have no effect. Vide also Syama Charan Saha v. Nagendra Nath Rakshit, 61 Cal WN 192 and Ali Jan v. Amir Khan, AIR 1957 Cal 332. But, it is quite a different matter regarding the credibility of such a witness.

12. The second contention of the learned counsel for the respondents is that though the petitioner was examined, she did not disclose what documents are with her brother-in-law, that there is no evidence to show what bearing the documents have on the case, that the discretion which is to be exercised under Section 540 Cr. P. C. is a judicial discretion and that, therefore, the new witness cannot be examined by the Court in exercise of its powers under that section. The Magistrate states in his order that the nature of the documents was not disclosed. But, as rightly pointed out by

the learned Sessions Judge, the documents are said to be with the brother of the deceased. It was stated that they relate to the title to and possession of the disputed land of the deceased. So, it is not proper to insist that the petitioner should state in detail the contents of the documents. It is, therefore, necessary for the just decision of the case that the new witness should be directed to produce the documents into the Court and be examined. The order of the Sessions Judge is correct.

13. In the result, the reference is accepted.

NRK/D.V.C.

Reference accepted.

AIR 1969 MANIPUR 12 (V 56 C 5)

C. JAGANNADHACHARYULU, J. C.

Kongkham Chandra Mani Singh, Petitioner v. Kongkham Sangai Singh and others, Respondents.

Criminal Ref. Case No. 32 of 1967, D/- 7-2-1968, made by S. J., Manipur, in Cri. Revn. Case No. 91 of 1965.

(A) Criminal P. C. (1898), S. 107 — Procedure — Summoning parties to ascertain facts and circumstances is illegal.

There is no provision in Sections 107 to 117, Cr. P. C. to summon the parties to ascertain whether any facts and circumstances exist for taking proceeding under Section 107, Cr. P. C. or not. Such a procedure adopted by a Magistrate is illegal. AIR 1953 Cal 109, Rel. on. (Para 6)

(B) Criminal P. C. (1898), S. 107 — Proceedings — No danger of breach of peace — Magistrate can drop proceedings — Possession of land given by Court — Party given possession entitled to protection — Magistrate needing proof of confirmation of possession should call for it and should not drop proceedings.

No doubt, the S. D. M. can drop the proceedings under Section 107, Cr. P. C. at any stage if he feels that there is no ground for proceeding further and there is no apprehension of breach of the peace. But in a case where the disputed land and the standing crops thereon were delivered to the petitioner by a Court he is entitled to have his possession of the disputed land and the crops protected by the Courts of law and to prevent breach of peace regarding the same. If the S. D. M. wants further orders confirming the delivery of possession of the disputed land to the petitioner he should give time to the petitioner to produce further orders. AIR 1953 Raj 180 and AIR 1959 Mad 339 and AIR 1964 All 391, Rel. on. (Para 6)

Cases Referred: Chronological Paras
(1964) AIR 1964 All 391 (V 51) =
1964 (2) Cri LJ 260, Asghar Khan
v. State

g

(1959) AIR 1959 Mad 339 (V 46) =
1959 Cri LJ 998, Thirunavukkarasu
v. State

(1958) AIR 1958 Raj 180 (V 45) =
1958 Cri LJ 970, Sheokaran v.
Dulla

(1953) AIR 1953 Cal 109 (V 40) =
1953 Cri LJ 344, Tulsibala Rakhit
v. N. N. Khasan

R. K. Manisana Singh, for Petitioner;
T. N. Bhattacharjee, for Respondents Nos. 1
to 14 and N. Ibotombi Singh, Public Pro-
secutor, for Respondent No. 15.

ORDER: This is a reference made by the Sessions Judge, Manipur, under Section 438 Cr. P. C. in Criminal Revision Case No. 91 of 1965 on his file to set aside the order of the S. D. M., Bishenpur in N. F. I. R. Case No. 22 of 1965 on the file of the S. D. M. dropping the proceeding under Section 107, Cr. P. C. and directing the return of seized paddy etc. to the respondents.

2. The petitioner filed a complaint before the Police against the respondents for drawing up proceedings under Section 107, Cr. P. C. on the allegation that the disputed land was delivered to him by the Court of First Subordinate Judge on 18-8-1965 in Execution Case No. 3 of 1959 on its file, that ever since the date of the delivery the petitioner and his men had been in continuous possession and enjoyment of the disputed land and that when the harvesting of the standing crops was begun, the respondents threatened the petitioner and his men with dangerous weapons and caused apprehension of breach of the peace.

3. The Police submitted a report before the S. D. M., Bishenpur under Section 107, Cr. P. C. against the respondents. The learned S. D. M. passed an order on 1-11-1965 directing his office to issue summonses to the parties to ascertain if a proceeding under Section 107, Cr. P. C. was to be drawn up. On 14-11-1965 both the parties appeared before him. He heard them orally and passed the impugned order dropping the proceedings under Section 107, Cr. P. C. and directed the seized paddy etc., to be returned to the respondents.

4. The petitioner filed Criminal Revision Petition No. 91 of 1965 against the respondents before the Sessions Judge. The respondents did not contest the proceeding before the Sessions Judge. The latter submitted the proceedings to this Court for quashing the order of the S. D. M.

5. The point for determination is whether the order of the S. D. M. is correct.

6. As rightly pointed out by the learned Sessions Judge, there is no provision in Sections 107 to 117, Cr. P. C. to summon the parties to ascertain whether any facts and circumstances exist for taking proceeding under Sec. 107, Cr. P. C. or not. Vide Tulsibala Rakhit v. N. N. Khasan, AIR 1953 Cal 109. So, the procedure adopted by the learned S. D. M. is illegal. No doubt,

the S. D. M. can drop the proceedings under Section 107, Cr. P. C. at any stage if he feels that there is no ground for proceeding further and there is no apprehension of breach of the peace. Vide Sheokaran v. Dulla, AIR 1958 Raj 180, Thirunavukkarasu v. State, AIR 1959 Mad 339 and Asghar Khan v. State, AIR 1964 All 391. But, in this case the S. D. M. was not justified in dropping the proceedings. For, the disputed land and the standing crops thereon were delivered to the petitioner by the Court of the First Subordinate Judge on 18-8-1965 in its Execution Case No. 3 of 1959. He is entitled to have his possession of the disputed land and the crops protected by the Courts of law and to prevent breach of peace regarding the same. The learned S. D. M. dropped the proceedings on the ground that the petitioner did not produce further orders of the First Subordinate Judge confirming the delivery of possession of the disputed land to the petitioner. The S. D. M. should have given time to the petitioner to produce further orders of the First Subordinate Judge, if he thought that they were necessary. But, in so far as the proceedings under Section 107, Cr. P. C. before the S. D. M. were concerned, the order of delivery of possession of the disputed land to the petitioner by the Court of the First Subordinate Judge on 18-8-1965 was sufficient and the S. D. M. should have acted upon it. Even otherwise, he should have given time to the petitioner to produce further orders of the First Subordinate Judge confirming the delivery proceedings. So, the S. D. M. committed a serious error in dropping the proceedings and directing the return of the seized paddy to the respondents, who had already been dispossessed by the Civil Court in the course of law.

7. It appears that there were previously proceedings between the same parties. Vide Criminal Revision Case No. 4 of 1965 on the file of the District Magistrate, Manipur and Criminal Reference No. 26 of 1967 on the file of this Court, under which a composite order passed by the same S. D. M. was set aside and he was directed to dispose of the case according to law.

8. In the result, the reference is accepted and the impugned order of the S. D. M. is set aside. The case is remanded to him for disposal according to law.

BDB/D.V.C.

Reference accepted.

AIR 1969 MANIPUR 13 (V 56 C 6)

G. JAGANNADHACHARYULU, J.C.

Kangjam Jadhob Singh and others,
Petitioners v. Chongtham Pishak Singh
and others, Respondents.

Civil Writ Appln. Case No. 7 of 1965,
D/- 27-11-1967.

BL/DL/A728/68

(A) Panchayats — U. P. Panchayat Raj Act (26 of 1947) (as extended to Manipur), S. 44 — U. P. Panchayat Raj Rules (1947), R. 146 (1) — Word "shall" used in R. 146 (1), interpretation of — "Shall" is mandatory and in context of S. 44 of the Act it means "must" — Proviso to S. 44 lays down penal consequences if Sarpanch and Sahayak Sarpanch are not elected within prescribed period, in which case the prescribed authority "may" appoint Sarpanch or Sahayak Sarpanch — Hence election of Sarpanch and Sahayak Sarpanch held beyond period of one month from date of appointment of Panchas is illegal and contrary to provisions of S. 44 and R. 146 (1) — AIR 1967 SC 276, Rel. on. (Para 6)

(B) Panchayats — U. P. Panchayat Raj Act (26 of 1947) (as extended to Manipur), S. 44 — U. P. Panchayat Raj Rules (1947), R. 146 (2) — Election of Sarpanch and Sahayak Sarpanch — Two parties — Some Panchas of one party arrested by police just before commencement of meeting for election on false and flimsy grounds to prevent them from taking part in election and vote — It was found that other panchas at whose instance they were arrested, played fraud and made election a simple farce and mockery. Held it was nothing but an abuse of democracy and democratic set up of Nyaya Panchayat and the so-called election was a sham and a colourable one which must be set aside — Constitution of India, Art. 226. (Para 7)

(C) Panchayats — U. P. Panchayat Raj Act (26 of 1947) (as extended to Manipur), Section 44 — U. P. Panchayat Rules (1947), R. 146 (4) — Election of Sarpanch and Sahayak Sarpanch — Quorum — Total number of members 15 — Three members arrested just before commencement of meeting for election — Five members on rejection of their application to adjourn meeting due to illegal arrest, leaving meeting without signing list of voters present — Election conducted subsequently held contravened provisions of Sub-R. (4) of R. 146 as there were only 7 members while the quorum required for meeting was 'eight' the strength of Nyaya Panchayat being 15: Case law discussed. (Para 8)

(D) Constitution of India, Art. 226 — Writ Petition — New point — Point regarding validity of election of Sarpanch and Sahayak Sarpanch after one month of appointment of Panchas of Nyaya Panchayat not raised in Writ Petition — Point raised in affidavit-in-rejoinder — Copies served on respondent's advocate — Held point raised in affidavit-in-rejoinder of which respondent had full notice could be urged — Panchayat — U. P. Panchayat Raj Rules (1947), R. 146 (1) — AIR 1965 SC 1578 and AIR 1967 SC 295, Foll. (Para 5)

(E) Constitution of India, Arts. 226 and 329 — U. P. Panchayat Raj Act (26 of 1947) (as extended to Manipur), Ss. 12(c) and 44 — U. P. Panchayat Raj Rules (1947), Rr. 147, 79 — Election of Sarpanch and Sahayak Sarpanch — Remedy to aggrieved party available under Rules — On facts and circumstances writ petition held maintainable.

Even if there is an alternative remedy it does not bar the jurisdiction of the High Court to exercise its jurisdiction under Article 226 of the Constitution, if the alternative remedy is not adequate and is not equally convenient, beneficial or effective. Article 329 of the Constitution of India bars the jurisdiction of the High Court to issue writs in respect of an election to either House of Parliament or either House of the Legislature of a State. But, there is no such constitutional bar to the exercise of writ jurisdiction in respect of elections to local bodies such as municipalities. Case law discussed. (Paras 13 and 14)

Where in an election of Sarpanch and Sahayak Sarpanch some members of the Nyaya Panchayat played fraud in getting the petitioners arrested just before the election was to be held on false allegations of theft and manipulated to have a majority of their party at the time of the election and the result of the election held on 16-9-64 was declared after 25-2-1965, the writ petition filed on 24-2-1965, held maintainable in the circumstances though the petitioner had alternative remedy of challenging election under R. 147 read with R. 79 of the Rules. (Para 22)

Firstly, the election was simply a mockery and a farce. It was a colourable one which could not be allowed to stand. Secondly, S. 12 (c) of the Act which bars jurisdiction of Civil Court does not apply to disputes regarding the election to office of Sarpanch or Sahayak Sarpanch. Thirdly, the election was held in total disregard of provisions of R. 146 (1)(4) and S. 44. (Para 14A)

Further, it could not be said that the petitioners circumvented the law of limitation by filing writ petition, as it was filed within one month of the period prescribed by R. 147 read with R. 79 for presenting election petition. (Para 15)

Cases Referred: Chronological Paras (1967) AIR 1967 SC 81 (V 54)=

(1966) 3 SCR 84, First Income-Tax Officer Salem v. Short Brothers (P) Ltd.

(1967) AIR 1967 SC 276 (V 54)= 1967 Cri LJ 285, State of Madhya Pradesh v. Azad Bharat Finance Co.

(1967) AIR 1967 SC 295 (V 54)= (1966) Sup SCR 311, Barium Chemicals Ltd. v. Company Law Board

- (1967) AIR 1967 All 452 (V 54)=
ILR (1967) 1 All 372, Hira v. Chetu 13, 14
- (1967) AIR 1967 Raj 239 (V 54)=
ILR (1966) 16 Raj 889 (FB), Atma Singh v. State of Rajasthan 13, 14
- (1966) AIR 1966 SC 197 (V 53)=
(1966) 1 SCR 284, M. G. Abrol Additional Collector of Customs, Bombay v. Shantilal Chhotelal 13
- (1966) AIR 1966 All 45 (V 53), Dr. Mrs. Shabbir Fatima v. Chancellor University of Allahabad 13, 14
- (1966) W. P. No. 12 of 1966=1966 Mani LJ 49, Laisram Thanil Singh v. Dist. Magistrate Manipur 13, 14
- (1965) AIR 1965 SC 1321 (V 52)=
(1965) 2 SCR 653, Municipal Council Khurai v. Kamal Kumar 13
- (1965) AIR 1965 SC 1578 (V 52)=
(1965) 3 SCR 17, Subramania Desika Gnanasambanda Pandarasanni-di v. State of Madras 5
- (1963) AIR 1963 Assam 168 (V 50), Ram Chandra Malpani v. State of Assam 12
- (1962) AIR 1962 SC 1044 (V 49)=
(1963) 1 SCJ 106, Calcutta Gas Co., (Proprietary) Ltd. v. State of West Bengal 12
- (1962) AIR 1962 Him-Pra 19 (V 49), Parmatma Ram v. Siri Chand 13, 14
- (1961) AIR 1961 SC 372 (V 48)=
1961 (2) SCR 241, Calcutta Discount Co., Ltd. v. Income-Tax Officer 13
- (1960) AIR 1960 Ori 79 (V 47)=
ILR (1960) Cut 129, Orissa Mineral Development Co. v. Commr. of Sales Tax, Orissa 12, 15
- (1957) AIR 1957 All 213 (V 44)=
1957 All LJ 938, Virendra Singh v. Returning Officer, Gaon Panchayat Elections 13, 14
- (1957) AIR 1957 All 354 (V 44)=
ILR (1956) 2 All 758, Bhagwati Prasad v. J. K. Tandon 13, 14
- (1956) AIR 1956 SC 153 (V 43)=
1956 Cri LJ 326, Virindar Kumar Satyawadi v. State of Punjab 13
- (1955) AIR 1955 SC 233 (V 42)=
1955 SCR 1104, Hari Vishnu Kamath v. Ahmad Ishaque 13
- (1864-1935) 2 Doabia's Ele-Cases Ed. 1955 p. 61, Dwarka Nath Dutta v. Chandra Mohan Roy 9

A. Nilamani Singh, for Petitioners; R. K. Manisana Singh, for Respondents Nos. 1 & 2; N. Ibotombi Singh, Govt. Advocate, for Respondents Nos. 8 to 12.

ORDER:— This is a petition filed under Article 226 of the Constitution of India for the issue of a Writ of Certiorari to quash the election of the respondents 1 and 2 as Sarpanch and Sahayak Sarpanch respectively of Mongsangei Nyaya Panchayat under the provisions of the United Provinces Panchayat Raj Act (U. P. Act

XXVI of 1947), (hereinafter called as the Act) and the Rules framed thereunder as extended to Manipur Union territory.

2. The petitioners, who were 8 in number at first, and the respondents 1 to 7 were appointed as Panchas of the Mongsangei Nyaya Panchayat by the 11th respondent District Magistrate on 30-5-1964 under Section 43 of the Act as extended to Union Territory of Manipur. Vide Ext. A/4 Manipur Gazette Extraordinary dated 11-8-1964. The 11th respondent District Magistrate, Manipur, fixed 9-00 a.m. of 6-7-1964 to be the time and the date for the meeting of the Panchas to elect their Sarpanch and Sahayak Sarpanch in pursuance of Section 44 of the Act read with Rule 146 (2) of the Rules. The meeting had to be held in the Panchayat Secretary's Office in Mongsangei (vide Ext. B/1 dated 23-6-1964). The District Magistrate nominated the 8th respondent, Assistant Panchayat Officer, Directorate of Panchayats, Imphal, to preside over the meeting under Rule 146 (3) of the Rules. (Vide Ext. B/2). But, the 11th respondent — District Magistrate — postponed the meeting for one week, (Vide Ext. B/3 dated 6-7-1964). Again, he postponed the meeting sine die. (Vide Ext. B/4 dated 9-7-1964). Finally, the 11th respondent appointed 10-00 a.m. of the 16-9-1964 to be the time and the date of the meeting of the Panchas to be held in the Panchayat Secretary's Office in Mongsangei and nominated the 8th respondent, Panchayat Inspector, to preside over the meeting. (Vide Exts. B/5 and B/6 copies of the orders dated 1-9-1964).

3. At the appointed time and place the meeting had to take place. But, while all the petitioners were coming, the petitioners No. 3, 7 and 8 were arrested by the Police Officers of Imphal Police Station on the ground that a report (F.I.R. Case No. 1045 (9) 64 of Imphal Police Station under Section 379 Indian Penal Code) was filed against them by the respondents 1 and 2 that the petitioners 3, 7 and 8 committed theft of some cement pipes. So, at about 10-00 a.m. of 16-9-1964 the remaining petitioners 1, 2, 4, 5 and 6, whose party strength was reduced to 5, appeared before the 8th respondent Panchayat Inspector and requested him to postpone the meeting until the three arrested persons were released and joined the meeting for the purpose of election (Vide Ext. B/7 copy of the petition dated 16-9-1964). The said five petitioners immediately left the meeting under protest. But, the 8th respondent proceeded to transact the business of the meeting without the presence of the petitioners.

There were only the respondents 1 to 7 in the meeting. At about 11-15 a.m. the name of the first respondent was proposed and seconded for the office of

the Sarpanch. At about 11-17 a.m. the name of the second respondent was proposed and seconded for the office of the Sahayak Sarpanch. At 12-00 a.m. the 8th respondent concluded the meeting and submitted a report to the District Magistrate of the proceedings of the meeting on 17-9-1964 (vide Ext. B/8). The petitioners also made a joint representation to the District Magistrate stating that there was no quorum under Rule 146(4) of the Rules and that there was no valid election of the Sarpanch and the Sahayak Sarpanch. After a lapse of about 5 months, the 8th respondent Panchayat Inspector intimated the petitioners by issuing an undated notice that the respondents 1 and 2 were deemed to have been elected as the Sarpanch and Sahayak Sarpanch in the meeting held on 16-9-1964. (Vide Ext. A/1 notice received by the petitioners on 27-2-1965).

4. Thereupon, the petitioners filed the present Writ Petition on 24-3-1965 challenging the election of the respondents 1 and 2 as Sarpanch and Sahayak Sarpanch of Mongsangei Nyaya Panchayat. During the pendency of the Writ Petition, the petitioners 5 and 6 and the 6th respondent died.

5. The first contention of the Learned Counsel for the petitioners is that the panchas of Mongsangei Nyaya Panchayat were appointed on 30-5-1964, as can be seen from Ext. A/4, that the election of the Sarpanch and Sahayak Sarpanch should have been held within one month thereafter under Rule 146 (1) of the Rules, but that it was held on 16-9-1964 after the expiry of more than one month from the date of the completion of the appointment of the Panchas of the Nyaya Panchayat and that, therefore, the election of the respondents 1 and 2 as Sarpanch and Sahayak Sarpanch is void. The learned Counsel for the respondents raised preliminary objection that this point was not raised by the petitioners in their writ petition, that it is a new point and that, therefore, the petitioners' counsel should not be permitted to raise it. But, the petitioners raised this point in their affidavit in rejoinder D/- 31-1-1966, copies of which were served on the respondents' Advocates on 1-2-1966 and 2-2-1966. So, the respondents were not taken unawares by this objection. The Supreme Court also ruled that an objection, raised in the affidavit-in-rejoinder filed by the petitioners of which respondents had full notice, could be urged. Vide 'Sri Sri Subramania Desika Gnanasambanda Pandarasannidi v. State of Madras,' AIR 1965 SC 1578 and 'Barium Chemicals Ltd. v. Company Law Board,' AIR 1967 SC 295. So, the preliminary objection of the respondents' counsel was overruled.

6. Rule 146 (1) of the Rules contains a mandatory provision that the period,

within which the Panchas of a Nyaya Panchayat shall elect from amongst themselves two persons as the Sarpanch and the Sahayak Sarpanch, shall be one month from the date on which the appointment of Panchas of the Nyaya Panchayat under Section 43 was completed. It runs as follows:

"The period within which the Panchas of a Nyaya Panchayat shall elect from amongst themselves two persons as the Sarpanch and the Sahayak Sarpanch 'shall' be one month from the date on which the appointment of Panchas of the Nyaya Panchayat under Section 43 is completed."

The word used is "shall" (underlined (here in ' ') by me) and in the context it means "must". So, the election of the respondents 1 and 2, which was held beyond the period of one month from 30-5-1964 the date of the appointment of the Panchas contravenes the provisions of Rule 146 (1) of the Rules. The learned Counsel for the respondents, however, urged that the word "shall" does not always mean "must" but that it must be understood as "may" and that, therefore, it was not compulsory that the election of the Sarpanch and Sahayak Sarpanch should be held within one month from the date of the completion of the appointment of the Panchas. They relied on the passage at page 376 of Maxwell's Interpretation of Statutes (10th edition) and also 'State of Madhya Pradesh v. M/s. Azad Bharat Finance Co.,' AIR 1967 SC 276. The Supreme Court held that it is well settled that the use of the word "shall" does not always mean that the enactment is obligatory or mandatory but that it depends upon the context in which the word "shall" occurs and the other circumstances. In that case the construction of Section 11 of the Opium Act (Act 1 of 1878) as amended by Madhya Bharat Opium Act of 1955 was in question. In the present case, that the word "shall" is mandatory and means "must" is clear from Section 44 of the Act, under which the Sarpanch and Sahayak Sarpanch have to be elected. It runs thus:

"44. Election of Sarpanch, Sahayak Sarpanch — The panchas appointed under Sec. 43 'shall' in the manner and within the period to be prescribed, elect from amongst them two persons who are able to record proceedings, one as the Sarpanch and the other as the Sahayak Sarpanch:

Provided that if the panchas fail to elect the Sarpanch or the Sahayak Sarpanch as aforesaid the prescribed authority 'may' appoint the Sarpanch or the Sahayak Sarpanch."

In S. 44 also the word used is "shall" (underlined (herein ' ') by me). The pro-

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1969

Mysore High Court

AIR 1969 MYSORE 1 (V 56 C 1)

A. R. SOMNATH IYER
AND M. SADANANDASWAMY, JJ.

Muthyala Reddy, Petitioner v. State of Mysore, represented by the Chief Secy. to Govt. Vidhana Soudha, Bangalore and another, Respondents.

Writ Petn. No. 1934 of 1966 D/- 18-4-1968.

(A) Constitution of India, Arts. 31, 19 (1) (f). — Public purpose — Declaration of, by authority — Notice calling for objections need not precede — Failure to give such notice before declaration of public purpose — No infringement of Art. 19 (1) (f).

The authority which makes an acquisition, does not perform quasi-judicial function in deciding whether the acquisition is for a public purpose. It is an administrative function. Therefore, if the decision that certain acquisition is for public purpose, is not preceded by an opportunity to demonstrate that there is no public purpose, such decision is not an infraction of the fundamental right created by Art. 19 (1) (g). AIR 1964 SC 648, Foll. (Para 15)

The fundamental right which can be asserted in the sphere of compulsory acquisition is the right to resist such acquisition when it is made except under the authority of a law which provides for compensation or when it is not made for a public purpose. The fundamental right created by Article 19 (1) (g) to hold the property proposed to be acquired can have no relevance if the proposed acquisition does not infringe the fundamental right created by Article 31. If a law nevertheless provides for an op-

portunity for opposition to the proposed acquisition, the right to that opportunity is not a fundamental right as contended but is a statutory right created by the law which brings it into being. If the statute provides none, it is not claimable of right. But, if it does, it is claimable only by those who are clothed with it. (Paras 14, 16)

(B) Municipalities — Mysore, City of Bangalore Improvement Act (5 of 1945), S. 16 (2) — Procedure under for serving notice — Not identical with procedure prescribed under Land Acquisition Act (1894) — No discrimination between persons governed by section 16 (2) — Section 16 (2) is not unconstitutional — Constitution of India, Art. 14.

Section 16 (2) cannot be declared as unconstitutional merely because it provides inter alia for service of notice upon a person whose name is entered in the Land Revenue Register and the owner or occupier of a land has no opportunity to oppose the acquisition under the Improvement Act since that Act does not direct a notice to him, whereas that opportunity is available to him under the Land Acquisition Act (1894) has no relevance to constitutionality. Since all persons whose lands are acquired under the Improvement Act are treated alike and the provisions of section 16 (2) do not subject certain persons or classes of persons who are governed by its provisions along with others to hostile discrimination, Section 16(2) is not unconstitutional. (Paras 29, 30)

The purpose of the Improvement Act is not the same as the purpose of the Land Acquisition Act, since the acquisition under the Improvement Act is permissible only when there is an improvement scheme, whereas the existence of a public purpose is sufficient under the

Land Acquisition Act. The mere fact that eventually there can be an expropriation under both the laws cannot sustain the argument that the expropriation or acquisition should be made by adherence to the same kind of procedure under both. The statutory provisions in the two laws with respect to the service of notices are intended only to assist the decision of the question whether the land is required for an improvement scheme in the one case, and for a public purpose in the other. It is plain that the Legislature has the competence to prescribe the procedure by the adoption of which that administrative decision could be reached and it is not open to the petitioner to contend that the procedure by which it could be reached under the improvement Act should be the same as that by which it could be reached under the Land Acquisition Act. A person whose property is proposed to be acquired has no right to any particular procedure by adherence to which the conclusion is reached that it is required either for the improvement scheme under the Improvement Act or for a public purpose under the Land Acquisition Act (1894). AIR 1954 SC 545 and AIR 1963 SC 786 distinguished. (Paras 26, 27, 32;

Cases Referred: Chronological Paras

- (1964) AIR 1964 SC 648 (V 51) =
 (1964) 5 SCR 294, Jayantilal Amratlal v. F. N. Rana 13, 31, 36
 (1963) AIR 1963 SC 786 (V 50) =
 (1963) Supp 1 SCR 676, Udit Narain Singh v. Board of Revenue Bihar 36
 (1954) AIR 1954 SC 545 (V 41) =
 1955 SCR 448, Suraj Mall Mohta and Co. v. Viswanatha Sastri 35
 N. N. Hegde, for Petitioner; E. S. Venkataramaiah, for T. Krishna Rao, H. C. Special Government Pleader (for No. 1) and V. H. Ron, (for No. 2), for Respondents.

JUDGMENT: It is not necessary in this writ petition to embark upon a discussion as to the meaning to be given to the words 'land revenue register' occurring in section 16 (2) since no argument was presented about it. A discussion of that question is not necessary since on behalf of the petitioner, Mr. Mohandas Hegde did not assert that the petitioner's name had been entered in the land revenue register.

2. Now, section 16 (2) on the constitutionality of which considerable argument was expended, provides principally for service of notices on persons interested in opposing the scheme for the implementation of which an acquisition is proposed to enable them to oppose the acquisition should they so desire.

3. It will be seen from its provisions that when a land is proposed to be ac-

quired, the person on whom service of notice is enjoined by this sub-section is he whose name is entered in the land Revenue Register as the person primarily liable to pay the land revenue. It is that person who can object to the proposed acquisition and it is his objection that has to be considered and transmitted to Government under section 17.

4. The argument advanced for the petitioner by Mr. Mohandas Hegde was that section 16 (2) which restricts the service of notice only on the person whose name is entered in the land revenue register, is open to the denunciation that it makes a hostile discrimination against others as the owners and occupiers of the property proposed to be acquired. This argument is constructed on the contrast between the provisions of section 4 of the Central Land Acquisition Act, 1894, which will be referred to as the Land Acquisition Act, as extended to the new State of Mysore by the Land Acquisition Amending Act, 1961, and the Improvement Act.

5. Now section 16 (2) was introduced into the Improvement Act in the year 1952, and, when the scheme was published under section 16 (1) of the Improvement Act, in the year 1963, there were two laws under which the acquisition of a property for a public purpose was possible. The one was the Land Acquisition Act to which we have referred and the other was the Improvement Act.

6. It was said that a person whose property was acquired under the Land Acquisition Act was in a more advantageous position than he whose property was acquired under the Improvement Act in respect of notices which should issue before a final declaration is made by the appropriate authority that the acquisition is for a public purpose.

7. Section 18 of the Improvement Act and section 6 of the Land Acquisition Act are the two provisions under which that declaration is made as the case may be. Similarly, section 16 (2) of the Improvement Act corresponds to S. 4 (1) of the Land Acquisition Act. Section 16 (2) of the Improvement Act provides for the publication of a scheme, while section 4 (1) of the Land Acquisition Act authorises a notification about the proposed acquisition.

8. Now, section 4 (1) of the Land Acquisition Act as it now stands, provides for the publication of a preliminary notification and enumerates the powers of the officers. It will be seen from this section that when an acquisition of a property is proposed to be made under the Land Acquisition Act, the announcement that an acquisition is proposed to be made should be published in the official gazette, and in addition, the De-

1969

puty Commissioner should cause public notice to be given. These are the imperative provisions of section 4(1) of the Land Acquisition Act. That sub-section in addition provides that the Deputy Commissioner may cause notices to be served on the owner and the occupier as the case may be. It was argued on behalf of the Board that the word 'may' occurring in the concluding part of this sub-section in the context of these notices, when contrasted with the word 'shall' occurring in the earlier part, supports the interpretation that the Deputy Commissioner is invested with the discretion to serve those notices on the owner or the occupier and that the service of notices on them is not mandatory.

9. It will be recalled that section 16 (2) of the Improvement Act also directs the publication of the scheme in the official gazette but does not direct any public notice such as the one which section 4 (1) of the Land Acquisition Act directs.

10. Mr. Hegde who did not to any extent depend upon the absence of a direction for a public notice in section 16 (2) of the Improvement Act, placed before us the postulate that section 16 (2) is open to the condemnation that it is unconstitutional since the service of notices on owners and occupiers which is authorised by section 4(1) of the Land Acquisition Act was dispensed with by section 16 (2) of the Improvement Act.

11. The stress of the argument was that the owner or the occupier of a land which is acquired under the Improvement Act is thus deprived of an opportunity to make his representation against the proposed acquisition while that opportunity is made available by the Land Acquisition Act. So, it was contended, that a person whose property is expropriated under the Improvement Act and one in whose case the expropriation is proposed to be made under the Land Acquisition Act, although similarly situate, are subject to unequal treatment.

12. It was also maintained that an authority which makes an acquisition, performs a quasi-judicial function in deciding whether the acquisition is for a public purpose and that a decision which is not preceded by an opportunity to demonstrate that there is no public purpose is an infraction of the fundamental right created by Article 19 (1) (g) of the Constitution. We were asked to say that section 16 (2) which dispensed with notices to an occupier or owner was an unreasonable restriction on the exercise of that right.

13. The postulate that a decision on the question whether an acquisition is for a public purpose involved a quasi-judicial function, is, in our opinion, unacceptable. The enunciation by the

Supreme Court in *Jayantilal Amratlal v. F. N. Rana*, AIR 1964 SC 648 on which Mr. Advocate General depends make it manifest that that function is an administrative function.

14. Article 31 of the Constitution authorises compulsory acquisition by the authority of law, and, such acquisition is possible only when the acquisition is for a public purpose and, the law authorising the acquisition also provides for payment of compensation. So, the fundamental right which can be asserted in the sphere of compulsory acquisition is the right to resist such acquisition when it is made except under the authority of a law which provides for compensation or when it is not made for a public purpose. The fundamental right created by Article 19(1)(g) to hold the property proposed to be acquired can have no relevance if the proposed acquisition does not infringe the fundamental right created by Article 31.

15. When a law authorises an acquisition for a public purpose and directs payment of compensation, there should be the formation of opinion by some designated instrumentality that there is a public purpose justifying the acquisition. The machinery for the formation of that opinion has to be created by the legislature which makes the law. But, whatever the machinery, the formation of the opinion is an administrative function according to the authoritative pronouncement of the Supreme Court. So, the argument that that opinion should be preceded by an opportunity for opposition, constructed on the supposition that a quasi-judicial function is involved, becomes groundless.

16. But, if a law nevertheless provides for an opportunity for opposition to the proposed acquisition, the right to that opportunity is not a fundamental right as contended but is a statutory right created by the law which brings it into being. If the statute provides none, it is not claimable of right. But, if it does, it is claimable only by those who are clothed with it.

17. Now, Section 6 of the Land Acquisition Act authorises a declaration by Government that the land in respect of which there was a preliminary notification under Sec. 4 is required for a public purpose, and Section 6(3) provides that when that declaration is published in the official gazette, it constitutes conclusive evidence that the land is needed for a public purpose.

18. But the Improvement Act provides for an improvement scheme, and Section 16(1)(b) of that Act directs the publication of the scheme for that purpose. Section 17 insists on Governmental sanction for that scheme, and, when that sanction is accorded, that there has been such

sanction shall be published in the official gazette as required by clauses (a) and (b) of Section 18(1). Clause (c) of that subsection provides that that declaration is conclusive evidence that the land is needed for a public purpose.

19. So, while under the Land Acquisition Act the publication of the declaration under Sec. 6(3) is preceded by a preliminary notification under Section 4 of that Act and the hearing of the objections under Section 5-A, the declaration under Sec. 18 of the Improvement Act is preceded by the publication of the scheme under S. 16 and the hearing of objections under sub-section (2) of that section, and the accord of Governmental sanction under Section 17. Those preliminary steps to be taken in the one case are not the same as those which have to be taken in the other.

20. However that may be, the only argument maintained before us was that Section 16 (2) of the Improvement Act subjects persons whose properties are proposed to be acquired under the Improvement Act to hostile discrimination, and that was the restricted submission made before us. So it becomes unnecessary to discuss the other variations between the preliminary procedure prescribed by the one Act and that prescribed by the other.

21. Section 16 (2) of the Improvement Act whose constitutionality was assailed on that ground reads:

"16(2). Service of Notices on owners of Property to be acquired in executing the scheme—

During the thirty days next following the day on which such notification is published in the Mysore Gazette, the Board shall serve a notice on every person whose name appears in the assessment list of the Corporation or the Municipality or local body concerned or in the land revenue register as being primarily liable to pay the property tax or land revenue assessment on any building or land which it is proposed to acquire in executing the scheme, or in regard to which the Board proposes to acquire such building or land or to recover such betterment fee for the purpose of carrying out an improvement scheme and requiring an answer within thirty days from the date of service of the notice stating whether the person so served dissents or not to such acquisition of the building or land or to the recovery of such betterment fee, and if the person dissents, the reasons for such dissent."

What is relevant for our present discussion in this context is that part of it which directs the service of notice on every person whose name appears in the land revenue register as being primarily liable to pay land revenue assessment.

22. This provision was contrasted with the provision in Section 4 of the Land Acquisition Act which authorises the Deputy Commissioner to serve notices on the owner, and on the occupier when the owner is not the occupier of the land. That there is no provision in S. 16 (2) of the Improvement Act for service of notice on the owner or the occupier was the foundation of the argument that the owner or occupier of a land is in a more advantageous position when the land is proposed to be acquired under the Land Acquisition Act, since the service of notice on the owner or occupier is not directed by section 16 (2) of the Improvement Act.

23. We have already mentioned that it is not the petitioner's case that his name was entered in the land revenue register to which section 16 refers, as the person primarily liable to pay the land revenue, and so, no argument was advanced that there was any disobedience to the provisions of section 16 (2). So we proceed to consider the argument of unconstitutionality.

24. Mr. Advocate General on behalf of the State Government and Mr. Ron on behalf of the Trust Board advanced the argument that the procedure prescribed for service of notices and the hearing of objections preceding the publication of a declaration under S. 6 of the Land Acquisition Act and under Section 18 of the Improvement Act as the case may be, constitute the procedure for the investigation of the question whether the land is needed for a public purpose, and that the mere fact that the procedure prescribed by the one Act was at variance with that prescribed by the other, cannot support the argument of discrimination.

25. It was also urged that the purpose of the Improvement Act was not the same as the purpose of the Land Acquisition Act since the acquisition under the Improvement Act is authorised only for an improvement scheme, while the acquisition under the Land Acquisition Act could be made for any public purpose. So it was contended that a person whose land is acquired under the Improvement Act does not occupy a position similar to that occupied by a person whose land is acquired under the Land Acquisition Act, and that it was open to the Legislature to prescribe the preliminary steps under the one law at variance with those prescribed under the other. It was said that the acquisition proposed to be made under the two laws is no more than a consequence emanating from the requirement which in the one case is not the same as in the case of the others.

26. We are of the opinion that the mere fact that eventually there can be an expropriation under both the laws

cannot sustain the argument that the expropriation or acquisition should be made by adherence to the same kind of procedure under both. We accept the argument of Mr. Advocate General that the purpose of the Improvement Act is not the same as the purpose of the Land Acquisition Act, since the acquisition under the Improvement Act is permissible only when there is an improvement scheme, whereas the existence of a public purpose is sufficient under the Land Acquisition Act.

27. Moreover a person whose property is proposed to be acquired has no right to any particular procedure by adherence to which the conclusion is reached that it is required either for the improvement scheme under the one Act or for a public purpose under the other.

28. While the competence to enact the Improvement Act is bestowed by the 5th entry in the State List, the source of Legislative competence to enact the Land Acquisition Act is the 42nd entry in the Concurrent List. The 5th entry in the State List authorises legislation as respects 'improvement trusts' while the 42nd entry in the Concurrent List confers power to make a law with respect to 'acquisition and requisition' of property. The sources of the legislative power to make the two laws are thus independent of one another and the topic of the legislation authorised by the State List is not the same as the topic of the legislation authorised by the Concurrent List. The main purpose of the Improvement Act is the promotion of an improvement scheme, whereas the primary purpose of the Land Acquisition Act is the acquisition of land.

29. The complaint of discrimination levelled against section 16 (2) of the Improvement Act can succeed only if it is demonstrated that its provisions subject certain persons or classes of persons who are governed by its provisions along with others to hostile discrimination. If there is no such hostile discrimination and if all persons whose land could be acquired under the Improvement Act are treated alike, the complaint of discrimination becomes groundless. So, the argument that the procedure prescribed by the Land Acquisition Act with respect to the service of notices to enable opposition to the acquisition, is at variance with that prescribed by the Improvement Act has no materiality. That is so, since all persons whose lands are acquired under the Improvement Act are treated alike and similarly all persons whose lands are acquired under the Land Acquisition Act are similarly treated alike.

30. The complaint that the owner or occupier of a land has no opportunity to oppose the acquisition under the Impro-

vement Act since that Act does not direct a notice to him, whereas that opportunity is available to him under the Land Acquisition Act, has no relevance to constitutionality.

31. In AIR 1964 SC 648 the Supreme Court explained that a decision under section 6 of the Land Acquisition Act that a land was required for a public purpose was an administrative decision, and that the investigation directed by the Act has to be made only to assist such decision. In that context the Supreme Court observed:

"The decision that any particular land is needed for a public purpose is an administrative decision and it is for the purpose of arriving at that decision that the Act requires that certain enquiries be made. It cannot in the circumstances be said that the inquiry is a judicial or a quasi-judicial inquiry." (Page 652).

32. So it becomes clear that the statutory provisions in the two laws with respect to the service of notices are intended only to assist the decision of the question whether the land is required for an improvement scheme in the one case, and for a public purpose in the other. It is plain that the Legislature has the competence to prescribe the procedure by the adoption of which that administrative decision could be reached and it is not open to the petitioner to contend that the procedure by which it could be reached under the Improvement Act should be the same as that by which it could be reached under the Land Acquisition Act.

33. It is true that while Section 16 (2) directs service of notice on a person whose name is entered in the land revenue register and does not speak of any such notice to the owner or occupier, Section 4 of the Land Acquisition Act directs, in addition publication in the gazette, a public notice, and, confers power upon the Deputy Commissioner to serve a notice on the owner or occupier as the case may be.

34. On the argument advanced by Mr. Ron appearing for the Board that while the publication in the gazette and the public notice to which section 4 of the Land Acquisition Act refers are imperative, the service of notice on the owner or occupier is optional in support of which he depended upon the language of Section 4 which uses the word 'shall' in the one case and the word 'may' in the other, we express no opinion.

35. The decision of the Supreme Court in Surajmall Mohta and Co. v. Viswanatha Sastri, AIR 1954 SC 545 on which Mr. Mohandas Hegde depends does not assist the argument of unconstitutionality. That is a case in which some among the same class of persons

who fell within the ambit of section 34 of the Income-tax Act were subjected to hostile discrimination and dealt with under the provisions of the impugned Act at the choice of the Commissioner though they could also be proceeded against under the provisions of S. 34 of the Income-tax Act. It is for that reason that the impugned Act was pronounced unconstitutional, and so, it is manifest that there could be no resemblance between that case and the one before us.

36. The decision of the Supreme Court in *Udit Narain Singh v. Board of Revenue, Bihar*, AIR 1963 SC 786, on which reliance was placed in support of the argument that the determination as to the existence of a public purpose is a quasi judicial decision is distinguishable since that was not a case in which that question was discussed or decided. On the contrary the enunciation on that matter was, as already observed, made in AIR 1964 SC 648 and, that enunciation is destructive of the argument advanced on behalf of the petitioner.

37. We are therefore of the opinion that section 16 (2) of the Improvement Act is not open to the condemnation that it is unconstitutional.

38. So we dismiss this writ petition.

39. No costs.

BNP/D.V.C. Petition dismissed.

AIR 1969 MYSORE 6 (V 56 C 2)

A. R. SOMNATH IYER, J.

Narayana Balhithaya, Plaintiff-Appellant v. Venkatesha Balhithaya, Defendant-Respondent.

Second Appeal No. 465 of 1964, D/- 12-1-1968, against judgment of Sub-J. Mangalore, D/- 7-4-1964.

(A) Easements Act (1882), S. 15 — Right to take water along artificial course — Absence of contract — Acquisition of right by prescription must be proved.

The right to take water along an artificial water course running over the land of another is not a natural right of property but could be acquired either under a contract or by prescription which presumes a grant. Where the plaintiff does not plead that there was a contract between himself and the defendant the only method by which he can establish his right which he asserts is by proof of acquisition by prescription. (Para 6)

The employment of the phrase 'mamul right' in the plaint does not alter the position to any extent since that expression means no more than that for a long period of time the plaintiff was receiving water into his land along the artificial water course. But in a suit to enforce the right

to receive such water, the plaintiff can succeed only if it is proved that the right flows from a contract or from a right acquired by prescription. (1909) 1 Ch. 427, Rel. on. (Para 7)

(B) Civil P. C. (1908), S. 107(d), O. 41, R. 27 — Additional evidence when may be admitted in appeal — Failure to adduce evidence in court of first instance — No satisfactory explanation therefor — Cannot be admitted as additional evidence in appeal. (Para 12)

Cases Referred: Chronological Paras (1909) 1909-1 Ch 427=78 LJ Ch. 144,

Whitmores (Edenbridge) Ltd. v.

Stanford

6

U. L. Narayana Rao, for Appellant; B. P. Holla, for Respondent.

JUDGMENT :— The plaintiff is the appellant and his suit was for a declaration that he had a mamul right to take water from a channel on the defendant's land S. No. 71/7 for the cultivation of his land Survey No. 71/5 after the construction of a katta in the south-east corner of the defendant's land across the stream so that the water may flow in the direction of his own land. He also sought a right of way on another land. I am not concerned in this appeal with the right of way since the claim to that right was given up in the lower appellate court. The only question, therefore, that remained for the lower appellate court to consider was whether the mamul right asserted by the plaintiff was established.

2. The plaintiff examined a large number of witnesses in support of his assertion that there was a mamul right and the defendant examined himself and another witness in support of the allegation that the plaintiff was not raising any wet crop on his land but allowed it to lie fallow. Both the courts disbelieved the evidence given by the plaintiff's witnesses. The Munsiff recorded the finding that the mamul right pleaded by the plaintiff was not established, while the Civil Judge reached the conclusion that the prescriptive right, as he called it, asserted by the plaintiff was not established. So, the plaintiff's suit was dismissed.

3. In this appeal Mr. Narayana Rao made many criticisms of the judgments of the courts below. The first and the most serious complaint made against the judgment of the Civil Judge by Mr. Narayana Rao was that the Civil Judge entirely misunderstood the character of the plaintiff's suit. It was maintained that the Civil Judge was in error in thinking that the plaintiff depended upon a prescriptive right while it was clear from the plaint and from the evidence that the right asserted by the plaintiff was a mamul right and not a prescriptive right.

4. Now, the plaintiff's forefathers and the defendant's forefathers were members

of an undivided Hindu family. At a partition between them, survey No. 71/5 fell to the share of the ancestors of the plaintiff and Survey No. 71/7 fell to the share of the defendant's ancestors. It is not the plaintiff's case that the water course flowing from the point where, according to him, he could erect a katta, to the point where, according to him, the water discharges, that is, the land bearing survey No. 71/5 is a natural water course. His allegation that he makes the water flow in that way by erecting a katta on the defendant's land makes it clear that the watercourse is an artificial watercourse.

5. About the origin of this artificial watercourse, there is no evidence. The only evidence produced by the plaintiff was that during a long period of time water was flowing along this artificial watercourse into the land of the plaintiff and that the defendant with the unmeritorious intention of depriving the plaintiff of the water which is the only source of irrigation deepened the channel and deviated the water into a bigger channel towards the west of the defendant's land whereas the plaintiff's land lies to its east.

6. It is a firmly established principle that the right to take water along an artificial watercourse running over the land of another is not a natural right of property but could be acquired either under a contract or by prescription which presumes a grant. The plaintiff did not plead that there was a contract or an agreement between the defendant and the plaintiff or their forefathers under which a right was created in the owner of survey No. 71/5 to take water along the artificial water course on the land of the defendant or his forefathers. That being so and since that right is not a natural right of property the right could be acquired only by prescription which presumes a grant. This was the enunciation made by *Whitmores (Edenbridge) Ltd. v. Stanford*, 1909-1 Ch. 427 in which it was observed that in the case of an artificial watercourse there is no presumption as to the ownership of the bed and that the right to take water along that artificial watercourse must either be founded on a contract or could be acquired by prescription. That being the true position and since the plaintiff did not found his right on a contract, the only method by which he could establish his right which he asserted was by proof of acquisition by prescription.

7. The employment of the phrase 'Mamul right' in the plaint does not alter the position to any extent since that expression means no more than that for a long period of time the plaintiff was receiving water into his land along the artificial watercourse. But in a suit to enforce the right to receive such water, the plaintiff can succeed only if it is

proved that the right flows from a contract or from a right acquired by prescription.

8. The Civil Judge's judgment cannot, therefore, be subjected to the criticism that he misunderstood the nature of the right asserted by the plaintiff. But, Mr. Narayana Rao submitted that what was missed by the courts below was that, according to the commissioner's report who submitted at least three reports, the plaintiff was growing at least one wet crop on the land and that that wet crop could not be grown except with the water discharged by the artificial watercourse. But in his report the commissioner stated that while that was the assertion of the plaintiff, the defendant stated that the wet crop was grown because the defendant depended upon water coming down from the hills to his land and on water which accumulates in the tank on the hill. It is true that the commissioner stated that that tank was in a state of disrepair, but when it came into a state of disrepair was not stated by him. It was for the plaintiff to prove affirmatively that he was growing wet crops because he was receiving water by the artificial watercourse, but the evidence which he produced in support of that theory was not believed by the courts below which recorded a finding that the plaintiff allowed his land to lie fallow. Even about the allegation that one wet crop used to be grown on the plaintiff's land there is no evidence which, in the opinion of the courts below was trustworthy.

9. Mr. Narayana Rao made the complaint that the two further reports made by the commissioner were not considered by the Civil Judge. It is true that they have not been referred to in the course of the judgment specifically, but when I look into those reports, I find that they contain nothing useful to the plaintiff. In one report the commissioner stated that he found some materials on one portion of the defendant's land at which, according to the plaintiff, there was a katta and those materials might have been used for the construction of the katta. The Civil Judge did not refer to that part of the commissioner's report and did not think that what was observed by the commissioner was true and that the plaintiff had erected a katta at any time before he instituted the suit. That part of the commissioner's report in which he stated that the defendant had diverted the water from a natural watercourse flowing from the East to the West into a bigger channel and that the diverted watercourse appeared newer than the watercourse upon which the plaintiff depended was no doubt not referred to by the Civil Judge, but that feature of

the two watercourses does not establish a prescriptive right.

10. In support of the prescriptive right which the plaintiff described as a mamul right, the plaintiff depended entirely on oral evidence and that oral evidence not having been believed by the courts below, the correctness of the findings on the prescriptive right is not open to discussion in this court.

11. What I have said so far is the end of this appeal. But Mr. Narayana Rao made the complaint that an application presented by the plaintiff in the court of the Civil Judge for the reception of additional evidence was unreasonably refused. He submitted that the plaintiff asked for the reception of three documents as additional evidence as those documents afforded valuable corroboration to the testimony of the plaintiff's witnesses. One of those documents is a certified copy of a revenue record known as Cultivation Register relating to the year 1944-45 in which, according to Mr. Narayana Rao, it is stated that the plaintiff had grown a wet crop during that year. But the fact that he had grown a wet crop during one year does not afford such great corroboration to the testimony of the plaintiff's witnesses as Mr. Narayana Rao suggests. The other document was an endorsement from the Tahsildar that the cultivation register for the year 1950-51 was destroyed, but that is neither here nor there. The other is document which, according to Mr. Narayana Rao demonstrated that some land in the vicinity was occupied by the Armed Forces between the year 1944-47 and that such occupation was responsible for the plaintiff's land remaining fallow. But the plaintiff admitted that the land occupied by the Armed Forces was half a mile away from his land and it is difficult to understand how the occupation of that land or any other land by the Armed Forces could constitute an impediment to the cultivation of the plaintiff's land.

12. Moreover, these documents which could have been produced in the court of the first instance were not produced and no satisfactory explanation was tendered for their non-production at the earliest stage.

13. I dismiss this appeal. But in the circumstances of the case, I make a direction that each party shall bear his own costs in all the three courts.

BNP/D.V.C.

Appeal dismissed.

AIR 1969 MYSORE 8 (V 56 C 3)

M. SANTHOSH, J.

Bore Gowda and another, Appellants
v. B. Nagaraju and another, Respondents.

Second Appeal No. 121 of 1966, D/- 28-2-1968, against judgment and decree of Civil J., Mandya, D/- 6-9-1965.

(A) Civil P. C. (1908), O. 32, R. 7 — Negligence in conducting suit by guardian — Avoidance of decree by minor — Grounds.

A minor can avoid a decree passed against him on the ground of gross negligence of the guardian ad litem even if the minor had not succeeded in proving fraud and collusion on the part of the guardian. The right of a minor to avoid a decree obtained against him on account of the gross negligence of his guardian ad litem is a substantive right and not a mere matter of procedure and does not depend on any rule of evidence. But the negligence of the guardian in order to be a good ground for the avoidance of a decree must be of such character as to justify the inference that the minor's interests were not at all protected and in substance though not in form the minor went unrepresented in the trial court. (Para 5)

Where the guardian is an illiterate person and engages a qualified lawyer, if the lawyer fails to raise a point of law which may well have been raised by him it cannot be held that the guardian has been grossly negligent in the conduct of the case. Case law discussed. (Para 6)

(B) Civil P. C. (1908), S. 100 — Negligence on the part of guardian in conducting suit — Question of law.

The question whether on the admitted facts gross negligence on the part of the guardian in conducting the suit on behalf of the minor is made out, is a question of law and the High Court can interfere with the finding of the lower appellate court under S. 100. AIR 1963 SC 1633, Foll. (Para 10)

(C) Evidence Act (1872), S. 112 — Suit for partition by mother on behalf of minor son — Evidence to show that the mother had deserted the defendant 25-30 years back and the minor was born subsequently — Defendant in cross-examination admitting that the plaintiff was his wife — Non-framing of fresh issue about non-access does not result in wrong decision of the case. (Para 5)

Cases Referred: Chronological Paras
(1963) AIR 1963 SC 1633 (V 50) =
(1964) 2 SCR 673, Ramappa v.
Bojjappa 10
(1960) AIR 1960 Ker 367 (V 47) =
1960 Ker LT 546, Narayanan Nam-
booripad v. Gopalan Nair 5

- (1957) AIR 1957 Andh Pra 692 (V 44)=
 (1957) 1 Andh WR 216, Srirama-
 murthy v. Official Receiver, Krishna 7
 (1954) AIR 1954 SC 176 (V 41)=
 1954 SCR 424, Venkateswarlu v.
 Venkatanarayana 4
 (1949) AIR 1949 PC 278 (V 36)=76
 Ind App 202, Lakshmananna v. Ven-
 kateswarlu 4
 (1936) AIR 1936 Mad 479 (V 23),
 Daiva Ammal v. Selvaramanuja
 Nayaker 6
 (1940) AIR 1940 PC 93 (V 27)=ILR
 1940 Kar PC 235, Nand Kishwar
 Bux v. Gopal Bux 4
 (1932) AIR 1932 All 293 (V 19)=
 ILR 54 All 646 (FB), Mt. Siraj
 Fatima v. Mahmood Ali 8
 (1889) 42 CHD 674=58 LJ Ch 713,
 In re, Weall; Andrews v. Weall 6
 (1883) 22 CHD 727, In re, Speight;
 Speight Gaunt 6
 V. Tarakaram, for Appellants; S. C.
 Javali (for No. 1) and S. G. Bhat (for
 No. 2), for Respondents.

JUDGMENT :— The appellants before this Court were defendants 1 and 2 in O. S. 60 of 1962 on the file of the Munsiff, Mandya. Respondent No. 1 who was the plaintiff, filed a suit for setting aside the decree passed in O. S. No. 3 of 1958 on the file of the same Court which was subsequently confirmed in appeal, R. A. No. 77 of 1959, by the learned Civil Judge, Mandya. The first suit O. S. 3/58 had been filed by respondent-2, the second plaintiff as guardian of plaintiff-1, for partition and possession of the one-third share in the joint family properties. The plaintiff's case is that he is the son of Byregowda by his third wife. Byregowda and the appellants before this court, who were defendants 1 and 2 in the first suit, were brothers and members of a joint family. For the sake of convenience, in this appeal, the parties will be referred to by their designation in O. S. 3 of 1958. The suit O. S. 3/58 filed on behalf of the plaintiff by his mother plaintiff-2 as his guardian, was dismissed. The appeal filed against this order (R. A. 77/59) was also dismissed on 17-3-1960. The second suit, O. S. 60/62 was filed on 17-1-1962. In O. S. 60/62, the plaintiff prayed that as there was gross negligence on the part of his mother as guardian in conducting the suit O. S. 3/58, the decree was not binding on him and should be set aside. The trial court held that there was no gross negligence on the part of plaintiff-2 in conducting the suit, and dismissed the second suit. In the appeal filed by the plaintiff, the learned Civil Judge, Mandya, set aside the order of the trial court in O. S. 60/62. The learned Civil Judge also set aside the decree in O. S. 3 of 1958 and the appellate order in R. A. 77 of 1959 passed by the same court. He directed the learned Munsiff, Mandya, to re-

store the suit, O. S. 3/58, to his file and frame an additional issue throwing the burden on the defendants to prove non-access and dispose of the case according to law. It is this order passed by the learned Civil Judge, Mandya, that is being challenged in this second appeal.

2. Sri Tarakaram, learned counsel appearing on behalf of the appellants (defendants 1 and 2) has contended that the learned Judge erred in holding that there was gross negligence on the part of the guardian of the plaintiff which justified the setting aside of the decree passed in O. S. 3/1958. He contends that the learned Civil Judge has mistaken the onus of proof with the burden of proof. He has practically reviewed the judgments in the previous case including that passed by his predecessor, i. e., the learned Civil Judge in R. A. 77/57, which he is not entitled to do. Sri Tarakaram also argues that the learned Civil Judge failed to consider the material evidence in the case such as exhibit D-2, which has resulted in a wrong decision.

The learned counsel contends that in this case, no question of application of Section 112 of the Indian Evidence Act arises as this was not a case where the defendants admitted the marriage between plaintiff-2 and Byregowda. The defendants denied that plaintiff-2 was the wife of Byregowda and as such the question of the application of Section 112 of the Evidence Act did not arise in this case and the learned Civil Judge was wrong in thinking that there was gross negligence on the part of the guardian in not getting an issue framed in the case on this question.

3. Sri Javali, learned counsel appearing on behalf of the respondents, contends that there was negligence in the conduct of the case right from the initial stage itself. The first issue should have been: "Was plaintiff-2 Mayamma the wife of Byregowda?". Sri Javali has stressed the fact that in the course of the evidence, defendant-2 has admitted that plaintiff-2 was the wife of Byregowda. The argument of Sri Javali is, when once an important admission like this had been made, a fresh issue on the question of non-access, should have been framed. Once it was admitted that Mayamma was the wife of Byregowda Section 112 of the Evidence Act is attracted and this would be conclusive proof that the plaintiff was the son of Byregowda, unless the defendants prove affirmatively that the parties to the marriage had no access to each other at any time. The argument is that the burden of proof was wrongly cast on the plaintiff by the lower court. It was for the defendants to make out clearly the case of non-access. No proper pleas have been raised or put forward in the case and as there was no issue of non-access as per

Sec. 112 of the Evidence Act, there was really no trial of the suit. Sri Javali also argues that the question whether there was gross negligence on the part of the guardian of the plaintiff is a question of fact depending upon the facts and circumstances of each case, and it is not a question of law and as such, this Court, in second appeal, cannot interfere with such a finding.

4. Sri Javali has strongly relied on *Venkateswarlu v. Venkatanarayana*, AIR 1954 SC 176. In the said case, their Lordships of the Supreme Court have pointed out that the presumption which Section 112 of the Evidence Act contemplates is a conclusive presumption of law which can be displaced only by proof of non-access between the parties to the marriage. Access and non-access connote existence and non-existence of opportunities for marital intercourse. Sri Javali argues that the trial court totally failed to advert to Section 112 of the Evidence Act and wrongly cast the burden of proof on the plaintiff to prove that he was the son of Byregowda. Sri Tarakaram has pointed out that in the Supreme Court decision mentioned above, the fact that the parties were married was admitted and hence Section 112 was attracted to the facts of that case. Sri Tarakaram argues, the defendants in this case denied in their pleadings that there was a valid marriage between plaintiff-2 and Byregowda. Sri Tarakaram contends, simply because in cross-examination defendant-2 admitted that Mayamma was the wife of Byregowda, there was no need, after the evidence had been recorded, to frame a fresh issue.

It was only an admission made by defendant-2. The courts decided the case bearing in mind this admission made by defendant-2 on the question whether the plaintiff was the son of Byregowda. Sri Tarakaram has also pointed out that the burden of proof never shifts and it is always for the plaintiff to prove his case. In this case, the plaintiff should have proved that Mayamma was the legally wedded wife of Byregowda and that the plaintiff was born to Byregowda during the subsistence of the marriage. The learned Civil Judge has mistaken the shifting of onus of proof to burden of proof. It may also be mentioned that in the very decision mentioned above, the Supreme Court has pointed out that non-access can be proved like any other physical fact either by direct or circumstantial evidence which is relevant to the issue. In this case, Sri Tarakaram has pointed out, the defendants have let in unimpeachable evidence to show that Mayamma deserted Byregowda in 1925 and thereafter, her whereabouts were not known. Exhibit D-2, the petition given by Byregowda to the District Magistrate

stating that Mayamma had deserted him, clearly proves the version of the defendants that there was non-access. The plaintiff, it may be mentioned, was born on 1941, about 16 years after Mayamma had deserted Byregowda. In O. S. 3/58 the learned Munsiff has pointed out that the admissions made by plaintiff-2 Mayamma conclusively show that the first plaintiff was not the son of Byregowda.

Mayamma had admitted that she had been residing in Bangalore for 23 to 24 years and she was working during the period as a cooly in a factory. The trial court has observed that it is very difficult to believe that Byregowda, who was himself a man of affluent circumstances, would have left his young wife, who was his third wife, at Bangalore and allowed her to live by working as a cooly. The trial court also held that the defendants had placed unimpeachable evidence to show that plaintiff-2 went away in the year 1925 and did not subsequently return and that Byregowda did not even know her whereabouts. While discussing the evidence, the learned Munsiff has observed as follows:—

"As contended by the defendants, deceased Byregowda had no access to his wife during this long period of 24 or 25 years. Under these circumstances, I think the contention of defendants 1 and 2 that the I plaintiff was not the son of deceased Byregowda has to be upheld."

Again at para 7, the trial court has observed as follows:—

"As already stated, the admission of the II plaintiff herself and the petition Ex. D-2 prove beyond doubt that the II Plaintiff left the village more than 30 years back that subsequent to her leaving the village she had no access to Byregowda and that her two children including the I plaintiff were born subsequently."

In this case, as already pointed out, after recording the full evidence, the trial court came to the abovementioned conclusion that Mayamma left the village 30 years back and that Byregowda had no access to his wife during that long period. Their Lordships of the Privy Council in *Nand Kishwar Bux v. Gopal Bux*, AIR 1940 PC 93 at paragraph 5 of their judgment have observed as follows:

"Turning to the High Court's judgments, it does not appear that the case was decided on the grounds of onus. As the learned Chief Justice observed, the question of onus of proof was of no great importance, because both sides had entered into evidence."

Again in *Lakshmananna v. Venkateswarlu*, AIR 1949 PC 278, in paragraph 43, Sir Madhavan Nair, J. has observed as follows:—

"What is called the burden of proof on the pleadings should not be confused with the burden of adducing evidence

which is described as 'shifting'. The burden of proof on the pleadings never shifts, it always remains constant. * * *

Then again at paragraph 44, their Lordships of the Privy Council have observed as follows:—

"This section shows that the initial burden of proving a prima facie case in his favour is cast on the plaintiff; when he gives such evidence as will support a prima facie case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage in the course of the evidence the onus shifts from one side to the other. When after the entire evidence is adduced the tribunal feels it cannot make up its mind as to which of the version is true, it will hold that the party on whom the burden lies has not discharged the burden; but if it has on the evidence no difficulty in arriving at a definite conclusion, then the burden of proof on the pleadings recedes into the background."

5. Keeping the abovementioned principles laid down by their Lordships in view, I will now examine whether there has been gross negligence on the part of the guardian justifying the setting aside of the decree passed in O. S. 3/58. The contention of Sri Javali is that after the admission made by defendant 2 in the course of his cross-examination that Mayamma was the wife of Byregowda the guardian should have insisted that a fresh issue about non-access should have been framed and it should have been brought to the notice of the court that the burden of providing this issue was on the defendants and not on the plaintiff. It is contended that failure on the part of the guardian to do so has resulted in a wrong decision of the case. Sri Javali has relied on *Narayanan Nambooripad v. Gopalan Nair*, AIR 1960 Ker 367 wherein it has been stated that a minor can avoid a decree passed against him on the ground of gross negligence of the guardian ad litem even if the minor had not succeeded in proving fraud and collusion on the part of the guardian. The right of a minor to avoid a decree obtained against him on account of the gross negligence of his guardian ad litem is a substantive right and not a mere matter of procedure and does not depend on any rule of evidence. But the very same decision points out that the negligence of the guardian in order to be a good ground for the avoidance of a decree must be of such character as to justify the inference that the minor's interests were not at all protected and in substance though not in form the minor went unrepresented in the trial court.

6. Here, the point to be remembered is that plaintiff-2 the guardian of the minor plaintiff-1, was an illiterate woman and a cooly. When she filed a suit on behalf of her minor son, she entrusted the conduct of the proceedings to a qualified lawyer. In the very nature of things, she cannot be expected to know what are the issues arising in the case and whether fresh issues should be framed after the recording of the evidence. In filing a suit, all that she can be expected to do is to engage a qualified lawyer. If there is any negligence on the part of the lawyer in the conduct of the suit, can it be said that the guardian of the minor is grossly negligent in the conduct of the suit? In *Daiva Ammal v. Selvaramanuja Nayakar*, AIR 1936 Mad 479 *Madhavan Nair, J.* as he then was, speaking for the Bench, in a similar case has observed at page 485 as follows:.

"We are prepared to assume that the special aspect of the question of non-liability now presented before us escaped the notice of the lawyer who conducted the case. But the question is whether the guardian who has taken all the necessary steps to conduct the case properly and has entrusted the case to a lawyer can be said to be grossly negligent on account of the lawyer's failure to raise a legal point in defence which may well have been raised by him. It is not denied that the lawyer engaged was sufficiently competent to conduct the case. It is not suggested that there was any collusion between the lawyer and the plaintiff or that he was in any other way remiss in conducting the case. It is not proved that the lawyer was not provided with sufficient funds to conduct the case. In these circumstances, is it reasonable to hold that the guardian has been grossly negligent in the conduct of the case if the lawyer fails to raise a point of law which may well have been raised by him? We think not. It was observed in (1883) 22 Ch. D. 727 that a trustee is bound to conduct the business of trust in the same way as an ordinary prudent man of business conducts his own and has no further obligation. In (1889) 42 Ch. D. 674 it was pointed out that a trustee may select solicitors and agents and so long as he selects persons properly qualified he cannot be made responsible for their intelligence and honesty. We think the same may be said about the guardian of a minor also."

7. In *Sriramamurthy v. Official Receiver Krishna*, AIR 1957 Andh Pra 692, a Bench of the Andhra Pradesh High Court has held that if the next friend or guardian ad litem had been guilty of gross dereliction of duty, that is to say if he had neglected to do what was plainly his duty, or did or omitted to do something which no man of common

honestly and ordinary prudence would have done or omitted, then the minor would have a right to sue to set aside an adverse decision attributable to the guardian's breach of duty. The negligence of the guardian must be so serious or of such a character as to justify the inference that the minor's interests were not at all protected and in substance, though not in form, the minor went unrepresented in the trial court.

8. A Full Bench of the Allahabad High Court in *Mt. Siraj Fatma v. Mahmood Ali*, AIR 1932 All 293 has laid down that the negligence in order to be a good ground for the avoidance of a decree must be of such a nature as to justify the inference that the Minor's interests were not at all protected and therefore, he was not properly represented. The negligence must be so gross as to amount to a clear violation of the duty cast upon the guardian.

9. Bearing these principles in mind, I am clearly of opinion that in the instant case, the lower appellate court erred in law in coming to the conclusion that there was gross dereliction of duty on the part of the guardian to justify the setting aside of the decree in O. S. 3 of 1953.

10. Sri Javali has contended that the question whether there has been gross negligence is a question of fact and is not a question of law and would not come within the purview of Section 100 C. P. C. to enable this court to interfere in second appeal. He has strongly relied on *Ramappa v. Bojjappa*, AIR 1963 SC 1633 wherein their Lordships have pointed that sufficiency or adequacy of evidence to support a finding of fact is a matter for decision of the court of facts and cannot be agitated in a second appeal. But, here the question for consideration is whether on the admitted facts, what has been done amounts to gross negligence in law on the part of the guardian. The proper legal effect of proved facts is essentially a question of law and the High Court is entitled to interfere in second appeal. What is the legal conclusion to be drawn from the facts and whether in law gross negligence on the part of the guardian has been made out, are, in my opinion, questions of law. In Mulla's Code of Civil Procedure, 13th edition, by T. L. Venkatarama Ayyar, at page 439, para 5, in its commentary under Section 100, it is stated as follows: "Though a second appeal does not lie from a finding of fact, yet where a legal conclusion is drawn from the finding a second appeal will lie under cl. (a) of the section on the ground that the legal conclusion was erroneous. Thus, the question whether possession is adverse or not is often one of simple fact, but it may also be a conclusion of law or a mixed

question of law and fact. xx xx
The facts found (by the lower appellate court) need not be questioned. It is the soundness of the conclusions from them that is in question and this is a matter of law.' As stated by their Lordships of the Privy Council in another case 'the proper legal effect of a proved fact is essentially a question of law', and the High Court is, therefore, entitled to interfere in second appeal."

I am therefore clearly of opinion that the question whether on the admitted facts gross negligence on the part of the guardian is made out, is a question of law and this court can interfere with the finding of the lower appellate court under section 100, C. P. C.

11. In the result, for the reasons mentioned above, I am of opinion that the order of the learned Civil Judge is contrary to law and has to be set aside and I do so accordingly and allow the appeal and restore the decree of the trial court. In the circumstances of the case, there will be no order as to costs.
MVJ/D.V.C. Appeal allowed.

AIR 1969 MYSORE 12 (V 56 C 4)

NARAYANA PAI, J.

Sivhamurthy Swamy, Petitioner v. Agodi Songanno, Respondent.

E. P. No. 3 of 1967, D/- 15-9-1967.

Evidence Act (1872), Ss. 154 and 142 — Scope — Principles governing grant of permission to cross-examine one's own witness — Circumstances under which leading questions may be allowed.

It is not necessary to make a formal declaration that a witness is hostile before permission is granted under section 154. The discretion of the Court in granting permission is a judicial discretion and is required to be exercised in a judicious way. In ordinary circumstances or in a majority of cases it may be taken that when a party calls a witness, he represents to the Court that the witness called by him is worthy of credit and is likely to speak the truth in respect of facts touching matters under enquiry by Court. But occasions may, not infrequently arise, where a party may be obliged to examine a witness, with whom he may have no privity and of whose general character and credibility he may not be fully aware or informed and in such cases, it will not only be absurd to assume that he represents to the Court that the witness is worthy of credit but also, in the highest degree, unfair and unjust. Permission under section 154 could hardly be refused when any witness makes an unexpected statement adverse to the case of the prosecution. It means that an attempt on the part of the witness to

depart from what is tentatively believed to be true is open to the suspicion that he may be departing from the truth, making it necessary to test his veracity by cross-examination by the party to whose detriment his unexpected departure may operate. It is wrong law to assume that such witnesses must be regarded as witnesses called by the Court and liable to be cross-examined as of right by the party citing them. A witness should be regarded as adverse and liable to cross-examination by the party calling him only when, in the opinion of the Court, he bears hostile animus to the party calling him and further that a hostile witness in the real sense is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth. Where no case has been made out for a general permission to cross-examine witness under section 154 of the Evidence Act, it may become necessary on particular topics or in relation to material circumstances to relieve the party against the prohibition of putting leading questions to the witness, so that the Court may have a clear picture of the witness's reaction to those questions as an aid to discovering the truth. For this purpose it is open to the Court to act either under S. 154 to a limited extent or under Section 142 which allows leading questions to be put in examination in chief, even if objected to, with the permission of the Court. AIR 1922 PC 409 and 1961 (2) Cri LJ 653 (Mys) and AIR 1933 Pat 488 and AIR 1921 Cal 677 and AIR 1936 Mad 516 and AIR 1931 Cal 401 (FB), Rel. on.

(Paras 4, 6, 14, 18, 19)

Cases Referred:	Chronological Paras
(1960) 38 Mys LJ 887=1961 (2) Cri LJ 653, State v. Subbappa	5
(1936) AIR 1936 Mad 516 (V 23)= 37 Cri LJ 909, Ratnasabhapathy v. Public Prosecutor	28
(1933) AIR 1933 Pat 488 (V 20)= 34 Cri LJ 892, Sachidanand Prasad v. Emperor	18
(1931) AIR 1931 Cal 401 (V 18)= 32 Cri LJ 768 (FB), Profulla Kumar v. Emperor	36
(1930) AIR 1930 Cal 139 (V 17)= 31 Cri LJ 610, Bikram Ali v. Emperor	36
(1922) AIR 1922 PC 409 (V 9)=27 Cal WN 797, Baikuntha v. Prasanna	4
(1921) AIR 1921 Cal 677 (V 8)= ILR 47 Cal 1043, Surendra Krishna Mandal v. Rani Dassi	19
B. S. Patil and Smt. Pramila, for Petitioner; D. Venugopalachari, for Respondent.	

ORDER: Further examination of this witness was stopped after recording the last answer just before the Court rose for lunch. When the Court reassembled

after lunch, Mr. B. S. Patil, learned counsel for the petitioner, sought my permission under Section 154 of the Evidence Act to put to this witness questions which may be put to him in cross-examination by the adverse party. This request was opposed (page 246) by Mr. Venugopalachari, learned counsel for the respondents on the ground that in the circumstances of this case, no such permission could properly be granted at all or that at this stage of the examination of the witness, the petitioner may not be said to have laid the foundation necessary for seeking permission to cross-examine under section 154 of the Evidence Act.

2. As both the counsel sought some time for addressing full arguments on this question with the assistance of citations, the examination of this witness was postponed and the next witness, P. W. 19, put into the box. After completing the examination of P. W. 19 yesterday, arguments were commenced. They concluded today.

3. Although many cases have been cited by Counsel on both sides, there is not much doubt or obscurity about the principles governing the Court's discretion whether or not to grant the permission under Section 154 of the Evidence Act. Most of the cases have been cited only by way of illustration of the particular and respective positions taken up by the counsel or merely as examples of the application of the well established principles to the facts and circumstances of particular cases. It will not, therefore, be necessary for me to refer in detail to everyone of the case cited.

4. Whatever may be the position under the English law, it has never been doubted that, under the Indian law and particularly in view of the wording of Section 154 of the Evidence Act, the matter is left entirely to the discretion of the Court. It is not necessary, as pointed out by the Privy Council so early as in AIR 1922 PC 409, Baikuntha v. Prasanna, to make any formal declaration that a witness is hostile before granting permission under section 154 of the Evidence Act. But though the discretion is stated in wide terms, there is no doubt that it is a judicial discretion and is required to be exercised in a judicious way.

5. The general or basic principles governing the exercise of such discretion have been the subject of consideration by a Division Bench of this Court, in a case, the judgment of which is reported in the State v. Subbappa, 1960 Mys LJ 887 at pp. 895 and 896 of the report = ((1961) (2) Cri LJ 653 at p. 656); it is pointed out therein:

"Having regard to the ultimate objective of taking evidence, namely, to dis-

cover the truth to the best of one's ability, it is obvious that that principle alone should be the one to guide and direct the exercise of the Court's discretion and not any considerations bearing upon whether the granting or refusing to grant permission to cross-examine a witness in a particular instance will be favourable or unfavourable to the case of the one or the other party before Court."

6. It was also pointed out on an examination of the relevant sections of the Evidence Act, that in ordinary circumstances or in a majority of cases it may be taken that when a party calls a witness, he represents to the Court that the witness called by him is worthy of credit and is likely to speak the truth in respect of facts touching matters under enquiry by Court. Such general proposition was also qualified by the statement that occasions may, not infrequently arise, there a party may be obliged to examine a witness, with whom he may have no privity and of whose general character and credibility he may not be fully aware or informed and that in such cases, it will not only be absurd to assume that he represents to the Court the witness is worthy of credit but also, in the highest degree, unfair and unjust.

7. These propositions briefly stated in the said decision should now be explained in some detail before applying them to the facts of this case.

8. Now, when a party comes to Court with a pleading in support of the case propounded by him, the law assumes that he is putting forward that case with the belief that it is true on facts and sustainable in law. When a party calls a witness, he does so to prove his case; and may therefore reasonably expect the witness to depose to facts which go to support his case.

9. Witnesses depose on oath to speak the truth and may, therefore, be expected to speak the truth. The total effect of these considerations is that when a party cites witness, he is representing to the Court that the said witness is, in his opinion, a trustworthy witness who may be expected to speak the truth, and because he has put forward a case which he believes to be true, by expecting the witness to speak the truth, he may be taken to expect that he will speak in favour of his case.

10. Exceptional cases would fall into two categories. The first is where a person is bound by law to examine a witness of a particular description to prove his case, as for example, examination of an attester of a will or an attester of documents required by law to be attested. The second category of cases would

be cases where a party is obliged not by any rule of law but by force of circumstances or pure necessity to examine a witness in order to complete the statement of his case or completely to discharge the burden of proof placed on him by the law.

11. But whatever may be the category into which a given case falls, and whatever may be the circumstances which oblige a party to call particular witness, there is no doubt that so far as his case itself is concerned, he does represent to the Court that the said case is true on facts or at any rate, that he believes that the facts stated in his pleadings in support of his case are true.

12. There is also no doubt that the only purpose of a party leading evidence is to lend support to his case. It will, therefore, not be wrong or unfair to proceed on the footing that in citing a witness and examining him on his side, he expects or at any rate entertains the hope that the evidence of the said witness will lend some support to his case.

13. The purpose of the court in conducting the trial is, as already stated, to make the best attempt that is humanly possible to discover the truth. The task of the Court in recording the examining or assessing evidence is to discover the truth as far as it is humanly possible to do so. It is with this in view that the Court should exercise its discretion under section 154 of the Evidence Act.

14. Although as stated by the Privy Council and as always held to be correct law in India, it is not necessary to make a formal declaration that witness is hostile to the party calling him before permitting a party to cross-examine him because the purpose of cross-examination is to test the truth of the evidence given by a witness, the Court would be right in permitting the cross-examination by the very party who called that witness only if it has reason to believe that the witness may be in some manner or the other unwilling to speak the truth or not disposed to speak the truth and that therefore it is necessary to submit his evidence to the test of cross-examination by the very party calling him. Now, it should be remembered that in the case of every witness, there is a right of cross-examination given by the Evidence Act to the adverse party. An adverse party in normal circumstances is the party opposed to the party calling the witness. An answer given by a witness adverse to the party calling him would in normal circumstances be an answer in favour of the case of the opposite party. Hence the opposite party may not be interested in cross-examining him in respect of the answer. It is in such circumstances that the Court will

find itself without assistance of the test of cross-examination if the party calling him is not himself permitted to cross-examine his witness.

15. The essence of the matter, therefore, is not whether an answer given to a question is adverse to the case of one or the other of the parties but whether an answer given or a disposition disclosed in a matter likely to damage the case of the party calling the witness, may be suspected to be inspired by a desire not to speak the truth or to hide the truth or to colour the truth in such a way as to mislead the Court.

16. In normal cases where it can fairly be assumed that a party calling a witness represents to the Court that he is a trustworthy witness, an occasion for the party calling him to seek permission under Section 154 of the Evidence Act can arise only where he unexpectedly gives an answer which is adverse to his case. Even there, it is not enough if the party feels that the witness is hostile to him; it is necessary that the Court should come to entertain an opinion that the witness has such hostile animus against the party calling him as to be inspired by a desire to speak the untruth or not to speak the truth.

17. Hence, in such cases, an element of surprise of the type mentioned above becomes the starting point for a consideration by the Court of the question whether it should exercise its discretion under Section 154 and permit the party calling a witness to cross-examine him.

18. It is with reference to such cases that Rowland J., observed in *Sachidanand Prasad v. Emperor*, AIR 1933 Pat 488 at p. 492, that permission under Section 154 could hardly be refused when any witness makes an unexpected statement adverse to the case of the prosecution. As I read the observation, it means that an attempt on the part of the witness to depart from what is tentatively believed to be true is open to the suspicion that he may be departing from the truth, making it necessary to test his veracity by cross-examination by the party to whose detriment his unexpected departure may operate.

19. with reference to cases of witnesses like an attesting witness whom the law obliges a party to examine, Mukherjee, J., has in *I. L. R. 47 Cal 1043* (AIR 1921 Cal 677) pointed out that it is wrong law to assume that such witnesses must be regarded as witnesses called by the Court and liable to be cross-examined as of right by the party citing them. His Lordship states that a witness should be regarded as adverse and liable to cross-examination by the party calling him only when, in the opinion of the Court, he bears hostile animus to the

party calling him and further that that a hostile witness in the real sense is one who from the manner in which he gives him evidence shows that he is not desirous of telling the truth.

20. Now, the present case does not fall under either of these categories. According to Mr. Patil, he has been obliged by circumstances and by way of pure necessity to call this witness, because having regard to the acts and activities attributed to this witness which amount to corrupt practice under the Representation of the People Act, he was one who, in all probability, was not likely to be examined by the respondents at all but whose evidence is necessary to be placed on record to assist the petitioner to discharge the burden of proof resting on him. Indeed, this witness has been described by Mr. Patil as in truth and in substance a witness for the respondents, that is to say, a person who by his acts has shown himself to be so deeply interested in the respondents as to be regarded as a witness favourable to the respondents and unfavourable to the petitioner. He further adds that the petitioner considers it his duty to cite and examine this witness with a view to assist the court to arrive at the truth.

21. Now, these statements or contentions put forward by Mr. Patil for the petitioner lead to one inevitable inference, viz., that even at the time this witness was cited by the petitioner, he had no illusions about the type of evidence he might give, but did distinctly and clearly contemplate that it would be necessary for him to cross-examine this witness for the purpose of making out his own case.

22. If such is the position, he cannot be said to represent to the Court that this witness may be regarded as a trustworthy witness. If, therefore, he gives an answer adverse to the case of the petitioner he cannot be heard to say that he has been taken by surprise and that therefore he may be permitted to test the truth of the answer by himself cross-examining the witness. Mr. Patil nevertheless argues that his case must be regarded as on par with the case of an attesting witness which a party propounding a will or an attested document is bound by law to examine.

23. I do not think that the analogy applies in all respects. The necessity in this case of examining the witness is not one imposed by law but one regarded as existing by the petitioner and one which to a great extent depends upon an opinion of the petitioner. If his view is that this witness is strongly disposed in favour of the respondents and against the petitioner and he nevertheless entertains the opinion that it is necessary for him to examine this witness to make out this case and at the same time actually expects that if

will be necessary for him to cross-examine him to make out his case, then, it clearly means that he is taking a chance of the witness making some answers which may support his case, but at the same time expects to be enabled by the Court to impeach his credit by cross-examination should he give answers adverse to his case.

24. Such a situation in my opinion, is not one which may, in any sense, be said to entitle the petitioner to seek permission of the Court under Section 154 of the Evidence Act to cross-examine the witness. If he took the chance of this witness making some answer in favour of his case, he must also take the risk of the witness damaging his case by his other answers. To hold otherwise would be to bring about a situation which is clearly unfair to the respondents.

25. What is stated above is a line of inference which flow from the original opinion entertained by the petitioner when he cited this witness, and the consequences which flow from his conduct are consequences which, both according to law as well as ordinary human calculations, a man taking a chance must in all fairness take.

26. From the point of view of the Court, the one and only consideration is whether the attitude disclosed by the witness is one destructive of his duty to speak the truth. An animus adverse to the party calling him necessary for the grant of permission under Section 154 is such animus as is sufficient to create in the mind of the Court a tentative opinion or at least a suspicion that the witness is not disposed to speak the truth or is disposed to speak the untruth, making it necessary to permit the party calling him to cross-examine him for the simple reason that the opposite party normally entitled to cross-examine him may not cross-examine him in view of the fact that the answer is favourable to his case.

27. From this point of view, the mere fact that the answer is adverse to the case of the party calling him is not sufficient, and in peculiar circumstances of this case, such an answer by itself can hardly be regarded as untrue or as disclosing a desire on the part of the witness to speak the truth, because the petitioner did not expect and cannot reasonably be said to have expected that the witness would support his case and he cannot therefore tell the Court that because he does not support his case, the witness is speaking the untruth. It may be that the witness knows that every thing stated about him in the petition is not true or not knowing what has been stated about him in the petition is admitting only such facts of his as are true and denying as untrue any other acts or

activities which he did not indulge in. Even if he should be regarded, as the petitioner contends, as a person favourably disposed towards the respondents, it need not be that he has any special animus against the petitioner so as to be willing to speak the untruth.

28. No doubt the other witnesses examined for the petitioner have spoken to some of the acts and activities of this witness as alleged in the petition. But the fact that this witness or any answer given by this witness contradicts the evidence of those witnesses is not by itself sufficient to hold that he has such hostile animus as to entitle the petitioner to seek my permission under Section 154. This position has been fairly conceded by Mr. Patil. That is also what the Madras High Court has held in *Ratnasabhapathy v. Public Prosecutor*, AIR 1936 Mad 516. See page 520 of the Report.

29. But the burden of Mr. Patil's argument is that because the respondents taking refuge under the rule as to burden of proof would not examine this witness on their side, he is not only obliged to examine him on his side but also feels it to be his duty to assist the Court in discovering the truth by placing on record the evidence of this witness and further by cross-examining him for testing the truth of his evidence.

30. So far as the petitioner's opinion that it is necessary to examine this witness to complete his case is concerned, what I have stated above is a sufficient answer. If he did not expect this witness to support his case but merely took the chance of his giving some answers which may be in favour of his case, he cannot be heard to say that he should be relieved of the adverse consequences that may flow from his action.

31. So far as his duty to assist the Court is concerned, I am clearly of the opinion that his duty is to cite and examine witness whom he believes to be trustworthy. If he does not believe this witness to be a trustworthy witness and his object is only to hold up this witness as a liar, or to expose him in his true colours as Mr. Patil stated in the course of his arguments then, clearly his purpose is not bona fide desire to prove his case but to malign this witness as an individual. It should be clearly borne in mind that what the Court is interested in is to discover the truth or otherwise of the respective cases of the parties placed before it for adjudication. It is not directly interested in ascertaining the trustworthiness or good character of all and sundry persons. The veracity or credibility or trustworthiness of a witness is of importance only as a step in aid to its main task of adjudicating upon the truth or otherwise of the

case before it. I do not think that a Court can be called upon to divert its attention from its main task and concern itself with the character or conduct of a person who is not a party to the proceeding before it.

32. It may be that the witness may admit some facts and deny some facts. Whether those admissions or denials are secured either in the course of the cross-examination on behalf of the Respondent, the Court is not relieved of the duty of assessing their truth in the light of the entire evidence placed before it. If both the parties fail to elicit from the witness information which is relevant to this enquiry, the Court is not powerless; it can nevertheless intervene under Section 165 of the Evidence Act if it entertains the opinion that it is necessary to do so in the interests of discovering the truth. In such an event, it would also give liberty to both the parties to cross-examine the witness upon topics covered by examination by the Court.

33. In the circumstances of this case and for the reasons stated above, I am not satisfied that it has yet been made out that the witness has disclosed such animus as to require me to permit the petitioner himself to cross-examine him.

34. Although the petitioner has taken the risk of examining this witness on his side and should therefore be fairly called upon to take the consequences of the step taken by him, the evidence of this witness is of considerable importance to the decision of some of the important issues in this case. Hence, although in my opinion, no case has been made out for a general permission to cross-examine this witness being granted under S. 154 of the Evidence Act, it may become necessary on particular topics or in relation to material circumstances to relieve the petitioner against the prohibition of putting leading questions to the witness, so that I may have a clear picture of the witness's reaction to those questions as an aid to discovering the truth in this case.

35. For the said purpose, it appears to me that it is open to me to act either under Section 154 to a limited extent or under Section 142 which allows leading questions to be put in examination in chief, even if objected to, with the permission of the Court.

36. Mr. Patil cited the decision of the Calcutta High Court in AIR 1930 Cal 139 to suggest that it may not be possible to grant such permission to put leading questions without giving a general permission to cross-examine under S. 154. Some support for that view is available in the observation of Lord-Williams J., in the said decision. That view is not accepted by a subsequent Full Bench decision of the Calcutta High Court reported

in Profulla Kumar v. Emperor, AIR 1931 Cal 401 (FB), where it is clearly observed that there has never been any doubt as to the power of the Court to give leave to put leading questions to one's own witness as is plain from Section 142 of the Evidence Act. I respectfully agree with the view stated by the Full Bench of the Calcutta High Court. It will be noticed that the objection to putting leading questions in the course of the examination in chief is that it may bring about a situation which is unfair either to the witness or to the other side. In the case of witnesses who are quite impartial and depose truthfully to facts which they know to be true, a leading question may divert them into giving an answer which may not be true according to their conception of the facts. In the case of witnesses clearly disposed in favour of the party calling them, they may very readily assent to whatever the examining counsel leads them to state. In the former case, the result would be unfair to the witness and in the latter unfair to the other side. But in the case of a witness like this who, even according to the petitioner, is not disposed favourably towards him, there is no question of his being led into an answer against his will. He may in normal circumstances be expected to state facts as he sees them, and should he state anything which discloses an undue favour towards the respondents, the manner and content of his answer will be of assistance to me in assessing the value of the same.

37. I, therefore, decline to grant the general permission under Section 154 of the Evidence Act to the petitioner to put this witness any question which can be put in cross-examination by adverse party. In the case of particular matters or particular topics which appear to me to be of material importance, I may grant permission to the Petitioner's counsel to put leading questions, each matter being considered on its own merits.

38. The examination of the witness will continue in the light of this ruling.

39. As it is now past 5 P.M. further examination is adjourned to 11 A.M. on Monday the 18th of this month. The witness will be present in Court at that time.

GGM/D.V.C.

Order accordingly

AIR 1969 MYSORE 17 (V 56 C 5).

A. R. SOMNATH IYER, J.

Boramma, Appellant v. Dharmappa, Respondents.

Second Appeal No. 530 of 1964, D/- 8-2-1968 against judgment of Civil, J.: Hassan, D/- 27-8-1963.

HL/HL/D426/68

(A) Evidence Act (1872), S. 112 — Applicability — Provisions are as much applicable to the offspring of a marriage between Hindus as it is to children of spouses professing other faiths.

(Para 5)

(B) Evidence Act (1872), S. 112 — Nature of onus under—Mere assertion as to non-access not sufficient—Child born during pendency of suit for maintenance — Earlier proceeding by wife for restitution amicably settled — No evidence as to relation between spouses during period the child could have been begotten produced by husband — Right of maintenance held not forfeited on ground of unchastity — Pendency of suit could not prove non-access — Hindu Adoptions and Maintenance Act (1956), S. 18 (3).

The burden under section 112 is a heavy burden and, since any pronouncement on legitimacy is a serious pronouncement having grave consequences, evidence of non-access should be clear and convincing. It is not enough for the husband to merely assert that he did not have access to his wife but it must be proved that the circumstances were such that there was no opportunity for access or sexual intercourse at any time when the child could have been begotten. In the absence of such evidence, the presumption is that the child was legitimate. (Para 10)

The application for restitution filed by the wife was disposed of on the report made by the wife that the matter had been settled between the parties. During pendency of suit for maintenance filed by the wife subsequently a child was born. The husband merely denied that the child was born to him while the wife asserted that he was the father of the child. No evidence was produced by the husband as to what were the relations between the spouses at the most crucial point of time:

Held, that the wife had not forfeited her right of maintenance on the ground that she was unchaste. There was a presumption that the child so born was a legitimate child and that presumption could be displaced only on production of proof that at the time the child could have been begotten there were no opportunities for access. The bald statement by the husband that the child was not his and that he had no access to her was not sufficient. AIR 1934 PC 49 Rel. on. (Paras 15 and 16)

It could be seen, from the manner in which the proceedings for restitution of conjugal rights terminated, that the mere fact that the two parties were arrayed on opposite sides to the maintenance proceeding, did not constitute an impediment to their coming together as asserted by the wife in those proceedings.

(Para 14)

Cases Referred: Chronological Paras (1934) AIR 1934 PC 49 (V 21) =

ILR 12 Rang 243, Karapaya Ser-
vai v. Mayandi

R. N. Narasimha Murthy, for Appellant; B. T. Parthasarathy, for Respondents.

JUDGMENT: The suit out of which this second appeal arises commenced with an application for permission to sue in forma pauperis which was presented on July 14, 1958. The plaintiff was the wife who sought a decree for maintenance against her husband. There was an ex parte decree on April 8, 1959, and, in execution of that decree, the property of the husband was sold. It was at that stage that the husband made an application for getting the ex parte decree set aside, and, it was set aside on payment of costs. The written statement was then produced on January 15, 1962 in which the husband contended that the wife had forfeited her right to maintenance by her unchastity.

2. The allegation of unchastity was made on the foundation of the birth of a female child to the plaintiff on November, 8, 1960 during the pendency of the suit. The husband denied that that child was born to him while the wife asserted that he was her parent.

3. The courts below pronounced against legitimacy and this was responsible for their conclusion that the wife was unchaste and so was not entitled to maintenance.

4. The judgment of the Civil Judge who heard the appeal which he dismissed, is open to the criticism that he completely misunderstood the provisions of Section 112 of the Evidence Act which raises a presumption of legitimacy if the child was born during the continuance of a valid marriage and it was not shown that the parties to the marriage had no access to each other at any time when the child could have been begotten.

5. Since there was no dispute that the marriage between the two spouses was a valid marriage, the burden of establishing that the spouses had no access to each other at the time when the child could have been begotten was on the husband. Not unnaturally, an appeal to this section was made on behalf of the wife, and, while it was negatived by the court of first instance, it was negatived by the Civil Judge on the ground that the presumption could not be claimed by a Hindu wife. It is obvious that in taking this view, he was plainly mistaken. The provisions of section 112 of the Evidence Act are as much applicable to the offspring of a marriage between Hindus as it is to children of spouses professing other faiths.

6. The Civil Judge, therefore, proceeded without reference to the presumption claimable under section 112 of the Evidence Act and in derogation of the well known rule which emerges from the decision of the Privy Council in *Karapaya Servai v. Mayandi*, AIR 1934 PC 49 that the burden of proving that parties to a valid marriage had no access to each other at any time when the child could have been begotten is on the person challenging legitimacy.

7. Now, the Civil Judge depended in support of his conclusion that the child was illegitimate on the evidence given by the husband and that given by D. W. 2 as he did upon a certain chronology of events.

8. Defendant 1 stated in his examination-in-chief that he had no access to his wife and that the child was not born to him. In his cross-examination, he stated that some other person was the father of the child and that the wife was of an immoral character. But what appears from another part of his cross-examination is that his justification for the accusation of infidelity against his wife was the fact that she was 'seen' by him with a certain Annayya of Ibbani.

9. D. W. 2 who is a resident of the village in which the husband lives, stated that there were strained relations between the spouses during a period of five years and that the husband had not gone to the village in which the wife was living and that the plaintiff did not visit her husband in his village. But, when the plaintiff gave evidence, she asserted that the child was born to her husband, and, she repudiated the suggestion in cross-examination that the offspring was the result of adultery.

10. It is clear that the evidence of D. W. 2 was no evidence of non-access. He is a resident of the husband's village and he could not be sure that at no time when the child could have been begotten the husband had not gone to the wife's village or that the wife did not go to the husband's village. The mere assertion of the husband that he had no access to his wife, is, not, normally speaking, evidence of non-access, the burden of establishing which is thrown by S. 112 of the Evidence Act on him. That burden is a heavy burden, and, since any pronouncement on legitimacy is a serious pronouncement having grave consequences, evidence of non-access should be clear and convincing. It is not enough for the husband to merely assert that he did not have access to his wife but it must be proved that the circumstances were such that there was no opportunity for access. In the absence of such evidence, the presumption is that the child was legitimate.

11. The Civil Judge overlooked this principle by reason of his imperfect understanding of the provisions of Section 112 of the Evidence Act.

12. Now, there is nothing in the chronology of events which supports the conclusion of the Civil Judge. On the contrary, the chronology is such as to raise a doubt as to the truth of the allegation of the husband that he had no access.

13. The institution of the present suit was preceded by the prosecution of an application for restitution of conjugal rights by the wife. On January 24, 1958, that application was disposed of on a report made by the wife that the matter had been settled between the spouses.

14. The extremely slender foundation on which the courts below depended in support of their finding on legitimacy was the fact that the child was born during the pendency of the suit for maintenance. It is seen from the manner in which the proceedings for restitution of conjugal rights terminated, that the mere fact that the two parties were arrayed on opposite sides to a legal proceeding, did not constitute an impediment to their coming together as it did happen as reported by the wife in those proceedings.

15. The suit for maintenance was pending during a long period of more than two years before the child was born, and the husband produced no evidence as to what were the relations between the parties at the time when the child could have been begotten which was somewhere by the end of January 1960. There is a presumption that the child so born is a legitimate child and that presumption could be displaced only on production of proof that at the time the child could have been begotten there were no opportunities for access. The husband said nothing beyond making a bald statement that the child was not his and that he had no access to her, and, no evidence was produced as to what were the relations between the spouses at the most crucial point of time. What had to be proved by the husband was that there was no opportunity for sexual intercourse at that most material point of time, and, of that, no evidence was produced.

16. So, I set aside the decrees of the courts below, and, in substitution of the finding recorded by them that the wife was unchaste, I make a finding that she was not, and that she had not forfeited her right to maintenance. So, the wife was clearly entitled to maintenance.

17. But, unfortunately, on the measure of maintenance the Courts below recorded no finding. This was a very regrettable thing for them to do. It was

their duty to record findings on all the issues even if on the finding on any one of the issues it was possible to decide the suit one way or the other.

18. So, it becomes my duty to fix the rate of maintenance. I have looked into the evidence in the case, and, while the wife claims that the annual income of the husband is as high as Rs. 5,000/- the husband has made an extremely gross under-estimate. Taking all the circumstances into consideration, it seems to me that I should award maintenance at the rate of Rs. 25/- a month.

19. In regard to arrears, it is clear that if the husband is directed to pay arrears at the rate fixed by me during the whole of the period during which this litigation was pending, it becomes extremely oppressive. So, I award a sum of Rs. 600/- towards arrears of maintenance payable for the period till now. Future maintenance from this date will be paid at the rate fixed by me.

20. Each party will bear his or her own costs in all the three courts. But, the court-fee payable in all the three courts on the plaint and on the appeals shall be paid by defendant 1.

CWM/D.V.C.

Appeal allowed.

AIR 1969 MYSORE 20 (V 56 C 6)

SOMNATH IYER, J.

Puttamadamma, Appellant v. Puttappa, Respondent.

R. S. A. No. 200 of 1964, D/- 29-3-1967.

(A) T. P. Act (1882), S. 67-A — Section incorporates no prohibition against institution of suit on one of mortgages in case where no objection to form of suit is taken on earlier occasion. (Para 4)

(B) T. P. Act (1882), S. 68 (1) (d) — Mortgagee's right to sue for mortgage-money — Right when acquired.

The clear meaning of section 68 (1) (d) of the T. P. Act is that in all cases where a mortgagor fails to deliver possession of the property mortgaged although the mortgagee is entitled to such possession, the mortgagee acquires the right to sue for the mortgage-money. That right is acquired in a case where, under a usufructuary mortgage the mortgagor does not deliver possession of the property to the mortgagee on the date on which the mortgage comes into being and there is neglect on the part of the mortgagor to deliver possession.

(Para 7)

(C) T. P. Act (1882), S. 68 (1) (d) — Limitation Act (1908), Art. 132 — Suit

for decree for sale of mortgage property — Limitation when commences to run.

It is clear when Art. 132 of the Limitation Act, 1908 is read with section 68 (1) (d) of the T. P. Act that the money becomes due to a mortgagee who is not able to obtain possession of the mortgaged property from the mortgagor who was bound to deliver possession but did not. The provision which clothes the mortgagee with the right to sue for the mortgage-money when the mortgage is a usufructuary mortgage is the failure on the part of the mortgagor to deliver possession. It is that event which entitles the mortgagee to sue for the mortgage-money, and that right cannot come into being if the money sued for does not become due within the meaning of the third column of Art. 132 of the Limitation Act, 1908. Limitation commences to run under that column in a suit for decree for sale of the mortgaged property on the date on which the mortgagor who was under a duty to deliver possession does not deliver possession.

(Para 10)

G. Vedavyasachar, for Appellant; K. Swami Rao, for Respondent.

JUDGMENT: On March 20, 1944 the defendant who is the appellant in this court executed a registered usufructuary mortgage deed for a sum of Rs. 200 in favour of the plaintiff. It was provided by the mortgage deed that the mortgagee who is the plaintiff should be in possession of the mortgaged property for a period of fifteen years, and that there could be a redemption after the expiry of that period. On June 30, 1959 the plaintiff brought the suit out of which this appeal arises, and the decree which he sought, after he was permitted to amend his plaint, was a decree for sale of the mortgaged property. The plaintiff made an allegation that the defendant never delivered possession of the mortgaged property to him, and that she was herself in wrongful possession. The defendant repudiated the truth of that allegation, but in her written statement the defendant contended that the suit was barred by limitation and that it was not maintainable. It is not necessary to refer to the other contentions which the written statement incorporates. The Munsiff accepted both these contentions and dismissed the suit, but the Civil Judge in the appeal, preferred by the plaintiff, reversed the decree of the Munsiff and gave the plaintiff the decree he wanted. So the defendant appeals.

2. Mr. Vedavyasacharya appearing for the defendant made three submissions. The first was that the plaintiff could not ask for decree for sale of the mortgaged property. The second was that the suit was not maintainable, and the third was

that in any event the suit was barred by limitation.

3. There is no substance in the first submission that the plaintiff could not ask for a decree for sale since, on the allegation in the plaint that the defendant did not deliver possession of the property which was usufructuarily mortgaged which was not denied, the plaintiff became clearly entitled to a decree for sale under section 68 (1) (d) of the Transfer of Property Act.

4. There is no substance in the second submission either. That submission was that there were two mortgages by the defendant in favour of the plaintiff, the first of which was a usufructuary mortgage which is the subject matter of this appeal and the second a simple mortgage. It was submitted by Mr. Acharya that the plaintiff had brought an earlier suit for the recovery of the amount due under the simple mortgage, and that it was his duty as provided by S. 67-A of the Transfer of Property Act to consolidate the mortgages and bring one suit for all the reliefs emanating from those two mortgages. The answer to this submission is that section 67-A which provides for consolidation, incorporates no prohibition against the institution of a suit on one of the mortgages in a case where no objection to the form of the suit is taken on the earlier occasion.

5. So what remains to be considered is the validity of the third submission that the suit is barred by limitation. Mr. Acharya's submission was that on the allegation in the plaint, the plaintiff became entitled to sue for the recovery of the mortgage debt when the defendant failed to deliver possession of the mortgaged property on the date of the execution of the mortgage deed. The plaintiff's case, it was pointed out, was that notwithstanding the recital in the mortgage deed that the defendant had delivered possession of the property to the plaintiff, there was no such delivery of possession of the property. So it was submitted that the money due under the mortgage deed became due immediately there was failure to deliver possession and that it therefore became due on the date of execution of the mortgage deed and that the suit should have therefore been brought within twelve years from that date.

6. To this submission made by Mr. Acharya there can be no answer. Under section 68 (1) (d) of the Transfer of Property Act, the mortgagee has a right to sue for the mortgage-money in a case where the mortgagor fails to deliver possession of the mortgaged property, although the mortgagee is entitled to such possession. The relevant part of that sub-section reads:

"68. Right to sue for mortgage-money
(1) The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely:

x x x xxx x x
(d) Where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor."

7. The clear meaning of this part of the sub-section is that in all cases where a mortgagor fails to deliver possession of the property mortgaged although the mortgagee is entitled to such possession, the mortgagee acquires the right to sue for the mortgage-money. That right is acquired in a case where, under a usufructuary mortgage the mortgagor does not deliver possession of the property to the mortgagee on the date on which the mortgage comes into being and there is neglect on the part of the mortgagor to deliver possession.

8. Article 132 of the Limitation Act, 1908, which governs suit of that description reads:—

Description of suit.— Art. 132. To enforce payment of money charged upon immoveable property.

Period of limitation.— Twelve years.
Time from which period begins to run.— When the money sued for becomes due.

9. Mr. Swami Rao appearing for the plaintiff is not right in contending that the money sued for by the plaintiff did not become due on the date of execution of the mortgage deed and that the acquisition of that right was postponed until the period of fifteen years specified in the mortgage deed expired. That period of fifteen years to which the mortgage deed Ex. P-1 refers is the period during which the plaintiff was entitled to remain in possession of the mortgaged property without the defendant having a right of redemption. That covenant in the mortgage deed can have no relevance to a case in which the usufructuary mortgagee claims to have acquired the right to sue for the mortgage-money under the provisions of Section 68 (1) (d) of the Transfer of Property Act. That right accrues when the mortgagor neglects to deliver possession, and in such a case the covenant for possession during a period of fifteen years during which the mortgagor shall have no right of redemption can have no meaning.

10. It is clear when Art. 132 of the Indian Limitation Act is read with section 68 (1) (d) of the Transfer of Property Act that the money becomes due to a mortgagee who is not able to obtain possession of the mortgaged property from

the mortgagor on the date on which the mortgagor was bound to deliver possession but did not. The provision which clothes the mortgagee with the right to sue for the mortgage-money when the mortgage is a usufructuary mortgage is the failure on the part of the mortgagor to deliver possession. It is that event which entitles the mortgagee to sue for the mortgage-money, and that right cannot come into being if the money sued for does not become due within the meaning of the third column of Art. 132 of the Indian Limitation Act, 1908. Limitation commences to run under that column in a suit like the one with which I am concerned, on the date on which the mortgagor who was under a duty to deliver possession does not deliver possession.

11. It was recited in Ex. P-1 that the mortgagor had delivered possession of the property to the plaintiff on the date of the mortgage deed. But the plaintiff's case was that such possession was not delivered, and, so, there was a failure on the part of the defendant to deliver possession of the mortgaged property on the day on which the mortgage deed was executed. It is at least from that date that limitation commenced to run under Art. 132 of the Indian Limitation Act, 1908. So the plaintiff's suit which was brought more than twelve years after that date was clearly barred by limitation and was rightly dismissed by the Munsiff.

12. I therefore allow this appeal and reverse the decree made by the Civil Judge and restore that of the Munsiff.

13. But, in the circumstances I direct that each party will bear his or her own costs in all the three courts.

MBR/D.V.C.

Appeal allowed.

AIR 1969 MYSORE 22 (V 56 C 7)

C. HONNIAH, J.

State of Mysore, Appellant v. A. G. Ramaswamy, Respondent.

Criminal Revn. Case No. 45 of 1967, D/-19-12-1967, from order of S. J., Chitradurga in Cr. R. P. No. 7 of 1967.

Criminal P. C. (1898) S. 540 — Limits of discretionary power — Application by prosecution to issue summons to additional witnesses — That the evidence sought to be proved was for just decision not disclosed in the application — Court is justified in rejecting application to exercise powers under section on such application as it will amount only to filling up the gap in the prosecution case. (Para 4)

DL/DL/B589/68

N. P. Moganna for State Public Prosecutor, for the State; E. Kanakasabhapathy, for Respondent.

ORDER: This is a reference under section 438 of the Code of Criminal Procedure, by the Sessions Judge, Chitradurga, recommending to set aside the order passed by the Special First Class Magistrate, Davanagere, in Criminal Case No. 2892 of 1967.

2. The facts which have given rise to this reference are these: The Sub-Inspector of Police Davanagere filed a charge sheet on 25-5-66 against one A. G. Ramaswamy (respondent in the reference) in the court of the Special First Class Magistrate, Davanagere, alleging that he was in possession of some brandy bottles without a valid permit and thereby committed an offence punishable under section 12 (a) read with section 59 (b) of the Mysore Prohibition Act. For one reason or the other, the respondent did not appear before the Court. Therefore, the learned Magistrate stopped the proceedings under section 249 Cr. P. C. on 14-6-66.

After nearly 13 months the prosecution filed an application on 28-7-1967, requesting the Court to revive the proceedings, stating that the respondent had been traced. The learned Magistrate revived the case and took the case on his file giving C. C. No. 2892/67. On that day the prosecution filed an application along with three references, requesting the Court to include the names of three witnesses mentioned in the said application and to issue summonses to them. The Magistrate posted the case to 31-7-67 for filing the objections by the respondent, if any, to the said application. On that day, no objections were filed. Thereafter, the learned Magistrate passed an order dated 2-8-1967, rejecting the application filed by the prosecution to examine additional witnesses. The learned Sessions Judge has made this reference to set aside the said order.

3. It could be seen from the order of the learned Magistrate that no provision of law was mentioned in the application under which the prosecution sought to examine three additional witnesses. However, the learned Magistrate, took that application to be one under Section 540 Cr. P. C. He rejected the application mainly on the ground that no material was placed before him in the application that the evidence of the three witnesses was essential for the just decision of the case in order to exercise the discretion given to him under section 540 Cr. P. C. In disposing of the application he stated thus:

"Even the reasons are not forthcoming to show that the evidence of these witnesses is essential to the just decision of the case. In what manner the evidence

is necessary and why they kept back all these documents, are not forthcoming. Therefore, I cannot exercise my power under Section 540 Cr. P. C."

The first part of section 540 Cr. P. C. gives purely discretionary authority to the Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code to summon any one as a witness or to examine any person present in Court or to recall and re-examine any person whose evidence has already been recorded. The second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. When the charge-sheet was filed against the respondent the witnesses now sought to be examined were not mentioned. No reasons are given in the application why these three witnesses should be examined in the case. Nor it is stated in the application why the evidence of these witnesses is necessary.

The prosecution were in possession of all the materials on which they sought to establish the charges against the respondent, at the time the charge-sheet was filed. If the prosecution withheld some materials and then at a later stage wanted to produce them even without stating the necessity for such materials, the Court cannot exercise its power under Sec. 540 Cr. P. C. If the Court exercises the powers on such an application, it will only amount to filling up a gap in the prosecution case. As the application filed by the prosecution was bald and did not disclose that the evidence sought to be proved was for the just decision of the case, the learned Magistrate was justified in rejecting that application.

5. In these circumstances, the reference cannot be accepted and the same is rejected.

MKS/D.V.C.

Reference rejected.

AIR 1969 MYSORE 23 (V 56 C 8)

M. SADASIVAYYA

AND D. M. CHANDRASHEKHAR JJ.

M/s. D. Cawasji and Co., Mysore, Petitioners v. State of Mysore by its Chief Secretary Bangalore-1 and others, Respondents.

Writ Petns. Nos. 1096 and 1097 of 1966, 1393, 1800, 2069, 2160, 2637 to 2639, and 2995 to 2997 of 1967, 92, 108, 221, 240, 392, 393, 520 to 524, 612, 627 to 631, 639, 640, 832, 862 to 864, 944, 950 to 954, 957, 959 to 961, 985, 986, 989, 1016, 1041, 1044, 1090 and 1105 to 1110 of 1968, D/- 2-5-1968.

(A) Mysore Elementary Education Act (6 of 1941) S. 9 — Levy of education cess

HL/HL/D519/68

on toddy shop rent and tree tax in Bellary District is without authority of law since the Act has not been subsequently extended to Bellary district — Even the Notification of sale of excise privileges does not provide for such payment.

(Paras 23 and 26)

(B) Mysore Elementary Education Act (6 of 1941) S. 9 — No education cess on Arrack or beer shop rent can be levied.

Since the local cess was not being levied either on arrack shop rent or Beer shop rent in the year 1941, when the Education Act came into force, nor was education cess being levied on arrack shop rent or on Beer shop rent in the year 1955 when the Mysore Elementary Education (Amendment) Act, 1955 came into force there is no charge of Education Cess under section 9 of the Education Act on Arrack shop rent and Beer shop Rent.

(Para 32)

(C) Mysore Excise Act (5 of 1901), S. 29 — Rules regulating sale of excise privileges, R. 23 — Levy of education cess on Beer shop rent, toddy shop rent, tree tax and tree rent — Such cess is neither leviable under R. 23 nor under any notification — Mysore Elementary Education Act (6 of 1941) S. 9 and Schedule — Constitution of India, Art. 265.

Education cess was not being levied under any Government order, notification, or statutory enactment or rule thereunder when the Mysore Elementary Education (Amendment) Act, 1955, came into force. Rule 23 of the rules purports to impose a levy of Education Cess on Toddy shop rent, tree tax and tree rent. But from the language of rule 23 it does not appear that it itself purports to create any charge of Education Cess on these items, on the other hand, the Note to this rule seems to proceed on the assumption that there has been a lawful charge of Education Cess on these items by some other provision of law; and the rules merely provide that Education Cess payable on these items shall be paid along with the monthly kist. It cannot also be said that even if Education Cess on Toddy shop Rent, Tree Tax and Tree Rent, had not been imposed by any law before 1955, Education cess has all along been factually levied and collected on these items, and that since it was being so levied when the Mysore Elementary Education (Amendment) Act, 1955, came into force, the charge of Education Cess on these items, is attracted under section 9 of the Education Act and the schedule as amended in 1955. The necessary implication of the words "on which education cess is now being levied" occurring in the amended Schedule to the Education Act, is that such cess is being lawfully levied and not without the authority of law. The Schedule to the Education Act was

amended after the advent of the Constitution and hence it is reasonable to impute to the State Legislature not merely knowledge of, but also anxiety for compliance with, Article 265 of the Constitution which provides that no tax shall be levied or collected except by authority of law. That the Legislature did not have in mind any unauthorised levy of collection, is clear from the fact that neither the original Education Act nor the amending Act of 1955 contains any provisions for validating any levy or collection made without the authority of law. (Paras 38, 39, 41, 42 and 108)

(D) Constitution of India, Art. 14 — Different laws in different parts of State — Levy of Education Cess only in old Mysore area (excluding Bellary district) under Mysore Elementary Education Act, 1941 (as amended) does not violate Article 14 of the Constitution—Mysore Elementary Education Act (6 of 1941) S. 9. AIR 1962 SC 981, Rel. on; AIR 1963 SC 853, Explained. (Para 48)

(E) Constitution of India, Art. 265 — "Tax and Cess"—Term Cess is used when levy is for some special administrative expense. (Para 50)

(F) Mysore Excise Act (21 of 1966), Section 24 — Excise Duty — Shop rent on Toddy shop, Arrack shop and Beer shop is not a duty of excise — Levy of Education cess is however valid since it is not confined to duties of excise only—Mysore Elementary Education Act (6 of 1941), S. 9 and Schedule (as amended in 1955). (1966) 1 Mys LJ 554, held reversed in AIR 1967 S. C. 1512.

Section 24 of the Mysore Excise Act 1966 (Mysore Act 21 of 1966) which declares that the sum accepted in consideration of grant of any lease relating to excisable articles, shall be the excise duty, cannot expand the definition of excise duty and cannot render shop rent in respect of Toddy shop, Arrack shop and Beer shop a duty of excise. But the levy of Education cess is valid. This is because the scope of the amended schedule to the Education Act is wide and under the Education Act the levy of Education Cess is not confined to duties of excise only, but extends to items which are not duties of excise but still come within excise revenue. AIR 1967 SC 1512 (Reversing (1966) 1 Mys LJ 554) and AIR 1962 SC 1281 Rel. on. (Paras 60, 65 and 108)

(G) Constitution of India, Art. 277 — Tax imposed under a pre-constitution statute — Valid continuance after Constitution — Conditions essential — Education cess levied under Mysore Elementary Education Act.—Validity — Mysore Elementary Education Act (6 of 1941) S. 9 and Schedule (as amended in 1955).

For continuance of a tax under Article 277 of the Constitution the three conditions that are to be satisfied are (1) the tax should be one which has been lawfully levied; (2) the identity of the body that collects the tax, the area for whose benefit the tax is to be utilised and the purpose for which the utilisation is to take place continue to be the same; and (3) the rate of tax is not enhanced nor its incidence in any manner altered. As regards the Education Cess levied under the Mysore Act there is no charge of Education Cess on Arrack shop Rent, Toddy shop Rent, or Beer shop rent, Tree tax, or tree rent either under the Education Act as originally enacted or as amended by the Elementary Education (Amendment) Act, 1944. Even if Education Cess was levied, as a matter of fact, on these items of Excise Revenue, it (Education Cess) cannot be said to have been lawfully levied. Thus Education Cess on shop rent does not satisfy the first of the above three conditions. Even the second condition is not satisfied. The effect of the repeal of sections 7 and 8 of the Education Act, is that the proceeds of Education Cess will go to the consolidated funds of the State and will become part of it, whereas before such repeal such proceeds would go to a separate earmarked fund for each District, and such fund had to be utilised only for meeting the expenses incurred on elementary education in that particular District. Thus before the commencement of the Constitution the area for whose benefit Education Cess was utilised, was each of the nine Districts of the then State of Mysore. But after the Mysore Elementary Education (Amendment) Act, 1955, repealed sections 7 and 8, the proceeds of Education cess which go to the consolidated funds of the State, will be available for the benefit of the entire new State of Mysore. On account of the first two of the aforesaid three conditions not being satisfied, the saving under Article 277 is not available to Education Cess on Shop rent, if shop rent falls outside any of the Entries in List II of the Eleventh Schedule to the Constitution. AIR 1962 SC 1073 and AIR 1964 SC 1166, Rel. on.

(Paras 68, 69, 72, 73 and 108)

(H) Constitution of India, Preamble and Sch. 7 Lists I, II and III — Interpretation of Legislative Entries.

Entry in the Legislative lists in the Seventh Schedule to the Constitution, should be given the widest scope of which their meaning is fairly capable and each general word should, accordingly be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended in it.

(Para 75)

(I) Constitution of India, Art. 265, Schedule VII, List II, Entries 8, 46 to 63 — Power to tax cannot be deduced as an ancillary power from legislative entries.

Taxation is considered as a distinct matter for the purpose of legislative competence and the power to tax cannot be deduced from a general legislative entry as an ancillary power. The legislative power to tax alcoholic liquor must be derived from one of the Entries of Taxation, i.e. Entries 46 to 53 in List II, of the Seventh Schedule. Power to regulate or restrict manufacture, sale, and consumption of liquor would include the power to impose any tax which has the effect of discouraging consumption of liquor. No doubt, one of the objects of imposing taxes on liquor may be to check consumption. AIR 1958 SC 468 and AIR 1954 SC 220, Rel. on. (Para 76)

(J) Constitution of India, Art. 265 and Sch. VII List II entry 62—Tax — Essentials — Shop rent under Mysore Excise Act is not a tax — It is not a tax on luxury—Mysore Excise Act (21 of 1966), S. 24.

One of the characteristics of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. In other words, there is no element of quid pro quo between the tax payer and the public authority. Since the payment of shop rent under Mysore Excise Act is for the benefit which the licensee gets in the form of exclusive privilege to sell liquor in certain area or in certain shops, shop rent cannot be regarded as a tax at all. AIR 1954 SC 282, Rel. on. (Para 82)

The shop rent on toddy shops, Arrack shop and Beer shop collected under Mysore Excise Act cannot be considered as a tax on luxury. There is no manifestation of the legislative intent to treat alcoholic liquors as articles of luxury and to impose tax on them as articles of luxury; on the other hand, the legislative intent appears to be to collect excise revenue in the form of shop rent. This is because (i) a tax on luxuries can be imposed either on the person providing or giving luxuries or on the person receiving luxuries, or both, and (ii) the amount of tax on luxuries must be correlated to the value, quality, or quantity of luxuries and the tax should not be imposed for the privilege of carrying of any trade or calling providing luxuries. Fact that shop rent is levied on the vendor of liquors and not on the consumers of liquor, is not, by itself, a factor that militates against the tax being a tax on luxuries. But if rent is not correlated to the quality, quantity, value of luxuries i.e. liquors but is imposed for the privi-

lege of vending liquor, it cannot be regarded as a tax on luxuries coming within Entry 62 in List II of the Seventh Schedule to the Constitution, even if it is assumed that alcoholic liquors are articles of luxury and shop rent is a tax. AIR 1966 Ker 46 and AIR 1958 Ker 129 (FB), AIR 1956 Bom 1 and AIR 1957 SC 699 and AIR 1959 SC 582, Rel. on. AIR 1967 SC 1512, Rel. on.

(Paras 81, 94, 95, 97 & 108)

(K) Contract Act (1872), S. 72 — Payment of tax under mistake of law — Party so paying entitled to recover — Payment of education cess on Toddy Shop rent, Beer shop rent and Arrack shop rent under Mysore Excise Act declared void—Parties are entitled to refund—Mysore Excise Act (21 of 1966), Section 24 — Constitution of India, Art. 265. AIR 1959 SC 135, Rel. on. (Para 112)

Cases Referred: Chronological Paras (1967) AIR 1967 SC 1512 (V 54) =

(1967) 1 SCR 548, Shinde Bros. v. Deputy Commr., Raichur 56, 59, 60, 61, 62, 81, 96, 97, 114, 115

(1967) AIR 1967 SC 1916 (V 54) = (1967) 3 SCR 595, Ahmedabad Manufacturing and Calico Printing Co. Ltd. v. State of Gujarat 101

(1966) AIR 1966 Ker 46 (V 53) = 1965 Ker LJ 337, Kaithakuttu v. Board of Revenue 80, 87

(1966) 1 Mys LJ 554 = (1966) 5 Law Rep 68, Suram Ruth Co. v. Deputy Commissioner (Excise) 54, 56

(1964) AIR 1964 SC 600 (V 51) = (1964) 5 SCR 683, Moti Ram Deka v. N. E. F. Rly. 105

(1964) AIR 1964 SC 1006 (V 51) = (1964) 6 SCR 261, State of Madhya Pradesh v. Bhailal Bhai 113

(1964) AIR 1964 SC 1166 (V 51) = (1964) 6 SCR 947, Amraoti Municipality v. Ramachandra 68

(1963) AIR 1963 SC 853 (V 50) = 1964 Supp 1 SCR 344, Anant Prasad v. State of Andhra Pradesh 44, 47

(1962) AIR 1962 SC 922 (V 49) = 1962 Supp (2) SCR 741, Abdulkadir v. State of Kerala 53, 58

(1962) AIR 1962 SC 981 (V 49) = 1962 Supp (2) SCR 257, Bhaiyalal Shukla v. State of Madhya Pradesh 46, 47

(1962) AIR 1962 SC 1073 (V 49) = 1962 Supp 3 SCR 70, Ram Krishna v. Janpada Sabha 68

(1962) AIR 1962 SC 1281 (V 49) = 1962 Supp 3 SCR 436, Amalgamated Coal Fields Ltd. v. Union of India 52

(1959) AIR 1959 SC 135 (V 46) = 1959 SCR 1350, Sales Tax Officer v. Kanhaiyalal 112

(1959) AIR 1959 SC 582 (V 46) = (1959) Supp (2) SCR 63, Western India Theatres v. Cantonment Board, Poona 92

- (1958) AIR 1958 SC 468 (V 45) =
 1958 SCR 1422, Sundararamier
 & Co. v. State of Andhra Pradesh 76
- (1958) AIR 1958 Ker 129 (V 45) =
 ILR (1958) Ker 148 (FB), T. K.
 Abraham v. State of Travancore
 Cochin 80
- (1957) AIR 1957 SC 699 (V 44) =
 1957 SCJ 607, State of Bombay
 v. R. M. D. Chamarbaugwala 89
- (1956) AIR 1956 Bom 1 (V 43) =
 ILR (1955) Bom 680, State of
 Bombay v. Chamarbaugwala 86
- (1954) AIR 1954 SC 220 (V 41) =
 1954 SCR 873, Cooverjee Bharucha
 v. Excise Commr. Ajmer 76
- (1954) AIR 1954 SC 282 (V 41) =
 1954 SCR 1005, Commr. Hindu
 Religious Endowments, Madras v.
 L. T. Swamiar 82
- (1887) 12 AC 575 = 56 LJ PC 87,
 Bank of Toronto v. Lambe 90
- M. K. Nambiar, S. Shivaswamy, D. R.
 Venkatesha Iyer, K. Srinivasan, A. Jagannath
 Shetty, M. N. Venkatachalaiah, K.
 Jagannath Shetty, for Petitioners (in all
 writ petitions); E. S. Venkataramiah, High
 Court Spl. Govt. Pleader, for Respondents.

CHANDRASHEKHAR, J.: The petitioners are Excise Contractors who had or have secured exclusive privilege of retail vending of Toddy, Arrack or Beer in different areas or shops in the Old Mysore Area of the new State of Mysore. In these petitions under Article 226 of the Constitution the validity of the levy of Education Cess on 'shop rents' in respect of Arrack, Toddy and Beer, and on Tree Tax and Tree Rent, has been challenged.

2. As many common questions arise for determination in these petitions, they were heard together and we are disposing them of, by this common order.

3. Briefly stated, the history of the impugned levy is as follows:

Education Cess on the aforesaid items was sought to be levied under the Mysore Elementary Education Act, 1941 (hereinafter referred to as the 'Education Act'), which was enacted prior to the Constitution by the then Princely State of Mysore to amend and consolidate the law relating to elementary education in Mysore. After Bellary District (excepting 3 Taluks) became part of the then State of Mysore on formation of Andhra State under the Andhra State Act, 1953, this Act was not extended to Bellary District and it continued to apply only to the then State of Mysore except Bellary District. Under section 119 of the States Re-organisation Act this Act has continued to be in force in the old Mysore area except Bellary District.

4. The Mysore Compulsory Primary Education Act, 1961, enacted by the new

State for the entire State of Mysore, repealed only Chapters VI and VII of the 1941 Act and the rest of the 1941 Act continues to be in force in the Old Mysore Area. Section 9 of the 1941 Act which provides for levy of Education Cess occurs in Chapter III and has not been repealed.

4A. Sub-section (1) of Section 9 of the Education Act, as originally enacted, read thus:

9(1). The Government may, for carrying out the purpose of this Act, levy throughout or in any part of Mysore an education cess or an additional education cess or any or all such items of State revenue or revenue forming part of a tax under the Municipalities Act, 1933, or the District Boards Act, 1962, at rates not exceeding those specified in the Schedule to this Act.

5. The relevant part of the Schedule to the Act as it stood originally, read:

SCHEDULE

Items on which Cess may be levied.	Maximum rate of levy.
1. Items on which local Cess is now levied.	Three pies in addition to the present rate of levy so as not to exceed a total of 9 pies in the rupee.

2.

6. By the Elementary Education (Amendment) Act, 1944, for sub-section (1) of section 9 of the Original Act, the following sub-section was substituted:

(1) The Government may for carrying out the purpose of this Act, levy throughout or in any part of Mysore, an education cess on any or all of such items of State revenue or of tax levied under any Act or rule constituting Local Bodies in Mysore and at such rates as are specified in the Schedule to this Act.

7. In the Schedule to the Act, the said amending Act substituted the words "2 pies in the rupee" in the second column.

8. The Schedule was further amended by the Mysore Elementary Education (Amendment) Act, 1955, and the relevant part of the Schedule as amended reads:

SCHEDULE

Items on which Cess may be levied.	Maximum rate of levy.
All items of land revenue, forest revenue, and excise revenue on which education cess is now being levied.	9 pies in the rupee.

9. The provisions pertaining to items of excise revenue, will now be adverted to.

10. Manufacture, import, export, transport, sale, possession and consumption of alcoholic liquor, opium and other narcotics, and raising revenue therefrom, were governed by the Mysore Excise Act, 1901, which was enacted by the then State of Mysore which was an independent sovereign State. This Act was extended to Bellary District by the Mysore Revenue Laws (Extension to Bellary) Act, 1955. Under Section 119 of the States Reorganisation Act, this Act continued to be in force in the Old Mysore Area until it was repealed by Section 72 of the Mysore Excise Act, 1965, which extends to the entire new State of Mysore with effect from 30-9-1967.

11. Section 17 of the 1901 Act empowered the Government to levy a duty, inter alia, on manufacture and sale of alcoholic liquor. Section 18 read:

18. Such duty may be levied in one or more of the following ways:

(a) by duty of excise to be charged in the case of spirits or beer either on the quantity produced in or passed out of a distillery, brewery or ware-house licensed or established under Section 12 or Section 14 as the case may be; or in accordance with such scale of equivalents, calculated on the quantity of materials used or by the degree of attenuation of the wash or wort, as the case may be, as the Government may prescribe;

(b) xx xx xx

(c) by payment of a sum in consideration of the grant of any exclusive or other privilege—

(1) of manufacturing or supplying by whole-sale, or

(2) of selling by retail, or

(3) of manufacturing or supplying by whole-sale and selling by retail any liquor or intoxicating drug in any local area and for any specified period of time;

(d) by fees on licenses for manufacture or sale;

(e) xx xx xxx

12. Section 15 of the 1901 Act provided that no liquor shall be sold without a licence from the Deputy Commissioner. Section 16, inter alia, empowered to grant to any person the exclusive privilege of selling by retail any Indian made liquor, on such conditions and for such period as the Government deemed fit. No grantee of such privilege could sell until he received a licence from the Deputy Commissioner. Section 24 provided, inter alia, for grant of license subject to such conditions as the Government might direct generally or in any particular case. Section 25 empowered the Excise Authorities to require every grantee of licence to execute a counterpart agreement in conformity with the tenor of his license.

13. Section 29 of the 1901 Act empowered the Government to make rules

for the purpose of carrying out the provisions of that Act. Under Sections 16 and 29 of that Act and in exercise of all other powers enabling the Government, in that behalf, the Government framed Rules called 'Rules Regulating Sale of Excise Privileges' (hereinafter called the Rules). These Rules were made under several Notifications between the years 1933 and 1942. Rule 23 of these Rules provides, inter alia, that the amount for which the privilege has been purchased shall be payable in twelve monthly instalments together with Education Cess. In the Note to this Rule kinds of liquor relevant for these petitions, items of Excise Revenue and the rates of cess are detailed as under:

Kind	Items	Rate per Rupee
Toddy	Tree Tax, Tree Rent and Shop Rent	9 pies.
Arrack, Beer		"

14. Under the Mysore Excise Act, 1901, the exclusive privilege of retail vending of Toddy in different areas (generally each Taluk or City constituting an area) was sold by auction or tender-cum-auction. Every licensee (who secured the exclusive privilege of vending Toddy), had to secure Toddy by tapping Toddy yielding trees either in Government groves assigned to his shops by the Excise Authorities, or trees in the lands of private persons with whom he had made private arrangements. The licensee had to pay to the State Tree Tax at the prescribed rates (varying according to the kind of palm tree from which Toddy juice is extracted) for the number of trees tapped by him. Where he tapped trees belonging to the Government he had to pay, in addition, Tree Rent to the State.

15. Under the Mysore Excise Act, 1901, the exclusive privilege of retail vending of Arrack in different areas (generally each Taluk or City constituting an area) was sold by auction or tender-cum-auction. The licensee (who secured the exclusive privilege of vending arrack) had to secure his requirement of Arrack from the Government Distillery on paying the price of arrack and duty thereon.

16. Under the Mysore Excise Act, 1901, the exclusive privilege of selling Indian made Beer in sealed bottles in shops in localities notified by the Excise Commissioner, was sold by auction or tender-cum-auction. The licensee (who secured such privilege) had to purchase his requirement of bottled Beer from breweries approved by the Excise Authorities and to pay to the State such duty as was fixed and notified by the Government from time to time.

17. The consideration paid by the licensee to the State for the exclusive privilege of vending Toddy, or Arrack or Beer, is popularly known as 'shop Rent'.

18. In the Notifications calling for bids and/or tenders for the exclusive privilege of retail vending of Toddy, Arrack and Beer, it used to be stated that Education Cess should be paid in accordance with Condition 23 of the General conditions applicable to all Excise Licences, and the kind of liquor, items and rates on and at which such cess was payable, were also detailed.

19. Section 23 of the new Excise Act which provides for the ways of levying excise duties, reads:

23. Ways of levying such duties— Subject to such rules regulating the time, place and manner, as may be prescribed excise duty and countervailing duty under Section 22 shall be levied in one or more of the following ways as may be prescribed, namely:

(a) rateably on the quantity of any excisable article produced or manufactured in or issued from a distillery, brewery manufactory or warehouse, or imported into the State.

(b) in the case of spirit or other liquor produced in any distillery established or any distillery, brewery or manufactory licensed under this Act, in accordance with its quality or strength, or in accordance with such scale of equivalents calculated on the quantity of materials used, or by the degree of attenuation of wash or wort, as the case may be, as may be prescribed;

(c) in the case of toddy, by tax on each tree from which toddy is drawn;

(d) by fees on licenses in respect of the manufacture or sale of any excisable article.

19A. Section 24 of the new Act purports to treat as excise duty, any sum accepted in consideration for grant of any lease relating to an excisable article. That section reads:

24. Excise Duty in respect of grant of leases:

Notwithstanding anything contained in Sections 22 and 23, the sum accepted in consideration of the grant of any lease relating to any excisable article under Section 17, shall be the excise duty or countervailing duty payable in respect of such excisable article in addition to any duty payable under sections 22 and 23.

19B. Section 26 of the new Act which deals with form and conditions of license is very similar to Section 24 of the 1901 Act.

20. Section 72 of the new Act which repeals earlier enactments in force in different areas of the new State, provides

that Sections 6, 8 and 24 of the Mysore General Clauses Act shall apply. Consequently Rules including the Rules regulating Sales of Excise Privileges, made under the Mysore Excise Act, 1901, continue to be in force until corresponding Rules are under the new Act.

21. It is against the background of the facts set out above that the respective contentions have to be appreciated.

22. The contentions advanced by the learned counsel for the petitioners may be formulated, thus:

(i) Section 9 of the Education Act read with the Schedule, does not impose Education cess on 'Shop Rent', Tree tax and Tree Rent;

(ii) Levy of Education Cess in only the old Mysore Area of the new State, is violative of Article 14 of the Constitution;

(iii) Shop Rent is not an excise duty and hence Education Cess, cannot be levied on Shop Rent;

(iv) Education Cess on Shop Rent is a tax on the business of vending Liquor, and the amount of cess payable by any one person to the State cannot exceed Rs. 250/- per annum; and

(v) As no separate procedure is provided by the Education Act for assessment and collection of Education Cess, it cannot be collected.

22A. Besides meeting these contentions, the learned Special Govt. Pleader raised the following pleas in defence;

(i) Levy of Education Cess is saved by Article 277 of the Constitution;

(ii) Shop Rent is a tax on luxuries; and

(iii) It is not open to the petitioners to question their liability to pay Education Cess which they have agreed to pay under contracts with the State.

22B. We shall proceed to consider these contentions.

23. W. Ps. Nos. 639 and 640 of 1968 relate to the levy of Education Cess on Toddy Shop Rent and Tree Tax in Bellary District for the period 1-1-1968 (sic) to 30-6-1959 (sic). As seen earlier, the Education Act enacted by the former Princely State of Mysore, was not subsequently extended to Bellary District. As, the Education Act has no application to Bellary District, the levy of Education Cess in Bellary District is clearly without the authority of law.

24. Even in the Notification of Sale of Excise Privilege dated 30-10-1967 (in pursuance of which, the petitioners in W. Ps. Nos. 639 and 640 of 1968 obtained the exclusive privilege of vending Toddy in certain Taluks of Bellary District), Cl. 18 states:

"Education Cess at the rate of five paise per rupee shall be payable on shop rentals of Arrack and Toddy, on duty of arrack and on tree of toddy 'Wherever applicable' (Underlining (here into ') is ours).

25. Even the terms of the Notification of the sale of Excise Privilege did not purport to provide for payment of Education Cess in Bellary District where there is no levy of Education Cess under the Education Act.

26. Thus it is beyond doubt that levy of Education Cess on the petitioners in W. Ps. Nos. 639 and 640 of 1968, is illegal.

27. The learned Counsel for the petitioners contended that even in the rest of the Old Mysore Area (excluding Bellary District), on a proper construction of the Education Act there is no charge of Education Cess on Toddy Shop Rent, Arrack Shop Rent or Beer Shop Rent, and Tree Tax.

28. There is no controversy between the parties as to the meaning of the words "now levied" occurring in the original Schedule at the end of the words, "Items on which local cess is now levied," and the meaning of the words "now being levied" occurring in the amended Schedule at the end of the words, "All items of land revenue, forest revenue and excise revenue on which education cess is now being levied". Learned counsel are agreed that according to the original Schedule to the Education Act, Education Cess was leviable only on those items on which local cess was being levied when the Education Act was enacted in the year 1941. Likewise learned counsel are agreed that according to the Schedule to the Education Act, as amended in the year 1955, Education Cess is leviable only on those items of land revenue, forest revenue, and excise revenue on which Education Cess was being levied when the Elementary Education (Amendment) Act, 1955, came into force.

29. The learned Special Government Pleader did not dispute that Education Cess was not being levied on Arrack Shop Rent till the year 1965 and that for the first time it was stated in the Notification of Sale of Excise Privilege for the year 1966-67 that Education Cess should be paid on Arrack Shop Rent and Beer Shop Rent.

30. Even in Rule 23 of the Rules regulating sale of Excise Privilege, contained in the Mysore Excise Manual, Vol. I (1956 Edition) all that is stated in respect of Arrack and Beer, is that Education Cess is payable on Duty. It has not been stated that Education Cess is payable on Arrack shop Rent or Beer Shop Rent.

31. In the Mysore Revenue Manual, Vol. I (1938 Edition) at page 384 and in the Mysore Revenue Manual (1967 Edition) at page 660, in the Chapter, Cesses and Taxes, under the heading, Abkari, it is stated:

"Formerly, the Local Cess was being levied on the following items:

(i) Arrack.

Note:— The cess is now merged in the still-head duty.

(ii)

(iv) Duty on beer

(Notification No. 312, dated 14th November 1871)."

32. It is clear beyond doubt that local cess was not being levied either on Arrack Shop Rent or on Beer Shop Rent in the year 1941, when the Education Act came into force; nor was education cess being levied on Arrack Shop Rent or on Beer Shop Rent in the year 1955 when the Mysore Elementary Education (Amendment) Act, 1955 came into force. Hence there is no charge of Education Cess under Section 9 of the Education Act on Arrack Shop Rent and Beer Shop Rent.

33. Learned counsel for the petitioners contended that even in regard to Toddy Shop Rent and Tree Tax, local cess was not being levied in the year 1941 and Education Cess was not being levied in the year 1955. In support of this contention reliance was placed on the following passage in the Mysore Revenue Manual (1938 Edition) Vol. I at page 334 and in the Mysore Revenue Manual (1967 Edition) at pages 660 and 661.

"Formerly, the local cess was being levied on the following items:

(i) x x x x

(ii) Toddy both date and bagani

(iii) x x x x

x x x x x

But in the marginal note dated G. O. (F.I. 9243-54 S. R. 145-06-1 dt. 16th June 1907), the following directions have been given:

(a) The separate levy of a local cess on tree tax is abolished and the cess at present levied merged in the main item the rates of tree tax on the various kinds of trees being as follows:

x x x x x
x x x x x

(b) Levy of a local cess on toddy shop rental is also abolished;

(c) The cess on tree-rent is merged in the main item itself. N. B. — 1/17th of the tree tax, the shop rental and tree rent collected, should be credited to Local Funds, in lieu of the one-anna cess formerly levied on these items. (vide also Art. 41-Mysore Accounts Code, Vol. I)".

34. From the above statement contained in both editions of the Mysore Revenue Manual, it is clear that local cess on Toddy Shop Rent, tree tax, and tree rent was abolished as early as in the year 1907. If local cess had been subsequently reimposed by any Government Order or by any legislative enactment, it is reasonable to expect that it would have been so stated in the Mysore Revenue Manual, especially of the 1967 Edi-

tion. The learned Special Government Pleader has not been able to lay his hands on any Government Order or Notification by which local cess was reimposed before the Education Act came into force in the year 1941.

35. However, the learned Special Govt. Pleader strongly relied on Rule 23 of the Rules Regulating Sales of Excise Privileges in support of his assertion that Education Cess was being levied on Toddy Shop Rent, Tree Tax, and Tree Rent when the Mysore Elementary Education (Amendment) Act, 1955 came into force. It is true that in the Mysore Excise Manual (1956 Edition) in the Note to Rule 23 the items, Tree Tax, Tree Rent and Shop Rent have been shown against Toddy and the rate of Education Cess has also been stated. But it is not clear under what Government Order or Notification or statutory enactment Education Cess was levied on these items.

36. Further, these Rules have been framed under Sections 16 and 29 of the Mysore Excise Act, 1901. It is true, as stated earlier, that Section 16 empowered the Government to grant the exclusive privilege of manufacturing or selling liquor, on which condition as it considered fit. But the power to impose a condition of licence, cannot go so far as to impose a new levy not provided by the Excise Act and not strictly required for the regulatory purposes of the licence. Under Section 29 of the Mysore Excise Act, 1901, the Government is empowered to make rules for carrying out the provisions of that Act. To levy a cess not provided by that Act, cannot be said to be for the purpose of carrying out the provisions of that Act, and would be outside the scope of the rule making power either under Section 16 or Section 29 of the Act.

37. But the learned Special Government Pleader argued that in the then Princely State of Mysore, His Highness the Maharaja was the absolute Sovereign and that there was no distinction between a legislative enactment and an executive order of His Highness; that in the preamble portion of the said Rules it has also been stated that the said Rules have been made in exercise of all other powers enabling the Government of His Highness the Maharaja of Mysore in this behalf, and that de hors the power under Sections 16 and 29 of the Mysore Excise Act it was competent for the Govt. of His Highness the Maharaja to provide, by rules, for levy of Education Cess on Toddy Shop Rent, Tree Tax and Tree Rent.

38. Though there may be considerable force in this contention of the learned Special Government Pleader, the question still is whether Rule 23 of the said

Rules purports to impose a levy of Education Cess on Toddy Shop Rent, Tree Tax and Tree Rent. We do not find from the language of Rule 23 that it itself purports to create any charge of Education Cess on these items. On the other hand, the Note to this Rule seems to proceed on the assumption that there has been a lawful charge of Education Cess on these items by some other provision of law; and the Rules merely provide that Education Cess payable on these items shall be paid along with the monthly kist.

39. Thus it has not been shown that Education Cess was being levied under any Government Order, Notification, or statutory enactment or rule thereunder when the Mysore Elementary Education (Amendment) Act, 1955, came into force.

40. The learned Special Government Pleader contended that even if Education Cess on Toddy Shop Rent, Tree Tax and Tree Rent, had not been imposed by any law before 1955, Education Cess has all along been factually levied and collected on these items, and that since it was being so levied when the Mysore Elementary Education (Amendment) Act, 1955, came into force, the charge of Education Cess on these items, is attracted under Section 9 of the Education Act and the Schedule as amended in 1955. In other words, according to this argument, factual levy of Education Cess (and not necessarily levy under any authority of law), is what amended Section 9 read with amended Schedule to the Education Act, contemplates.

41. We are unable to accede to this contention of the learned Special Government Pleader. The necessary implication of the words "on which education cess is now being levied" occurring in the amended Schedule to the Education Act, is that such cess is being lawfully levied and not without the authority of law. The Schedule to the Education Act was amended after the advent of the Constitution and hence it is reasonable to impute to the State Legislature not merely knowledge of, but also anxiety for compliance with, Art. 265 of the Constitution which provides that no tax shall be levied or collected except by authority of law. That the Legislature did not have in mind any unauthorised levy of collection, is clear from the fact that neither the original Education Act nor the amending Act of 1955 contains any provisions for validating any levy or collection made without the authority of law.

42. Thus the contention of the petitioners that the provisions of the Education Act as amended from time to time, do not impose a charge of Education Cess on Arrack Shop Rent, Beer Shop Rent and Toddy Shop Rent, Tree Tax

and Tree Rent, is well founded. As Education Cess is sought to be levied under that Act, and not under any other enactment, in the view we have taken, normally it would have been unnecessary to consider other contentions of the petitioners. But since the matter may be taken up in appeal to the Supreme Court having regard to the large financial effect of our decision, we consider it advisable to deal with all contentions advanced by the parties to avoid the necessity for a remand in the event of the Supreme Court disagreeing with our view on the first ground.

43. Mr. S. Shiva Swamy, learned counsel for some of the petitioners, contended that after the formation of the new State of Mysore, the continuance of the levy of Education Cess in only one area of the State, namely, the old Mysore Area, when there is no corresponding levy in other areas of the State, would offend Art. 14 of the Constitution. It was also argued by Mr. Shiva Swamy that when there was assimilation of the laws relating to primary education, in different parts of the new State by enacting the Mysore Compulsory Primary Education Act, 1961, it was not permissible to continue the operation of section 9 of the Education Act providing for levy of Education Cess in the Old Mysore Area (except Bellary District).

44. In support of his contention, Mr. Shiva Swamy relied on certain observations of the Supreme Court in *Anant Prasad v. State of Andhra Pradesh*, AIR 1963 SC 853 at p. 860. There, it was contended that the existence of two laws with respect to religious and charitable endowments in different areas of the State of Andhra Pradesh, was hit by article 14. Dealing with that contention the Supreme Court pointed out that the new State of Andhra Pradesh consists of two areas, one which came from former Andhra State and another from former Hyderabad State.

The Supreme Court observed:

"These two areas naturally had different laws. We are told that steps are being taken to assimilate the laws in the two different parts of the State and to bring them under one common pattern. But that naturally takes time and complete assimilation of the laws has not yet taken place. We are further told that the question of having one law for the public trusts of religious or charitable nature is under the active consideration of the State Government. In these circumstances it would not be right to strike down all laws prevailing in the two parts of the State because of certain differences in them arising out of historical reasons. . . ."

45. Mr. Shiva Swamy argued that from the above observations it can be

inferred that the Supreme Court would have held the existence of two different laws in the different areas as offending Art. 14, but for the assurance given on behalf of the State that steps were being taken to assimilate the laws in two different parts of the State and that the question of having one law for the public religious and charitable trusts, was under the active consideration of the Government. Mr. Shiva Swamy further argued that no such assurance was forthcoming from the State in the present cases and that even after assimilation of the laws relating to compulsory primary education, the levy of Education Cess is perpetuated in the Old Mysore Area.

46. On the other hand, the learned Special Government Pleader referred to the decision of the Supreme Court in *Bhaiyalal Shukla v. State of Madhya Pradesh*, AIR 1962 SC 981 in which the Supreme Court held that the existence of different laws in different parts of Madhya Pradesh could be sustained, on the ground that such differentiation arose from historical reasons and a geographical classification based on historical reasons.

47. In *Anant Prasad's* case, AIR 1963 SC 853 the Supreme Court has referred to its earlier decision in *Bhaiyalal's* case, AIR 1962 SC 981 and has not dissented from it. Upholding the continuance of different laws in different parts of the State in *Anant Prasad's* case, AIR 1963 SC 853 was not based on any assurance given on behalf of the Government of Madhya Pradesh that uniformity of laws would be brought about in near future. Therefore, from the mere circumstance that in *Anant Prasad's* case, AIR 1963 SC 853 the Supreme Court noticed the assurance given on behalf of the State that steps were taken to assimilate different laws in different parts of the State, it cannot be inferred that but for such assurance the Supreme Court would have necessarily struck down the laws because of the differences in them in different parts of the State of Andhra Pradesh.

48. Though it is desirable that uniformity is brought about throughout the State as to levying or not levying Education Cess, we are not satisfied, on the materials before us, that the continuance of the levy of Education Cess in the Old Mysore Area (excluding Bellary District) offends Art. 14 of the Constitution.

49. It was next contended by learned counsel for the petitioners that Arrack Shop Rent, or Beer Shop Rent or Toddy Shop Rent is not an excise duty on Arrack, Beer, or Toddy respectively and hence Education Cess cannot be levied on such Shop Rent.

50. It is common ground between the parties that the impugned levy is a tax

though called a cess. As explained by Hidayatullah, J., (as he then was), in his dissenting judgment, the term 'cess' is generally used when the levy is for some special administrative expense which the name (health cess, education cess, road cess etc.) indicates.

51. Mr. M. K. Nambiar, learned counsel appearing for some of the petitioners, argued that under the Education Act, Education Cess is levied as a surcharge or an increment to an existing tax and that it partakes the character of the principal tax on which it is an increment.

52. In *Amalgamated Coal Fields Ltd. v. Union of India*, AIR 1962 SC 1281, the Supreme Court, after considering the decisions of the Federal Court and of the Privy Council on the point, explained the nature of excise duty thus at page 1287:

"Excise duty is primarily a duty on the production or manufacture within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that is, it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience."

53. In *Abdulkadir v. State of Kerala*, AIR 1962 SC 922 the nature of the system of collecting tobacco revenue by auctioning the right to sell in retail tobacco in shops, came up for consideration. Wanchoo, J. (as he then was), who spoke for the Bench said at page 927:

"It is also obvious that this system of auction is not a system of levying sales tax because it has nothing to do with the levy on each sale, which is the essence of a sales tax. It seems that in the former States of Travancore and Cochin, auction system continued right upto the time the Constitution came into force and even for sometime thereafter. It seems under the circumstances that the auction system which was in force was only a method of realising duty through the grant of licences to those who made the highest bid at the auctions."

54. In *Suram Ruth Co. v. Deputy Commr. (Excise)* (1966) 1 Mys LJ 554, the validity of the levy of Health Cess on Toddy Shop Rent and Arrack Shop Rent, was assailed. Health Cess was sought to be levied on these items under the Mysore Health Cess Act, 1962. Section 3 of that Act provides for levy of Health Cess at the rate of 9 naye paise in the rupee, inter alia, on all items of

Land Revenue and on duties of excise leviable by the State on alcoholic liquor manufactured or produced for human consumption.

55. Upholding the contention of the State that Arrack Shop Rent and Toddy Shop Rent, were duties of excise, this is what Hegde, J. who spoke for the Bench of this Court, said at page 567:

"In the matter of collection of excise duty on liquors, one of the methods commonly used by almost all of the States in the country and that from a very long time is either by leasing out the right to sell those liquors for a specified sum or by auctioning that right. This mode of collection was in vogue even before the Constitution was drafted, nay even before the Government of India Act, 1935 was enacted. Therefore, we can safely presume that the Constitution makers were aware of those procedures. There is nothing in the Constitution which can be said to disprove those methods."

56. But the decision of this Court in *Suram Ruth Co.'s Case*, (1966) 1 Mys LJ 554 was reversed by the Supreme Court in *Shinde Brothers v. Deputy Commr. Raichur*, AIR 1967 SC 1512.

57. After analysing the real nature of Toddy Shop Rent, Sikri, J., who spoke for the majority, said at p. 1521:

"The taxable event is not the manufacture or production of goods but the acceptance of the license to sell. In other words, the levy is in respect of the business of carrying on the sale of toddy. There is no connection of any part of the levy with any manufacture or production of any goods. To accept the contention of the State would mean expanding the definition of "excise duty" to include a levy which has close relation to the sale of excisable goods. It is now too late in the day to do so."

58. The earlier decision of the Supreme Court in AIR 1962 SC 922 was considered and distinguished by the majority of the Bench. Sikri, J., speaking for the majority, stated thus at page 1522:

"It is true that Wanchoo, J., referred to the practice of public auctions of the right to possess and sell excisable goods but what he said was that the amount realised from these auctions was excised revenue; he did not say that the amount realised was excise duty as such in the strict sense of the term."

59. The learned Special Government Pleader did not dispute that the ratio of the majority decision in *Shinde Brothers' Case*, AIR 1967 SC 1512 would apply to Arrack Shop Rent, and Beer Shop Rent also and that in view of the majority decision in that case, Toddy Shop Rent, Arrack Shop Rent, or Beer Shop Rent, cannot be regarded as a duty of excise. He

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Orissa High Court

AIR 1969 ORISSA 1 (V 56 C 1)

S. BARMAN, C. J. AND S. ACHARYA, J.

Uttar'eswari Rice Mill, Berhampur,
Petitioner v. Sales Tax Officer, Intelligence Wing, Vigilance, Berhampur and another, Opposite Parties.

O. J. C. No. 464 of 1967, D/- 24-6-1968.

Sales Tax — Orissa Sales Tax Act (14 of 1947), S. 12(8) — Notice for showing cause against escaped assessment — Validity — Notice without disclosing any transactions from which the turnover is assumed to have escaped assessment is one purporting to make a roving enquiry and is invalid — Issue of such notice by Sales Tax Officer is in excess of his jurisdiction and violates principles of natural justice. ILR 1967 Cut 446, Foll. (Para 8)

Cases Referred: Chronological Paras
(1967) ILR 1967 Cut 446, Patnaik
Mines (P) Ltd. v. N. K. Mohanty 8, 9

P. V. B. Rao, for Petitioner; R. N. Misra, for Opposite Parties.

BARMAN, C. J.: This is a writ petition where the petitioner challenges the legality of a notice dated March 31, 1967 purporting to be under Section 12(8) of the Orissa Sales Tax Act for alleged escaped assessment of his turnover for the year ending 1963-64 in the circumstances hereinafter stated.

2. It is said that on March 30, 1967 the Sales Tax Officer, Intelligence Wing, Vigilance, Berhampur, made a search in the business premises of the petitioner and seized several books of accounts stated to have been found in the business premises of the petitioner; on the next day, March 31, 1967 also he seized some more books of accounts alleged to have been

recovered from the business premises of the petitioner; on both the occasions neither the petitioner nor any of the adult male members of the petitioner were present at the time when the seizure was made by the Sales Tax Officer as stated by the petitioner.

3. On March 31, 1967 the Sales Tax Officer issued a notice purporting to be under Section 12(8) of the Act, the relevant portion of which is set out as follows:

"Whereas it appears to me that your gross turnover* in the year immediately preceding the during the financial year ending the commencement of the Orissa Sales Tax Act, 1947 and 31st March 19

exceeded Rs. 10000 but that you have nevertheless wilfully failed to apply for registration under Section 9 of the Act;

*Whereas I have reason to believe that your turnover for the quarter ending 1963-64 on which Sales Tax was payable under the Orissa Sales Tax Act, 1947 has escaped assessment has been under-assessed.

You are hereby required to submit within one calendar month from the date of receipt of this notice a return in Form IV (enclosed) showing the particulars of your turnover for the year ending 1963-64."

4. The said notice was served on an employee of the petitioner purporting to reopen the assessment for the year 1963-64. Thereupon, the petitioner appeared before the Sales Tax Officer and filed a copy of the old return which he had filed in accordance with Section 11 of the Act. The petitioner attended before the Sales Tax Officer on several occasions with a view to know the reason for issuing a

notice under Section 12(8) of the Act. But the petitioner was never informed of any reason by the Sales Tax Officer.

5. The petitioner's case is that the Sales Tax Officer obtained several statements behind his back from witnesses in pursuance of his intention to proceed with reassessment under Section 12(8). The petitioner requested the Sales Tax Officer to furnish him with copies of such statements so that he may be in a position to know the reasons for the issue of notice under Section 12(8) and such other information so as to enable him to defend in the reassessment proceedings. The petitioner's said application for copies of statements was however rejected by the Sales Tax Officer. The petitioner thereafter filed an application in revision which also was dismissed. In these circumstances he filed this writ petition on December 26, 1967.

6. The main grounds in support of this writ petition are these:

(i) The proceedings started pursuant to the notice issued under Section 12(8) are illegal or without jurisdiction inasmuch as the Sales Tax Officer had not indicated any reason for issuing such notice as required by law; it was a roving enquiry on the part of the Sales Tax Officer groping in darkness.

(ii) The impugned notice issued by the Sales Tax Officer was contrary to the principles of natural justice as the petitioner was not intimated the reason for issue of such notice, and without knowing the reason the petitioner was not in a position to place his case before the Sales Tax Officer; indeed, the impugned notice was like a charge-sheet without a charge and therefore invalid, inoperative and without jurisdiction.

(iii) The Sales Tax Officer committed a serious illegality in not furnishing the information asked for by the petitioner nor giving any reason for proceedings under Section 12(8) of the Act; it was submitted that the notice issued was also violative of the provisions of the statute inasmuch as the statute requires the use of the words "for any reason" and not "have reason to believe" as mentioned in the impugned notice.

7. The Sales Tax Officer filed counter affidavit denying the allegations of the petitioner. The points taken by the Sales Tax Officer are, in substance, these: The impugned notice under Section 12(8) of the Act was based upon positive materials available with the Sales Tax Officer and as a matter of fact the seizure of documents which formed the basis of the proceedings under Section 12(8) was known to the assessee petitioner as stated in paragraph 3 of the counter affidavit; this is not a case based upon no materials; the petitioner was not entitled to have a copy of the statements record-

ed by the Sales Tax Officer until and unless the Sales Tax Officer sought to make use of them in any assessment proceedings; the information relating to disclosure of such facts is protected from being disclosed under Section 28 of the Act and that the petitioner can have grievance only when he is not given a due opportunity of meeting the points during the assessment proceedings.

It is stated that on August 10, 1967 the petitioner appeared through his advocate for verification of records and he also appeared on the following day, that is August 11, 1967; that the seized documents were asked to be inspected by the assessee and necessary permission was granted and actual inspection was also made. The point of the Sales Tax Officer is that every opportunity was given to the petitioner to have access to the documents on various dates as stated in paragraph 7 of the counter to the writ petition. According to the Sales Tax Officer no prejudice was caused to the petitioner in the proceedings and he was given all reasonable opportunities including inspection of books of accounts which were seized.

A further affidavit was also made on behalf of the Sales Tax Department which, inter alia, stated that the said notice was issued after obtaining information about certain clandestine dealings of the petitioner as stated therein. The deponent of the said further affidavit also stated that he found from the records that details of materials which had led to the initiation of the proceedings under Section 12(8) were recorded in the relevant case records which have been kept available for reference in court at the time of hearing.

8. The points involved in this writ petition are substantially covered by a decision of this court in *B. Patnaik Mines (P) Ltd. v. N. K. Mohanty*, ILR 1967 Cut 446 where on a similar notice under Section 12(8) couched in the same language as quoted above, this court held that the Sales Tax Officer had no jurisdiction under Section 12(8) to issue the impugned notice which was by way of making a fishing enquiry without indicating therein any reason for the alleged under-assessment in that case; that said notice was held to be a charge-sheet without mentioning any charge. It was also held that the issue of the said notice by the Sales Tax Officer was in excess, colourable exercise of jurisdiction and violation of the principles of natural justice; issue of the said impugned notice by the Sales Tax Officer resulted in injustice to the assessee-petitioner. The basic principles which weighed with this court in deciding that case, which we also follow herein, are these.

The court cannot decide unless there is some indication in the notice under Section 12 (8) of any reason for the alleged escaped assessment; whether or not the Sales Tax Officer has jurisdiction to issue the notice only depends on the existence of the reason for the alleged escaped assessment for which the impugned notice was issued; in other words, there must be in fact a reason for the alleged escaped assessment and natural justice demands that the notice issued to the dealer must mention the reason of the alleged escaped assessment so as to enable the dealer to meet the charge of escaped assessment; it is not understandable how the dealer would meet the charge of alleged escaped assessment unless there is at least some indication of one transaction, the turnover of which was not included in the previous assessment.

9. Mr. R. N. Misra, learned counsel appearing for the Sales Tax Department, sought to distinguish the present case on facts from those in ILR 1967 Cut 446 cited above. His point is that in the present case the petitioner was given every opportunity to have access to the materials on the basis of which the impugned notice was issued. This argument, however, does not appear to be tenable because the position at the point of time the notice was issued under Section 12(8) without indicating any reason whatsoever in the notice of the alleged escaped assessment is material. Assuming the Sales Tax Department had behind the back of the petitioner collected information—said to be clandestinely—purporting to show escaped assessment, even so the impugned notice when issued does not show that there was any reason for the issue of such notice for the alleged escaped assessment. It is not sufficient for the Sales Tax Officer to “have reason to believe” that the petitioner’s turnover for the quarter in question had escaped assessment as stated in the notice. It is not understandable how after the issue of the notice to the petitioner, the Sales Tax Officer proceeded to collect materials behind the back of the petitioner in support of the alleged escaped assessment.

10. In this view of the case, we hold that the Sales Tax Officer had no power or jurisdiction to issue the impugned notice. The writ petition is accordingly allowed; the said impugned notice dated March 31, 1967 and the proceedings taken pursuant to the said notice are all quashed. There will be no order as to costs.

11. ACHARYA, J.: I agree.

GGM/D.V.C.

Petition allowed.

AIR 1969 ORISSA 3 (V 56 C 2)

G. K. MISRA AND B. K. PATRA, JJ.

Pakula Majhi and others, Appellants v. Subhadra Bhotruni, Respondent.

A. H. O. No. 2 of 1964, D/- 18-6-1968, from decision of R. K. Das J. D/- 1-5-1964.

(A) Hindu Law — Inheritance — Oriya family belonging to Koraput not renouncing personal law when Koraput became part of State of Orissa in 1936 — Members of such family must be governed by law of inheritance as it prevailed in Madras before 1936. AIR 1921 PC 59, ILR 1 Mad 69 and AIR 1952 Orissa 307, Rel. on. (Para 2)

(B) Hindu Law — Mitakshara — Inheritance — Madras School — Deceased leaving behind only father’s brother’s daughter and no male heir — She is entitled to succeed as a Bandhu.

Under the Madras School of Hindu Law a father’s brother’s daughter is entitled to succeed as a Bandhu when the deceased has not left any other male heir. She is not disentitled to inherit merely by reason of her sex. ILR 14 Mad 149 and ILR 15 Mad 421 and AIR 1940 Mad 545, Rel. on. (Para 4)

The Bandhus or Bhinna Gotraj Sapindas are all cognates, that is, persons related to the deceased through a female or females. The Bandhus of a person are his blood relations connected through females who have passed into other families or gotras. It therefore follows that every Bandhu must be related to the deceased through at least one female. The Benaras School of Hindu Law does not recognise any exception to this Rule. In Madras however certain females are recognised as Bandhus, on the basis that if they would have been males and would have been heirs as Bandhus being connected to the propositus within the prescribed limits, they should not be debarred from succession merely by reason of their sex. (Para 3)

Cases Referred: Chronological Paras
(1952) AIR 1952 Orissa 307 (V 39)=

19 Cut LT 238, Bodo Annanda

v. Dando Naiko

(1940) AIR 1940 Mad 545 (V 27)=

ILR 1940 Mad 734, Jagannadhan

v. Adilaxmi

(1921) AIR 1921 PC 59 (V 8)=47 Ind

App 213, Balwant Rao v. Baji Rao

(1892) ILR 15 Mad 421=2 Mad LJ 86,

Chinnammal v. Venkatachala

(1891) ILR 14 Mad 149: 1 Mad LJ 46,

Nallanna v. Ponnal

(1876) ILR 1 Mad 69=3 Ind App 154

(PC), Raghunath v. Brajakishore

Y. S. N. Murty, for Appellants; P. V. B. Rao, for Respondent.

GL/IL/C901/68

PATRA, J.: The short point that arises for consideration in this appeal is whether a father's brother's daughter is a Bandhu entitled to succeed under Mitakshara Law as administered in the district of Koraput which once formed a part of the Madras Presidency. Guru Majhi, father of the respondent Subhadra and the father of the propositus Mangala were two brothers. Guru Majhi died long ago leaving behind him his daughter Subhadra as the only heir. Mangala died some time in 1954 leaving behind him no other relation excepting the respondent Subhadra. In this case Subhadra claims to succeed to the properties of Mangala as his sole surviving heir against the appellants who claim the properties under a deed of gift from Mangala. The trial Court and the first appellate court have disbelieved the story of the alleged gift in favour of the defendants and decreed the plaintiff's suit.

In second appeal, the main contention advanced on behalf of the appellants was that the plaintiff-respondent is not a Bandhu under the Benaras School of Mitakshara law which is prevalent in Orissa and that as such irrespective of the truth or otherwise of the defence set up by the appellants who admittedly are in possession of the suit properties, she is not entitled to recover possession of the same. Hon'ble Das, J. who heard the second appeal held that although the plaintiff is not a Bandhu according to the Benaras School of Hindu Law which is prevalent in Orissa, she is a Bandhu according to the Madras School of Hindu Law which in this case must govern the parties, who belong to the district of Koraput which once formed a part of the Madras Presidency and in the absence of any evidence to show that the parties, after 1936 when Koraput district became part of the Orissa State, had adopted the law prevalent in Orissa. In this view of the matter he dismissed the appeal. In pursuance of the leave granted by the learned Judge this appeal has been filed.

2. The main contention advanced by Mr. Y. S. N. Murty appearing for the appellants is that as Koraput district is now a part of the Orissa State since 1936, the law applicable to the parties must be deemed to be the Benaras School of Hindu Law which does not recognise a female Bandhu; and even if it is held that the Madras School of Hindu Law governs the case there is no instance in Madras where a father's brother's daughter has been recognised as Bandhu. Neither of these two contentions appears to have any merit. As early as in *Raghunath v. Brajakishore*, ILR 1 Mad 69 (PC) the Privy Council assumed that in respect of the Oriyas of Madras Presidency the Dravida School of Law prevails in matters of adoption. In *Bodo Annanda v. Dando*

Naiko, AIR 1952 Orissa 307 which was again a case of adoption, it was held by a Division Bench of this Court that,

"In the absence of proof of any valid change of law, the Oriyas of ex-Madras area continue to be governed by the Madras School of law in matters relating to adoptions."

The argument that the aforesaid two cases related to adoption and that we are here concerned with a case of inheritance is equally untenable. That the principle as enunciated in these decisions relates to all personal laws of an individual is clear from the pronouncement of their Lordships of the Privy Council in *Balwant Rao v. Baji Rao*, 47 Ind App 213 = (AIR 1921 PC 59). That was a case relating to succession and their Lordships observed:

"The particular doctrine of Hindu Law recognised in a province of India becomes part of the status of every family governed by them and continues to govern the family upon migration into a province where a different doctrine prevails, unless there is proved a renunciation of the original law for that of the place migrated to. It is the doctrine existing at the time of migration which, subject to renunciation continues to govern the migrated members. Decisions given by the Courts after the migration declaring what was the correct doctrine in the place migrated from affect the migrated members, but not customs there incorporated into the law after the migration."

There is no evidence in this case nor such a point had been agitated in the trial Court that after Koraput became a part of the State of Orissa in 1936 Mangala Majhi renounced the personal law by which he was till then governed and adopted the law as prevalent in the rest of Orissa. We must therefore hold in agreement with the learned Single Judge that this case must be governed by the law of inheritance as it prevailed in Madras before 1936.

3. The question then is whether a father's brother's daughter is a heir under the Hindu Law as administered in Madras. Gotraj Sapindas and Samanodakas are all agnates, that is, persons connected with the deceased by an unbroken line of male descent. Admittedly the plaintiff is neither a Gotraj-Sapinda nor a Samanodak of late Mangala. The Bandhus or Bhinna Gotraj-Sapindas are all cognates, that is, persons related to the deceased through a female or females. The Bandhus of a person are his blood relations connected through females who have passed into other families or gotras. It therefore follows that every Bandhu must be related to the deceased through at least one female. Judged by this test the plaintiff Subhadra cannot be deemed to be a Bandhu of Mangala because no female intervenes between her and Man-

gala. The Benaras School of Hindu Law does not recognise any exception to this Rule. In Madras however certain females are recognised as Bandhus, on the basis that if they would have been males and would have been heirs as Bandhus being connected to the propositus within the prescribed limits, they should not be debarred from succession merely by reason of their sex. Accordingly the Madras School had held that the brother's daughter, sister's daughter, brother's sons' daughter and father's sister are heirs. Under the Hindu Law of Inheritance (Amendment) Act 1929 the son's daughter, the daughter's daughter and sister were ranked as heirs. The daughter-in-law and son's daughter-in-law have been added after the Hindu Women's Right to Property Act 1937 came into force. Over and above these female heirs, certain other female heirs have been recognised in Madras from time to time like a son's daughter, ILR 14 Mad 149, daughter's daughter, ILR 15 Mad 421 and brother's sons' daughter, AIR 1940 Mad 545 although some of these were not connected with the propositus through a female.

4. In AIR 1940 Mad 545 Jagannadhan v. Adilaxmi the question arose whether a brother's sons' daughter of the deceased is entitled to succeed to the latter's property. It was held that under the Hindu Law as administered in the Madras Presidency, female Bandhus are entitled to come in after the male Bandhus are exhausted, provided they satisfy the other conditions required by law. Their Lordships held that the brother's sons' daughter is a Bhinna Gotraj-Sapinda or Bandhu within five degrees and that in the absence of any male heir she would be entitled to inherit and that she is not disentitled to inherit merely by reason of her sex. In the present case the plaintiff is removed from Mangala within the permissive degrees. The test of mutuality is satisfied. There is no evidence to show that Mangala has left any other male heir. In the circumstances, the plaintiff as a Bandhu is entitled to succeed to the properties of Mangala.

5. This appeal therefore fails and is dismissed with costs.

6. G. K. MISRA, J.: I agree.
CWM/D.V.C. Appeal dismissed.

AIR 1969 ORISSA 5 (V 56 C 3)

G. K. MISRA, J.

Amruta Purohitani, Appellant v. Jogesh Chandra Hota and another, Respondents.

Misc. Appeal No. 6 of 1965 with Civil Revn. No. 292 of 1965. D/- 26-3-1968, from order of Addl. Dist J. Sambalpur, D/- 20-7-1965.

L/GL/C32/68

(A) Registration Act (1908), S. 17(1)(b) and (2)(v) — Compromise — Registration — Petition of compromise — No creation or extinction of right by itself — Registration unnecessary.

Whether a non-testamentary document in respect of immovable properties is compulsorily registrable or not depends on the facts and circumstances of each case and upon construction of the terms of the document. No hard and fast rule can be laid down. The crucial test in each case is as to the nature of the document itself. If it does create a right, title or interest in itself, whether in present or in future, it is compulsorily registrable under Section 17(1)(b). If by itself it does not create any right but visualises creation or extinction of a right by some other document, then it falls squarely within the ambit of S. 17(2)(v) and hence, not registrable. (Para 4)

Where it is agreed upon by the parties under the compromise petition that certain property shall exclusively go to one of the parties and it is also further agreed that the party shall get a decree for declaration of right and recovery of possession of property it cannot be said that any right is created by the compromise itself and hence its registration is not necessary. AIR 1954 Pepsu 42 and AIR 1961 Pat 79 and AIR 1968 J & K 35, Disting. (Para 5)

(B) Registration Act (1908), Ss. 17(1)(b), 18(d) — Petition of compromise — Creation of rights in moveable property — Registration unnecessary. (Para 1)

Cases Referred: Chronological Paras
(1968) AIR 1968 J & K 35 (V 55)=

1968 Kash LJ 33, Ghulam Ahmad v.

Ghulam Quadir 6

(1961) AIR 1961 Pat 79 (V 48),

Brahmanath v. Chandrakali 6

(1954) AIR 1954 Pepsu 42 (V 41)=

ILR (1953) Patiala 319, Chambi

Devi v. Gora Lal 6

R. N. Sinha and S. N. Sinha, for Appellant; H. G. Panda, for Respondents.

ORDER: Between the parties a large number of arbitration cases were pending before the Arbitrator, Hirakud Land Organisation, Sambalpur. They entered into a compromise. The arbitration cases were disposed of in terms of the compromise. They are not the subject matter of the civil revision or the miscellaneous appeal. In paragraph 2 of the compromise petition filed before the Arbitrator, the compensation payable to the estate of Mst. Jema Purohitani in respect of submerged Bhogra and rayati lands in village Bausen was divided in certain proportions. The miscellaneous appeal is filed challenging this division. As the subject matter of the compromise in this paragraph consists of moveable property, there was no necessity for registration

and the compromise is held to be genuine and valid. The terms are enforceable. Mr. Sinha was, therefore, right in making a concession that it was difficult to support the miscellaneous appeal. It is accordingly dismissed. There would be no order as to costs of this appeal.

2. So far as the civil revision is concerned, the controversy centres round the terms of the compromise in paragraphs 3 and 4 of the petition. The relevant portions are extracted hereunder:

"Para 3. That the unsubmerged lands of mouza Bausen as also any other compensation payable to Mst. Jema shall exclusively go to Mst. Jaikumari Patiani.

Para 4. That Mst. Jaikumari (O. P. 5), who has filed a T. S. 41 of 62 in the court of the Sub-Judge against O. P. No. 3 shall get a decree for declaration of right and recovery of possession of unsubmerged lands at Bausen belonging to Jema Purohitani without costs"

3. It is the common case of the parties that the unsubmerged lands of mouza Bausen are the subject matter of dispute in T. S. 41/62. Mr. Sinha contends that as the value of the unsubmerged lands in mouza Bausen is about Rs. 4200 the compromise was compulsorily registrable and the suit could not have been compromised on the basis of the compromise petition filed in the arbitration cases on 24-7-63.

4. Mr. Sinha's contention is that the compromise in respect of the unsubmerged lands in mouza Bausen is compulsorily registrable under S. 17(1)(b) of the Indian Registration Act, which lays down that non-testamentary instruments, which purport to operate to create, declare, assign, limit or extinguish whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property, shall be registered. Mr. Panda, on the other hand, contends that the compromise petition falls within the purview of S. 17(2) (v), which enacts that nothing in clauses (b) and (c) of sub-section (1) applies to any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest. Section 17 (2), clause (v) is therefore a clear exception to S. 17(1), clause (b). There are abundant authorities in support of either contention. But all of them must turn on the facts and circumstances of each case depending upon the construction of the terms of the compromise. No hard and fast rule can be laid down. The crucial test in each case would be as to the

nature of the document itself. If it does create a right, title or interest in itself, whether in present or in future, it is compulsorily registrable. If by itself it does not create any right but visualises creation or extinction of a right by some other document, then it would squarely fall within the ambit of S. 17(1).

5. Looking to the paragraphs 3 and 4, already extracted, it would be clear that the parties did not intend to create any right by the compromise petition itself. Though paragraph 3 is capable of a construction that creation of a right in praesenti was intended, as would appear from the expression "shall exclusively go", paragraph 4 makes it further clear that creation of a right in praesenti was deferred. The expression used therein is "shall get a decree for declaration of right and recovery of possession of unsubmerged lands in T. S. 41/62". These paragraphs 3 and 4, read as a whole, leave absolutely no doubt in the mind that in the compromise petition dated 24-7-63, parties did not create or extinguish any right. Parties intended that such a right should be created or extinguished in the decree to be passed in T. S. 41/62. On the aforesaid conclusion, the view taken by the courts below was correct.

6. Mr. Sinha placed reliance on *Chambi Devi v. Gora Lal*, AIR 1954 Pepsu 42; *Brahmanath v. Chandrakali*, AIR 1961 Pat 79 and *Ghulam Ahmad v. Ghulam Qadir*, AIR 1968 J & K 35. They are correct so far as they go. In all these authorities the basic distinction has been kept in view. With respect to the facts in those cases their Lordships came to the conclusion that particular documents created rights and as they were unregistered, no rights can be acquired on that basis. These decisions have no application to the facts of this case.

7. In the result, the civil revision fails and is dismissed. In the circumstances, there would be no order as to costs.

DVT/D.V.C.

Appeal & Revision
dismissed.

AIR 1969 ORISSA 6 (V 56 C 4)

A. MISRA, J.

Daitari Sahu, Petitioner v. Lokanath Baral and others, Opposite Parties.

Criminal Revn. No. 170 of 1966, D/-23-2-1968 from order of Addl. Dist. Magistrate (Judicial) Cuttack, D/- 17-2-1966.

Criminal P. C. (1898), Ss. 476, 476-A, 476-B and 193(3) — Application under S. 476-A rejected by Magistrate — Appeal against order lies under S. 476-B — S. 195 (3) indicates superior appellate court as court of session.

GL/GL/D60/68

The power under S. 476-A can be exercised only where a subordinate court has neither made a complaint under S. 476 nor rejected an application for such a complaint. Where admittedly the application under S. 476 was rejected by the magistrate concerned in relation to whose court the offence was committed then the remedy is by way of appeal under S. 476-B. S. 195(3) indicates the superior appellate court and that is court of session. The A. D. M. (Judicial) cannot take any action under S. 476-A.

(Para 2)

R. Mohanty, R. K. Kar and S. N. Kar, for Petitioner; A. S. Khan, for Opposite Parties.

ORDER: This application in revision has been filed against an order of the A. D. M. (Judicial), Cuttack, rejecting the application of the petitioner to restore Misc. Case No. 70 of 1965. In short, the facts are that the petitioner filed a petition under Section 476 Cr. P. C. before the trying magistrate in a disposed of case for proceeding against the accused who had been acquitted in a case on the ground that they had produced a forged document in support of their defence. That application was rejected. Thereafter the petitioner filed a similar petition under Section 476-A, Cr. P. C. before the A. D. M. (Judicial), Cuttack. The said petition was registered as Criminal Misc. Case No. 70 of 1965, but the same was also dismissed on 1-2-66 as the petitioner was absent when it was called. The petitioner filed a petition for restoration of the Misc. case and the present revision is against the order of the A. D. M. (Judicial), rejecting the same.

2. The learned Counsel appearing for the petitioner contends that though there is no express provision in the Code providing for restoration of petitions comparable to the provisions contained in the Civil Procedure Code and though there is no provision comparable to Section 151 C. P. C., still there is judicial authority for the view that where the court finds that a final order has been passed without jurisdiction the court has inherent power to restore the same. For the present purpose it is not necessary to go into this question or consider how far such a contention is sustainable, and if sustainable to what extent and in what circumstances such power can be exercised by the court. The application under Section 476-A was filed before the A. D. M. (Judicial), Cuttack on the ground that it was a superior court to the court of the Magistrate in relation to proceeding in whose court the alleged offence is said to have been committed. Section 476-A contains two limitations for the exercise of the power by the superior Court. The power under Section 476-A can be exercised only where a subordinate court has

neither made a complaint under Section 476 Cr. P. C. nor rejected an application for such a complaint. In the present case as admittedly the application under Section 476 Cr. P. C. was rejected by the learned magistrate concerned in relation to whose court the offence was committed, I do not think the A. D. M. (Judicial) could have taken any action under Section 476-A. Apart from this, Section 476-B is another hurdle in the way of the petitioner. It provides that where the subordinate court has made a complaint or rejected an application to make a complaint under Section 476 Cr. P. C., the remedy is by way of appeal under Section 476-B. Section 195(3) indicates the superior appellate court. An appeal from the court of the learned Magistrate concerned was competent to the court of session. The petitioner did not avail of this remedy, but approached the A. D. M. (Judicial) who had no jurisdiction to entertain the application. In any view of the matter there is no merit in the application. The revision is accordingly dismissed.

DGB/D.V.C.

Revision dismissed.

AIR 1969 ORISSA 7 (V 56 C 5)

G. K. MISRA, J.

Kanhū Charan Behera and another, Petitioners v. Jagabandhu Behera and others, Opposite Parties.

Civil Revn. No. 80 of 1966 D/-9-4-1968, from order of Addl. Munsif Kendrapara, D/-20-1-1966.

(A) Civil P. C. (1908), S. 11 — Res judicata — Trial court and appellate court having concurrent jurisdiction to extend time — Adverse order passed by appellate court — Trial court cannot extend time.

When, over the same matter both the appellate court and the trial court had concurrent jurisdiction to extend time, and an adverse order was passed by the appellate court, the same matter cannot be reagitated before the trial court, though it had power to extend the same if the appellate court had not been moved in the matter. As between the parties, appellate court's order constituted res judicata. AIR 1966 SC 1061 and AIR 1965 SC 1970, Rel. on. (Para 8)

(B) Civil P. C. (1908) Ss. 148 and 152 and O. 20, R. 3 — Deposit of purchase money — Time specified by decree — Extension of time — Principles.

O. 20, Rule 3, lays down that once a judgment or decree is signed, it shall not afterwards be altered or added to, save as provided by S. 152, C. P. C. or on review. Accordingly S. 148, C. P. C. cannot be allowed to take away the effect

DL/IL/C27/68

of this rule, though, if the decree is varied or reversed by the appellate court, it can fix a period different from the one fixed by the lower court. This doctrine has, however, an important exception. Where the decree fixing the time is not intended to be final and the court still retains control over the proceeding, the court may extend the time granted under the decree under this section. Thus a distinction is to be drawn between a case, where the proceeding has come to a close, and another case, where it has not terminated and the Court still retains control over it. Whether a proceeding has come to a close, or is still alive, would again depend upon the nature of the proceeding and the order passed thereon. If the order is a final order, the court is *functus officio*, otherwise the court can enlarge time. AIR 1959 Orissa 74 and (1896) 1 Ch D 644 and AIR 1940 Pat. 50, Foll.

(Paras 4, 5)

Cases Referred: Chronological Paras

- (1966) AIR 1966 SC 1061 (V 53)
 = (1963) Supp (2) SCR 542, State of West Bengal v. Hemant Kumar 9
 (1965) AIR 1965 SC 1970 (V 52) = (1965) 2 SCA 558, Raja Gopal Rao v. Sitharamamma 9
 (1960) AIR 1960 Andh Pra 271 (V 47) = ILR (1960) 2 Andh Pra 504, M. Venkata Rami Reddi v. M. Adhinarayana Reddy 7
 (1959) AIR 1959 Orissa 74 (V 46) = ILR (1959) Cut. 142, Rajan Patro v. Akur Sahu 4
 (1958) AIR 1958 Cal. 284 (V 45) = 62 Cal. WN 418, National Textiles v. Premraj 4
 (1940) AIR 1940 Pat 50 (V 27) = 186 Ind Cas 870, Surajmal v. Bhubaneswar 5
 (1896) 1 Ch. D 644 = 65 LJ Ch. 375, Collinson v. Jeffery 4

B. K. Pal, D. P. Mohapatra and G. B. Patnaik, for Petitioners; P. C. Misra, for Opposite Party 1.

ORDER: The petitioners (plaintiffs) filed Title Suit No. 57/197 of 1960/1957 in the court of the Additional Munsif, Kendrapara, for partition and re-purchase of the homestead against the opposite parties (defendants). Opp. party 5 had sold his undivided dwelling house and homestead to opp. parties 1 to 4, who are strangers to the family of the plaintiffs and opp. party 5. The trial court decreed the suit in respect of the Bari land and dismissed it in respect of the house. The decretal order dated 11-2-61 runs thus—

The defendants 1 to 4 are directed to sell share of the bari land to the plaintiffs for Rs. 92/- within two weeks of the plaintiffs depositing Rs. 92/- into Court for payment to the defendants 1 to 4.

The plaintiffs to deposit the money within three weeks hence. On failure of the defendants 1 to 4 to execute the sale deed in the time limited the plaintiffs are entitled to apply to get a sale deed executed by the court in their favour. Plaintiffs deposited Rs. 92/- in court on 25-2-61. Against the judgment of the trial court, opposite party 1 preferred Title Appeal No. 70/1961 in respect of the Bari land. The petitioners preferred cross-objection against the dismissal of the suit for purchase of the house. On 31-7-63 the Additional Subordinate Judge dismissed T. A. No. 70/61. Thus plaintiffs' right to purchase Bari land was confirmed. The cross-objection filed by the petitioners was allowed with the following direction—

The judgment and decree of the learned Munsif are set aside and the plaintiff's suit is decreed in full with costs. He is permitted to repurchase the undivided share of defendant-5 from defendants 1 to 4. Defendant-1 and others be directed to sell the share of defendant-5 to plaintiffs for the amount mentioned in the sale deed. Plaintiffs are directed to deposit the said amount into the court of Munsif, Kendrapara within two months hence for payment to defendants 1 to 4 and defendants 1 to 4 are further directed to sell the property within one month from the date of deposit and on failure the plaintiffs are entitled to apply for getting a sale deed executed by court in their favour.

The petitioners did not deposit the amount within two months. On 5-12-63 they filed a petition in Misc. Case No. 53/63 before the appellate court for extension of time to deposit the purchase-money. On 2-1-65 the petition for extension of time was rejected. The petitioners filed Civil Revision No. 78 of 1965, which was not admitted. On 20-2-65 the petitioners filed a petition before the trial court for permission to deposit the purchase money of Rs. 1000/-. On 16-9-65 the Addl. Munsif passed the chalan for Rs. 1000/- and directed the chalan to be produced by 28-9-65. The chalan was filed on 27-9-65 showing payment. On 20-1-66 the Addl. Munsif rejected the petition for final decree, as Rs. 1000/- had been deposited beyond the time granted by the appellate court. Against this order the civil revision has been filed.

2. The learned Additional Munsif exercised his jurisdiction illegally in refusing to direct execution of a sale deed in respect of the Bari land for which the purchase-money of Rs. 92/- had been deposited in time on 25-2-61. The final decree should have been passed in respect of Bari land.

3. The main question for consideration is whether the learned Additional Munsif was justified in refusing to extend

time for deposit of the purchase-money in respect of the house. To answer it, the following questions require examination:

(i) Had the appellate court powers to extend time for deposit of the purchase-money in respect of the house? Was the order dated 2-1-65 passed by the appellate court refusing to extend time proper?

(ii) Has the trial court power to extend time after expiry of the time given by the appellate court in Title Appeal No. 70/61?

(iii) Has the trial court power to extend time after refusal by the appellate court to extend time?

4. The aforesaid questions necessitate examination of the powers of the court under S. 148, C.P.C. S. 148 runs thus —

Where any period is fixed or granted by the Court for doing of any act prescribed or allowed by this Code, the Court may in its discretion from time to time enlarge such period even though the period originally fixed or granted may have expired.

The question is whether time can be extended under this Section where a period is fixed or granted by a decree. Or. 20, Rule 3, C. P. C. lays down that once a judgment or decree is signed, it shall not afterwards be altered or added to, save as provided by S. 152, C. P. C. or on review. It has accordingly been held in many cases that S. 148, C. P. C. cannot be allowed to take away the effect of this rule, though if the decree is varied or reversed by the appellate court, it can fix a period different from the one fixed by the lower court. This doctrine has, however, an important exception. Where the decree fixing the time is not intended to be final and the court still retains control over proceeding, the court may extend the time granted under the decree under this section. For instance, in a suit for accounts, a Commissioner might be appointed by court to go into accounts. The preliminary decree gives a direction to the Commissioner to report within a stipulated time. Even though an appeal might be pending from the preliminary decree, the trial court retains power to extend time for filing the report by the Commissioner: (See AIR 1958 Cal 284, *National Textiles v. Premraj*). Where the preliminary decree also does not state what would be the effect of non-payment of a deposit in time, the court retains power to extend time. It has been held by the Supreme Court that this theory does not apply to suits for pre-emption as under the Civil Procedure Code the time is to be fixed for payment. In a suit for specific performance of contract, where no default clause has been attached, the time can be extended. See AIR 1959 Orissa 74, *Rajan Patro v. Akur Sahu*. This

principle has been well expressed by Kekowich, J in (1896) 1 Ch D. 644, *Colinsson v. Jeffery* thus—

It appears to me that this action is not dead. x x x x But a final stroke is required to effect death. That final stroke has not been delivered and therefore, in my opinion, the application is properly made and the matter asked for may be granted. x x x x There is another form of order available and appropriate where the court thinks that severe terms should be imposed, namely, that on failure to do certain act within the specified time, then "the action do stand dismissed without further order".

5. Thus distinction is to be drawn between a case, where the proceeding has come to a close, and another case, where it has not terminated and the Court still retains control over it. Whether a proceeding has come to a close; or is still alive, would again depend upon the nature of the proceeding and the order passed thereon. If the order is a final order, the court is *functus officio*, otherwise the court can enlarge time. The same view was taken in AIR 1940 Pat. 50 *Surajmal v. Bhubaneswar*.

6. In this case, the final order passed by the appellate court in Title Appeal No. 70/61 only granted time of two months for deposit of the purchase-money. It did not say that on failure to make such a deposit, plaintiffs' suit for repurchase of the house would stand dismissed. The decree was not final in respect of that relief and the court still retained control over the proceeding and the power to extend time. The appellate court's order dated 2-1-65 in saying that it was *functus officio* for extending the time was contrary to law. The legal position was not correctly brought to the notice of this Court in Civil Revision No. 78 of 1965, and accordingly the revision was not admitted.

7. After the appellate court decree in Title Appeal No. 70/61, the trial court had also the power to extend time. Both the appellate court and the trial court had concurrent jurisdiction in the matter of extension of time in the facts and circumstances of this case. The appellate court's power to modify its own decree and grant extension of time is unquestionable. The trial court had also power to extend time granted by the appellate court as time was not the essence of the decree and the period prescribed in the decree was not final and the court had the control over the proceeding to further extend the time. This view is fully supported by AIR 1960 Andh. Pra 271, *M. Venkata Rami Reddi v. M. Adhinarayana Reddy* which has reviewed the relevant decisions on the point.

The result of the aforesaid discussion is that both the trial court and the appellate

late court had power to extend time in the facts and circumstances of this case.

8. The next question for consideration is whether the trial court had still power to extend time after the appellate court refused the same on 2-1-65. The answer must be in the negative. The refusal of time by the appellate court was not without jurisdiction. It had jurisdiction either to extend time or to refuse it. The existence of power does not affect the discretion vested in the court to refuse extension of time. The observation of the appellate court that after the passing of the decree it was functus officio was undoubtedly contrary to law; but it was not without jurisdiction. Its observation that it was functus officio was an illegal exercise of jurisdiction. But the matter became final after the High Court refused to admit Civil Revision No. 78/65. The order of the High Court gave a final seal to the appellate court's order that its jurisdiction was not exercised either illegally or with material irregularity.

When over the same matter both the appellate court and the trial court had concurrent jurisdiction to extend time, and an adverse order was passed by the appellate court, the same matter cannot be reagitated before the trial court, though it had power to extend the same if the appellate court had not been moved in the matter. As between the parties, appellate court's order constituted res judicata.

9. Mr. Pal placed reliance on AIR 1966 SC 1061 State of West Bengal v. Hemant Kumar and AIR 1965 SC 1970 Raja Gopal Rao v. Sitharamamma in contending that as the appellate court had observed that it was functus officio, its order was without jurisdiction and, as such, a nullity, and would not constitute as a bar ousting the jurisdiction of the learned Munsif to pass an order extending the time. This argument is based on confusion of thought. As has already been said, the order of the appellate court that it was functus officio is not without jurisdiction. It had the power to extend time. In exercise of jurisdiction it passed an order which might be either right or wrong. A wrong order passed in exercise of jurisdiction is not a nullity. The aforesaid Supreme Court decisions have no application to the facts of this case.

10. In the result, the order of the learned Additional Munsif refusing to get a sale deed executed in respect of the Bari land is set aside and that refusing to extend time in respect of the house is confirmed. The Civil Revision is allowed in part. Parties to bear their own costs.

MVJ/D.V.C.

Petition partly allowed.

AIR 1969 ORISSA 10 (V 56 C 6)

G. K. MISRA, J.

Lakhyeswar Karmi and others, Petitioners v. Padmabati Karmi and others, Opposite Parties.

Civil Revn. No. 278 of 1966, D/- 25-6-1968, from an order of Sub J., Bargarh, D/- 31-8-1966.

(A) Civil P. C. (1908), S. 115, O. 33 R. 2 — Court not following provisions of O. 33 R. 2 — Order passed is revisable — 1958(2) Mad LJ 93, Dissented.

If the procedure prescribed by law is not followed by the subordinate courts and if they exercise their jurisdiction illegally then a case for interference under section 115 C. P. C. arises. Whether the court would interfere in civil revision in a particular case depends upon the facts and circumstances of each case and the nature of violation. But a broad proposition of law cannot be laid down that in no case the Court should interfere in civil revision.

Allowing parties to sue in forma pauperis, essentially involves non-payment of Court fees but Or. 33 itself prescribes the stringent procedure for the success of such an application. If a court illegally exercises jurisdiction by not following the procedure prescribed by law and allows the application to sue in forma pauperis, such order can be revised. Principle laid down in AIR 1961 SC 1299 that a revision in court-fee matters at the instance of a defendant is not maintainable, cannot be extended to cases under Order 33, C. P. C. by analogy or implications. AIR 1961 SC 1299, Disting. 1958 (2) Mad LJ 93, Dissented. (Para 5)

(B) Registration Act (1908), S. 17(1)(b) — Property valued over Rs. 100.00 P. — Relinquishment can only be by a registered document. (Para 4)

(C) Civil P. C. (1908) O. 33 R. 2 — Plaintiff receiving some properties — In due course his title over them is extinguished — In application to sue in forma pauperis plaintiff ought to show the properties and aver that his title is no longer there — Without such averment the application is liable to be thrown out. (Para 3)

Cases Referred: Chronological Paras
(1967) ILR (1967) Cut 163 = 33 Cut
LT 601, Banshidhar Mohapatra v. Souri Samal 6
(1961) AIR 1961 SC 1299 (V 48) =
(1961) 3 SCR 1015, Rathnavarma-
raja v. Vimala 5
(1958) 1958(2) Mad LJ 93 = 1958
Mad WN 351, Chinnamani Nadar
v. Devagirubai Rajan 5
R. N. Sinha, S. N. Sinha and R. P. Behera, for Petitioners; R. C. Misra (1),
for Respondents.

HL/HL/D319/68

ORDER: Plaintiff (opp. party no. 1) filed a Title Suit valued at Rs. 9600/- on which a court-fee of Rs. 1086/- was payable. She filed an application to sue in forma pauperis alleging that the total property belonging to her would be worth Rs. 240/-. The defendants contested the pauperism and took a specific plea that plaintiff was in actual possession and enjoyment of one-third of the property inherited by her from her mother in her own right, title and interest. Plaintiff's interest would be about 7 acres and odd yielding an income of Rs. 1000/- per annum. The learned Subordinate Judge, Bargarh, came to the conclusion that plaintiff No. 1 was not in possession of the property she inherited from her mother. On that finding he held that she had no sufficient means to pay the requisite court-fee and allowed her application to sue in forma pauperis. Against this order, the civil revision has been filed.

2. Mr. Sinha contends that the learned Subordinate Judge has recorded no finding that the Opposite Party No. 1 has no interest in the properties inherited by her from her mother and his finding that she was not in possession of those properties was contrary to the evidence on record and is based on a wrong notion of law that the draft record of rights is not admissible in evidence. Mr. Misra, on the other hand, contends that whatever may be the error the Subordinate Judge might have committed, this Court cannot interfere with it in revision and further the lower court's order substantially involves the question of court-fee which can be assailed only by the State and not by the petitioners.

These contentions require careful consideration.

3. The contention of Mr. Sinha that the learned Subordinate Judge has not recorded any finding regarding extinguishment of plaintiff's title in her mother's property is not disputed by Mr. Misra. The learned Subordinate Judge exercised his jurisdiction illegally in over-looking the provision of Order 33 Rule 2, C. P. C. which runs thus:

"Every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits: a schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings."

It would thus be clear that it was the paramount duty of the plaintiff to include her share of the mother's property in the schedule. She ought to have asserted in the application that there was ex-

tinguishment of her title in those properties and the properties were no longer available to her. The pauper application did not contain such an averment. Even in her evidence in Court she does not clearly and unambiguously assert that she has no interest in those properties. Her evidence is:

"I permitted my sister Para to enjoy the entire properties of my mother. I have executed any (no?) document in favour of my sister Para. I have not permitted Para but permitted my sister Jai to enjoy my mother's land. I have not asked my sister Jai and her son to give me back my share of mother's land. There is no document to this effect."

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xx

xx

"I have no interest whatsoever in my mother's properties. I am not in need of enjoying my mother's properties and hence I say that I have no interest therein. I have not permitted my sister Jai to enjoy my mother's properties".

4. Her evidence is not unequivocal and is shaky. There is no corroboration. This statement has been challenged by defendant No. 1 (D. W. 1). That apart, relinquishment of property of the value of more than Rs. 100 can be made only by a registered document. Taking the entire matter into consideration, there can be no escape from the conclusion that the plaintiff has substantive title and interest in 7 acres and odd of land which she inherited from her mother.

As admittedly she did not mention this item of the properties in the application as required under Order 33 Rule 2, C. P. C. the application to sue in forma pauperis was liable to be dismissed.

5. The next question for consideration is whether the civil revision at the instance of the petitioners is not maintainable. On analogous facts a learned single Judge held in Chinnamani Nadar v. Devagirubai Rajan, 1958 (2) Mad LJ 93 that a revision at the instance of the defendant is not maintainable. His Lordship was of the view that allowing an application to sue in forma pauperis involving the question of payment of court-fee affects the State and not the defendants.

With great respect I do not subscribe to this view. Doubtless allowing parties to sue in forma pauperis essentially involves non-payment of court-fee but Order 33 itself prescribes the stringent procedure for the success of such an application. If the procedure prescribed by law is not followed by the subordinate courts and if they exercise their jurisdiction illegally then a case for interference under S. 115, C. P. C. arises. There are abundant authorities in support of this view even in cases arising out of an order allowing a pauper application. If the view is held that High Court cannot in-

terfere even if no (sic) subordinate courts do not at all adhere to any of the rules prescribed under O. 33 disastrous consequences would follow. Whether the court would interfere in civil revision in a particular case depends upon the facts and circumstances of each case and the nature of violation. But a broad proposition of law cannot be laid down that in no case the Court should interfere in civil revision. In this case the Subordinate Judge exercised his jurisdiction illegally in allowing the pauper application ignoring the position that she had means to pay court-fee. *Rathnavarmaraja v. Vimala*, AIR 1961 SC 1299 is not a case under Order 33, C. P. C. Its principle that a revision in court-fee matters at the instance of a defendant is not maintainable, cannot be extended to cases under Order 33, C. P. C. by analogy or implication.

6. In recording of finding that the plaintiff is not in possession of the properties belonging to her mother, the learned Subordinate Judge has committed an error of law in saying that the draft record of rights is not admissible for any purpose. The matter is concluded by a decision of this Court reported in *Banshidhar Mohapatra v. Souris Samal*, ILR 1967 Cut 163 wherein it was observed that it is admissible in proof of the fact that at the time when the draft record-of-rights was prepared, the tenant to whom the parcha slip was issued was found to be in possession by public servants in due discharge of their duties. In view of my conclusion that the plaintiff has substantive title in her mother's properties, it is unnecessary to pursue the question of possession.

7. In view of the aforesaid discussion the plaintiff's application to sue in forma pauperis is liable to be rejected as she has means to pay the requisite court-fee. The order of the learned Subordinate Judge is set aside and the civil revision is allowed with cost. Hearing fee Rs. 50. Mr. Misra for the plaintiff prays for three months time for payment of the court-fee. Time is allowed. The record of the case be sent back at once as the case has been long pending.

BDB/D.V.C.

Revision allowed.

AIR 1969 ORISSA 12 (V 56 C 7)

S. BARMAN, C. J.

Prasana Kumar Patra, Appellant v. Smt. Sureswari Patrani, Respondent.

Miscellaneous Appeal No. 88 of 1967, D/- 2-5-1968 from order of Sub-J., Sambalpur, D/-19-7-1967.

Hindu Marriage Act (1955), S. 24 — Maintenance pendente lite — Court ex-

HL/HL/D309/68

penses — Act does not lay down scale — Divorce Act (1869), S. 36 lays down limit of one fifth of husband's net income — Conduct of wife is a factor to be considered — Court expenses to be granted should be reasonable.

There is no doubt that the wife is entitled to certain amount of maintenance pendente lite. But the question is what should be the reasonable amount? As for maintenance pendente lite, courts generally allow it at one-fifth the income of the husband after necessary deductions. Under the Indian Divorce Act the maximum alimony pendente lite has been fixed at one-fifth the net income. Under the Hindu Marriage Act no such limit has been prescribed. In the absence of special circumstances, maintenance should be allowed at one-fifth the net income of the husband. As regards litigation expenses it should be reasonable.

In determining the quantum of maintenance the conduct of the parties is also relevant; it is permissible for the court to go into the conduct of the wife with reference to the question whether she should be held to have forfeited her claim for maintenance in sympathy of her claim. AIR 1958 Raj 322, Rel. on.

(Paras 3, 4)

Cases Referred: Chronological Paras

(1958) AIR 1958 Raj 322 (V 45)=ILR

(1958) 8 Raj 843, Mukan Kunwar v.

Ajeetchand

3

Y. S. N. Murty, for Appellant.

ORDER: This is a husband's appeal against an order passed by the Subordinate Judge, Sambalpur, on the wife's application for maintenance under S. 24 of the Hindu Marriage Act (Act 25 of 1955) by which the wife was granted Rs. 30 as interim maintenance and Rs. 75 as litigation expenses.

2. The relationship between the husband and the wife does not appear to be very cordial in that on February 1, 1967 the husband filed a suit against the wife under S. 9 of the Hindu Marriage Act for restitution of conjugal rights. During the pendency of the said suit the wife filed this petition under S. 24 for interim maintenance and for expenses of the litigation. According to the wife, the husband has sufficient income to the extent of Rupees 2,033 per year. The learned Subordinate Judge on appreciation of the evidence as discussed by him in his judgment, which I need not repeat herein, came to the conclusion that taking a modest view of the earnings of the husband it will not be less than Rs. 60 per month from the Pan shop and from his joint family lands.

The reasoning on which he granted Rs. 30 as interim maintenance is that the husband has no dependent to maintain and further that in these hard days the

barest minimum expenditure for the maintenance of an adult will not be less than Rs. 30 per month and accordingly the learned Subordinate Judge thought it reasonable to direct the husband to pay Rs. 30 to the wife as interim maintenance and Rs. 75 as litigation expenses.

3. There is no doubt that the wife is entitled to certain amount of maintenance. But the question is: what should be the reasonable amount? As for maintenance pendente lite, courts generally allow it at one-fifth the income of the husband after necessary deductions. Under the Indian Divorce Act the maximum alimony pendente lite has been fixed at one-fifth the net income. Under the Hindu Marriage Act no such limit has been prescribed. In the absence of special circumstances, maintenance should be allowed at one-fifth the net income of the husband. As regards litigation expenses, it should be reasonable, *Mukan Kunwar v. Ajeetchand*, AIR 1958 Raj 322.

4. In determining the quantum of maintenance the conduct of the parties is also relevant; it is permissible for the court to go into the conduct of the wife with reference to the question whether she should be held to have forfeited her claim for maintenance in sympathy of her claim. In the present case, evidently, the wife refused to stay with her husband by reason of which the husband had to file a suit for restitution of conjugal rights under Section 9 of the Hindu Marriage Act.

5. The learned Subordinate Judge does not appear to have taken into consideration these aspects in fixing the quantum of maintenance granted to the wife. The finding of the learned Subordinate Judge is that the husband has an income of only Rs. 60 per month from the Pan shop and from his joint family lands. In these circumstances, I think that a sum of Rs. 30 per month as interim maintenance granted by the learned Subordinate Judge seems to be excessive. In this case, having regard to the income of the husband and the conduct of the wife Rs. 12 per month as representing one-fifth of the income of the husband will be reasonable.

6. In this view of the case, the order of the learned Subordinate Judge is modified to the extent that the wife will be entitled to Rs. 12 per month as interim maintenance. As regards litigation expenses, the order of the learned Subordinate Judge allowing Rs. 75 is confirmed. The Miscellaneous Appeal is allowed in part. There will be no order as to costs.

BDB/D.V.C. Appeal partly allowed.

AIR 1969 ORISSA 13 (V 56 C 8)

S. BARMAN, C. J. AND S. ACHARYA, J.

Sribatsa Misra, Petitioner v. State of Orissa and another, Opposite Parties.

O. J. C. No. 448 of 1967, D/- 20-8-1968.

Constitution of India, Art. 309 — Promotion of Government Servant — Unambiguous order of promotion — Promotees governed only by the order.

When an order of promotion is clear, unambiguous and self-contained, no conditions not incorporated therein can be implied. The promotees can only be governed by that order and other statutory rules regulating the conditions of service if any that were obtaining at the time. Petitioner was promoted as head clerk and the only condition being that he would continue to draw his original pay as before until he passed the Accounts examination. Subsequently the Government by an order exempted the petitioner from passing the Accounts examination. The Orissa Ministerial Service Rules, 1963 requiring the assistants to pass departmental examination, as a condition precedent to promotion, were not then in existence; and they came into force about six years after the petitioner had been promoted to the post of Accountant although only his drawal of pay in the higher scale of Accountant was made subject to his passing the Examination. By a subsequent order the Government required all the persons holding the posts of Head Clerks to pass the examination in Accounts within two years, and failure to do so was to entail reversion. Petitioner having been reverted, Held that it was not open to Government to again require the petitioner to pass the Preliminary and Final Examination as they purported to do by their subsequent order dated October 1963, nor was it open to Government to take the view that the petitioner had not qualified himself to continue in the post of Accountant to which he had been promoted. 1967 SLR 155, Rel. on. (Paras 10 to 12)

Cases Referred: Chronological Paras (1967) 1967 SLR 155, Chief Secy. to the

Govt. of Mysore v. S. C.

Chandraiah

10

B. M. Patnaik and G. B. Patnaik, for Petitioner; Advocate-General, for Opposite Parties.

BARMAN, C. J.: The petitioner challenges an order of the Additional District Magistrate, Sundargarh, dated March 18, 1967 by which the petitioner was reverted from the rank of senior Upper Division Clerk to the rank of Junior Upper Division Clerk on the ground that he had not passed the Final Accounts Examination as required by Rule 9 of the Orissa Ministerial Services (Method of Recruitment

and Conditions of Service of Clerks and Assistants in the District Offices and Offices of Heads of Departments) Rules 1963 (hereinafter referred to as the Orissa Ministerial Service Rules).

2. The petitioner's main points are that the Orissa Ministerial Service Rules, 1963, as prospective do not apply to his case; that he was exempted from undergoing a course of training in Accounts as required prior to the Rules of 1963; that in any event he actually passed the Accounts Examination and should be deemed to have satisfied the appropriate rule or order — even if applicable to the petitioner — requiring the passing of such examination, all as discussed hereunder.

3. Rule 9 of the Orissa Ministerial Service Rules, 1963 which requires the passing of departmental examination as a condition precedent for promotion to the higher posts in the cadre of ministerial service of the district offices, so far as material, is this:

“9. Promotion to the higher posts in the cadre of ministerial service of district offices shall be subject to passing of departmental examinations and such other tests, if any, as may be ordered by the head of the district office in that behalf and shall be based on merit and suitability in all respects, with due regard to seniority, and will be made in the following manner, namely

xx xx xx"
For commencement of the Rules, it is
provided in sub-rule (2) of Rule 1, which
is this:

"1(2) They shall come into force on such date as the State Government may, by order, direct."

The State Government by order directed the Rules to commence from April, 15, 1963.

4. In the counter-affidavit filed on behalf of the opposite parties (State of Orissa and the Additional District Magistrate, Sundergarh) in support of the order of reversion it is said that according to Rule 9, the passing of the Final Accounts Examination is a condition precedent for promotion to the rank of senior Upper Division Clerk which is equivalent to the post of a Head-clerk previously held by the petitioner; that the petitioner was not eligible to hold the post of Head clerk as he had not till December, 1966 passed the Final Accounts Examination as required by the Orissa Ministerial Service Rules, 1963 and the Accounts Examination Rules prior thereto. It was also stated that the petitioner was not exempted from passing the said examination and that he had been taken as Head Clerk under the orders of the Collector only as a provisional measure. The records, however, do not show what has been stated in the counter-affidavit in support of the order

of reversion. The correct position appears to be as hereinafter stated.

5. On April, 1, 1948 the petitioner was appointed Lower Division Clerk in which post he was confirmed on April 1, 1950. On July 18, 1955 he was promoted as Junior Upper Division Clerk. Two years thereafter on June 1, 1957 the petitioner, then upper division clerk cum Store Keeper of Rajgangpur N. E. S. Block, was promoted to the post of Accountant of that office but he was to draw his salary on his then existing pay scale, until he passed the Accounts Examination in the Accounts Training School, Bhubaneswar. Thereafter, by an order dated August 19, 1958 the Government of Orissa were pleased to exempt him, among others, from undergoing the course of training in Accounts in the Accounts Training School at Bhubaneswar as prescribed in Political & Services Department letter No. 4485 (68) CDF dated December 20, 1956. Thereafter in March, 1960 he was promoted on a temporary basis as Progress Assistant which post, the petitioner states in his petition, he joined on August 1, 1960 and continued therein till August 31, 1964. In the meantime, the Orissa Ministerial Service Rules, 1963 came into force with effect from April, 1963 as aforesaid.

6. The circumstances in which after the Government exempted the petitioner from appearing in the Accounts Examination, the question of the petitioner having been required to pass the examination again arose, are stated hereunder.

7. On April 22, 1965 Government Order No. 5275 (13) CD dated October 19, 1963 requiring the passing of the examination was for the first time communicated to the petitioner under memo No-2553 (1) Estt. dated April 22, 1965. The said Government order of October 19, 1963 purports to be a decision of the Government that the unpassed candidates holding the posts of Upper Division Clerks and Head Clerks in the blocks will be allowed two years time from the date of issue of the said order to pass the Preliminary and Final Accounts Examination prescribed by the Board of Revenue for the purpose; in case anyone fails to pass the tests within the period specified above, he will have to quit or be downgraded; no exemption will however be allowed from passing the Accounts tests.

8. The petitioner submits that he was not aware of the said order of Government dated October 19, 1963 prior to the receipt of the memo dated April 22, 1965. Alternatively he submits that assuming that he is bound by the said order of Government dated October 19, 1963, even so he actually passed the Examination; and should be deemed to have passed the Examination within the period as required by the said order.

9. The reasoning, on which the petitioner claims that he should be deemed to have passed the examination is, in substance, this. The two years time mentioned in the said order of October 10, 1963 requiring him to pass the Examination should be counted from April 22, 1965 that is, the date on which the order was actually communicated to and received by him; in other words, according to the petitioner he was given time to pass the examination till April 22, 1967; in fact he appeared in the Final Accounts Examination in December, 1966—the last date of which was December 12, 1966. Although the result of the Examination was published on October 4, 1967 the petitioner claims to have passed the same with effect from December 12, 1966 which was the last date of the examination; this claim is based on Government order dated June 28, 1956 quoted in paragraph 10 of the writ petition to the effect that

"Clerk who passes the examination or test shall be deemed to have passed the same on the last date on which the examination or test was held"

The petitioner having thus passed the examination the last date of which was December 12, 1966 must be deemed to have passed it on that date which was well within the period of two years which was not due to expire until April, 22, 1967 in the case of the petitioner. But according to the opposite parties, the period of two years must be counted from the date of issue of the aforesaid Government order dated October 19, 1963 so that, according to them, two years expired on October 19, 1965; and because the petitioner did not pass the examination within this period, the opposite parties could revert him.

10. But the crux of the point for decision is; Can it be said in the circumstances of the case that the petitioner was bound to pass the departmental examination? In our opinion, having regard to the terms of the order of his promotion dated June 1, 1957, such promotion was not made subject to any condition that he should pass any departmental examination. The order of promotion dated June, 1, 1957, was in these terms:

"Sri Sribatsa Misra U. D. Clerk cum Storekeeper of Rajgangpur N. E. S. Block is promoted to the post of Accountant of that Block Office in the scale of 90-5-120 P. M. with effect from 1st June, 1957. He will, however, draw his salary in the existing pay scale of Rs. 70-2/1-90-E. B 4-100 until he passes the Accounts training class at Bhubaneswar.

S. A. L. Nair

District Magistrate, Sundergarh"

It is clear from the aforesaid order that his promotion was not subject to any condition. The only condition was in respect

of the salary he would draw on promotion, and all that was ordered was that until he passed the examination, he would continue to draw pay in his then existing scale. But there was no ambiguity about the position that he was promoted as Accountant of the Rajgangpur Block Office. The order as worded cannot support the contention that his promotion was made subject to his passing the Accounts Training Class examination at Bhubaneswar. This our view is supported by the decision of the Supreme Court in Chief Secretary to the Government of Mysore v. S. C. Chandraiah, 1967 SLR 155, 158 (Paragraph 7). There, in an almost similar case, their Lordships laid down as follows:

"When the order of promotion is clear, unambiguous and self-contained, we cannot legitimately imply any conditions which are not incorporated therein. The promotees can only be governed by that order and other statutory rules regulating the conditions of service, if any, that were 'obtaining at that time'. We therefore hold that the order promoting the respondents as Assistants was not subject to the condition that they should pass any departmental test." (the underlining (here in ' ') is ours).

11. In the present case, at the point of time — June 1, 1957 — when the petitioner was promoted by a self-contained order in such clear and unambiguous terms as quoted above, the Orissa Ministerial Service Rules, 1963 requiring the assistants to pass departmental examination, as a condition precedent to promotion, were not there in existence; in fact, as already pointed out the said Rules did not come into force until April 15, 1963; that is to say, until about six years after the petitioner had been promoted to the post of Accountant although only his drawal of pay in the higher scale of Accountant was made subject to his passing the Examination.

12. As regards the passing of the Examination in the Accounts Training School, Bhubaneswar, as a condition precedent to the drawal of a higher pay as Accountant than what he was drawing as U. D. Clerk cum Store-keeper, the Government by their order dated August 19, 1958 exempted him from undergoing such training in the Accounts Training Class at Bhubaneswar. In fact, the District Magistrate, Sundergarh, also permitted the petitioner to draw pay in the higher scale with effect from August 1, 1957. After having thus exempted him from training in Accounts in the Accounts Training School in 1958 and permitted him to draw pay in the higher scale with effect from August 1957, it was not open to Government to again require the petitioner to pass the Preliminary and Final

Examination as they purported to do by their subsequent order dated October 1963, nor was it open to Government to take the view that the petitioner had not qualified himself to continue in the post of Accountant to which he had been promoted.

13. This by itself is sufficient ground for quashing the order of reversion. It is unnecessary for us to go into the questions as to whether the petitioner must be deemed to have passed the Examination in compliance with the requirements of the Orissa Ministerial Service Rules, which he claims to have done in December 1966 within the prescribed period; whether the order of Government dated, October 19, 1963, was not actually communicated and received by him until April 22, 1965; and whether the period of two years prescribed in that order should run from the date of that order, namely October 19, 1963 or from April 22, 1965, the date of receipt of the said order by the petitioner, all which matters being purely questions of fact, we are not to deal with in this writ petition.

14. In the result, therefore, the writ petition is allowed and the order of reversion of the petitioner dated March 18, 1967 is quashed. The petitioner is entitled to all salaries and emoluments due to him, on promotion, as permissible under the rules and according to law. The petitioner will also be entitled to costs. Hearing fee Rs. 100 (Rupees one hundred only).

15. **ACHARYA, J.:** I agree.

GGM/D.V.C.

Petition allowed.

AIR 1969 ORISSA 16 (V 56 C 9)

G. K. MISRA, J.

Sanyasi Behera, Appellant v. Onarasi alias Varanasi Kantamma and others, Respondents.

M. A. No. 50 of 1965 with C. R. No. 81 of 1965, D/- 6-8-1968 from order of Sub. J., Berhampur, D/-20-2-1965.

(A) Civil P. C. (1908), O. 21, Rr. 63, 58 — Sale of disputed property by A, B and C in favour of D — E attached property in execution of his decree against A, B and C — D's objection under O. 21 R. 58 dismissed — D's suit under O. 21 R. 63 as well as for declaration of his title — Sale by A, B, C in favour of F — E was also party in D's suit but his name was expunged as E's claim was satisfied — D's suit was decreed — Suit filed by F decreed against A, B and C but dismissed against D — In execution of money decree F attaching disputed property — A, B and C not having any subsisting interest in

property — Objection by D under O. 21 R. 58 — D's objection must succeed. AIR 1963 Pat 225 and AIR 1945 Mad 333 and AIR 1959 Andh Pra 180, Dist. (Para 5)

(B) Civil P. C. (1908), O. 21 R. 63 O. 1 R. 10, S. 11 — Suit under — Judgment-debtors are not necessary parties but made parties — Effect.

In a suit under O. 21 R. 63, the judgment-debtors are not necessary parties. But if in fact the judgment-debtors are made parties and the suit is disposed of in their presence, they are bound by the decision in the suit and the decision would constitute res judicata as against them in all subsequent litigation.

(Para 5)

Cases Referred: Chronological Paras
(1963) AIR 1963 Pat 225 (V 50)=1962

BLJR 898, D. Ramkishun v. Mst.

Alakh Kuer

5

(1959) AIR 1959 Andh Pra 180 (V 46)=

ILR (1958) Andh Pra 665, Vishwanadham v. Basavayya

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(1945) AIR 1945 Mad 333 (V 32)=ILR

(1946) Mad 79 (FB), K. Narasimhachariar v. R. Padayachi

5

R. C. Misra, for Appellant.

JUDGMENT: Against one order both the miscellaneous appeal and the civil revision have been filed. It is the common case of the learned advocates that miscellaneous appeal lies and the civil revision does not lie. The civil Revision is accordingly dismissed.

2. The facts arising in this appeal may be stated in brief. On 18-12-58 defendants 1 and 2 and the husband of defendant 3 executed a registered sale deed (Ex. 1) in favour of defendant-4, the claimants under Order 21, Rule 58, C. P. C. One Satyabadi Panda attached the disputed property in E. P. 82 of 59 in execution of a decree against defendants 1 to 3. Defendant 4 filed an objection under O. 21, Rule 58, C. P. C. which was dismissed on 20-10-60. On 11-1-61 defendant 4 filed Title Suit No. 7 of 62 (T. S. No. 5 of 61. B. M.C.) under Order 21, Rule 63, C. P. C. as well as for declaration of title and for vacating the attachment effected by Satyabadi Panda. On 9-8-61 defendants 1 to 3 executed an agreement for sale of the disputed house in favour of Sanyasi Behera. Sanyasi filed T. S. 44 of 62 on 14-8-62 making defendants 1 to 4 as parties.

On 22-12-62 T. S. No. 7 of 62 was decreed in favour of defendant 4 declaring his title over the suit property as against defendants 1 to 3 (Ex. 3) and a decree (Ex. 3/a) was passed to the same effect on 7-1-63. It is to be noted that originally Satyabadi Panda was a party to the suit. As during the pendency of the suit his claims were satisfied by defendants 1 to 3, the attachment was raised and his name was expunged. On 22-8-63 T. S.

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All India Reporter

1969

Patna High Ct

AIR 1969 PATNA 1 (V 56 C 1)

FULL BENCH

R. L. NARASIMHAM, C. J.,
R. K. CHOUDHARY AND K. SAHAI, JJ.

Maharaja Chintamani Saran Nath Sah
Deo, Appellant v. Tikait Pratap Chandra
Nath Sah Deo, Respondent.

A. F. O. O. No. 181 of 1960, D/- 14-10-
1966, from order of Sub-Divisional Offi-
cer, Khunti, D/- 26-4-1957.

Tenancy Laws — Bihar Land Reforms
Act (30 of 1950), S. 14 — Applicability —
Provisions do not apply to rent decree
charged upon a tenure under S. 60 of
Chhota Nagpur Tenancy Act — Remedy
of decree-holder is not under the provi-
sions of S. 14.

S. 14 of the Bihar Land Reforms Act
does not apply to the case of rent or
rent decree charged upon a tenure under
the provisions of Section 60 of the Chhota
Nagpur Tenancy Act. The charge created
under S. 60 of the Chhota Nagpur Ten-
ancy Act is not contemplated by S. 4(a)
of the Bihar Land Reforms Act. The
nature of such charge is different from the
charge defined in S. 100 of the T. P. Act.
1963 BLJR 779 & 1962 BLJR 928, Ap-
proved. (Para 12)

A landlord has got a right to recover
arrears of rent by enforcing the charge
on the tenure or the holding. He may
also, without claiming to enforce the
charge or where he is not entitled in law
to enforce the charge, on account of
cessation of the relationship of landlord
and tenant or on any other ground, sue
the tenant on the personal covenant to
pay the rent. Such a suit obviously can-
not be barred under Ss. 4(a) and 4(d)
of the Reforms Act, and the recovery of

the arrears of rent, after obtaining a
decree for the same by execution against
the right, title and interest, of the tenant
in any property is not controlled by sec-
tion 14 of the Reforms Act. AIR 1952
Pat 42 & 1961 BLJR 38 & AIR 1914 PC
111, Ref. (Para 9)

Cases Referred: Chronological Paras
(1963) 1963 BLJR 779, Kameshwar
Singh v. Govind Lal 1, 2, 6, 11, 12
(1962) 1962 BLJR 928=ILR 42 Pat
687, Shri Thakur Lakshmi Narainji
Birajman Mandir v. Umashanker
Sinha 1, 2, 6, 11, 12
(1962) Misc. J. C. No. 289 of 1962
(Pat), Rani Umeshwari Kuer v.
Nazmul Hassan 2
(1961) 1961 BLJR 38=1960 Pat
LR 252, Mathura Prasad Singh v.
Binda Prasad Sinha 9
(1952) AIR 1952 Pat 42 (V 39)=
ILR 30 Pat 325, Ramkali Kuer
v. Ram Bujhawan Singh 9
(1932) AIR 1932 Cal 321 (V 19)=
ILR 59 Cal 1202 (SB), Krishna Pada
Chatterjee v. Manada Sundari
Ghose 9
(1914) AIR 1914 PC 111 (V 1)=ILR
41 Cal 926, Arthur Henry Forbes
v. Maharaj Bahadur Singh 9
K. B. N. Singh, Janardan Sinha and
S. B. N. Singh, for Appellant; Lalnarayan
Sinha, L. K. Choudhury and S. K. Chou-
dhury, for Respondent.

CHOUDHARY, J.:— This Full Bench
has been constituted for deciding the
following questions of law referred by a
Division Bench of this Court:

(1) Whether section 14 of the Bihar
Land Reforms Act applies to the case of
rent or rent decree charged upon a
tenure under the provisions of section 60
of the Chhota Nagpur Tenancy Act;

(2) Whether the applicability of sec-
tion 14 of the Bihar Land Reforms Act is

FL/HL/D194/68

1969 Pat./1 I G—35

excluded by reason of the fact that the charge on the tenure is destroyed on the vesting of the tenure in the State by virtue of the notification under section 3 of the Bihar Land Reforms Act; and

(3) Whether the cases reported in 1962 BLJR 928 and 1963 BLJR 779 were correctly decided.

2. The short facts are these: The decree-holder appellant filed a suit for recovery of arrears of rent against the judgment-debtor respondent, who was a tenure-holder, in the year 1949. The estate of the appellant-proprietor as well as the tenure of the respondent-tenure-holder vested in the State of Bihar before June, 1952, under the provisions of the Bihar Land Reforms Act (hereinafter to be referred to as the "Reforms Act"). On the 28th August, 1953, the appellant obtained a decree for recovery of arrears of rent, and levied execution in Execution Case No. 21 of 1956-57, by sale of certain moveables lying in the house of the judgment-debtor, standing crops lying on plots, door leaves, tiles and other materials of the house, and other moveable properties specified in the execution case including compensation money payable to the judgment-debtor under the provisions of the Reforms Act and by arrest of the judgment-debtor. The judgment-debtor filed objection to the execution on the ground that the decree obtained by the appellant subsequent to the vesting of his estate as well as of the tenure of the judgment-debtor was invalid and the execution case was not maintainable.

The learned Sub-divisional Officer accepted the objection and held that the decree was not executable. The decree-holder has, therefore, filed the present appeal. The appeal was listed for hearing before a Division Bench of this Court, and an argument was advanced before that Bench that Section 14 of the Reforms Act applied to the case of rent or rent decree charged upon the tenure under the provisions of Section 60 of the Chhota Nagpur Tenancy Act (hereinafter to be referred to as the "Tenancy Act"), and that the remedy of the decree-holder was to proceed under Section 14 of the Reforms Act. On behalf of the appellant, it was argued that section 14 of the Reforms Act had no application to his case, and, in support of this contention, reliance was placed on two Division Bench decisions of this Court in *Thakur Lakshmi Narainji Birajman Mandir v. Umashanker Sinha*, 1962 BLJR 928 and *Kameshwar Singh v. Govind Lal*, 1963 BLJR 779. It was contended on behalf of the respondent that a subsequent Division Bench of this Court in *Rani Umeshwari Kuer v. Nazmul Hassan*, MJC No. 289 of 1962 (Pat) and its analogous cases took the view that the cases reported in 1962 BLJR 928 and 1963 BLJR 779 required reconsideration in

view of the submission of the Counsel appearing for the opposite parties that the charge referred to in section 65 of the Bihar Tenancy Act, which is equivalent to section 60 of the Tenancy Act, is covered by the provisions of section 4 (d) and section 14 of the Reforms Act, so that a claim made under section 14 would, undoubtedly, be entertained by the Claims Officer, as, in the opinion of their Lordships constituting that Division Bench, this aspect of the case did not appear to have been considered in the two Division Bench cases of this Court, referred to above. That Bench, therefore, referred the case to be decided by a Full Bench. Later on, all the writ applications filed in those cases were withdrawn and the points remained undecided. The Division Bench hearing this appeal, therefore, referred the above questions of law to be decided by a larger Bench.

3. Under section 4(a) of the Reforms Act, on the publication of the notification under sub-section (1) of Section 3, or sub-section (1) or (2) of section 3A, such estate or tenure, including the interests of the proprietor or tenure-holder in any building or part of a building comprised in such estate or tenure and used primarily as office or cutchery for the collection of rent of such estate or tenure, and his interests in trees, forests, fisheries, jalkars, hats, bazars, mela and ferries and all other sairati interests as also his interest in all sub-soil, including any rights in mines and minerals, whether discovered, or undiscovered or whether being worked or not, inclusive of such rights of a lessee of mines and minerals, comprised in such estate or tenure (other than the interests of raiyats or under-raiyats) vest absolutely in the State with effect from the date of vesting free from all incumbrances and such proprietor or tenure-holder ceases to have any interests in such estate or tenure, other than the interests expressly saved by or under the provisions of this Act.

Section 4(d) of the Reforms Act lays down that no suit shall lie in any civil Court for the recovery of any money due from such proprietor or tenure-holder the payment of which is secured by a mortgage of, or is a charge on, such estate or tenure and all suits and proceedings for the recovery of any such money which may be pending on the date of vesting shall be dropped. Sub-section (1) of section 14 of the Reforms Act provides that every creditor, whose debt is secured by the mortgage of, or is a charge on, any estate or tenure or part thereof vested in the State under section 3 or 3A may, within six months of date of such vesting or the date on which such creditor is dispossessed under the provisions of clause (g) of section 4, or within three months

from the date of appointment of the Claims Officer, whichever date is later, notify in the prescribed manner his claim in writing to a Claims Officer to be appointed by the State Government for the purpose of determining the amount of debt legally and justly payable to each creditor in respect of his claim. Sub-section (3) of that section says that every claim of the nature referred to in sub-section (1) which is not duly notified to the Claims Officer within the time and in the manner mentioned in the said sub-section shall be barred. Section 16 of the Reforms Act relates to the determination of the amount to be paid to the claimant according to the principles laid down in that section.

4. Section 65 of the Bihar Tenancy Act lays down that, where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding or part of his holding shall be liable to sale in execution of a decree for the rent of the tenure or holding, and the rent shall be a first charge on the tenure or holding. Section 60 of the Tenancy Act similarly makes the rent a first charge on the tenancy.

5. Section 100 of the Transfer of Property Act lays down that where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinafter contained which apply to a simple mortgage shall, so far as may be, apply to such charge. It has further provided that nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

6. Counsel for the respondent has submitted an argument that the charge created under section 65 of the Bihar Tenancy Act or section 60 of the Tenancy Act disappears under the provisions of section 4(a) of the Reforms Act, according to which the tenure vests in the State free from all incumbrances. His argument is that section 4(a) does not make any difference between a charge created by a contract or a charge created under a statute; the interests of the tenure-holder or the proprietor, as the case may be, vest absolutely in the State free from the charges created by section 65 of the Bihar

Tenancy Act or section 60 of the Tenancy Act; and, that being the position, steps for recovery of arrears of rent cannot be taken otherwise than as provided in section 14 of the Reforms Act. He has also submitted that the charge created under the above provisions of the two Tenancy Acts comes definitely within the purview of "charge" as defined in section 100 of the Transfer of Property Act; and, in this view of the argument, he has urged that the cases reported in 1962 BLJR 928 and 1963 BLJR 779 have not been correctly decided.

7. On behalf of the appellant, however, an argument has been advanced that the question of the destruction of the charge created under the Tenancy Acts, referred to above, on the vesting of the estate of the proprietor or the tenure of the tenure-holder in the State under the provisions of the Reforms Act, does not arise, in view of the subsequent enactment of the Bihar Recovery of Arrears of Rents of Outgoing Proprietors and Tenure-holders (Vested Estates and Tenures) Act, 1953 (Bihar Act III of 1953). It has further been submitted that, even if the above Act would not have been enacted, the charge created under the two Tenancy Acts was not contemplated to be destroyed under section 4(a) of the Reforms Act. It has been argued that the nature of the charge created under the Tenancy Acts is absolutely different from the charge defined in section 100 of the Transfer of Property Act.

8. In my opinion, the argument advanced by learned Counsel for the appellant is well founded and must be accepted as correct. The Legislature, while enacting Bihar Act III of 1953, was well aware of the provisions of section 4(d) of the Reforms Act, according to which no suit could proceed for enforcing the charge on the tenure which had vested in the State and the person having the charge had to take recourse to section 14 of the Reforms Act for recovery of the money covered by the charge. If, by enacting those two sections in the Reforms Act, the Legislature intended to bring the charge created under the Tenancy Laws within the purview of those two sections of the Reforms Act, Bihar Act III of 1953 would not have been enacted at all. The preamble of Bihar Act III of 1953 says that Act to be an Act to provide facilities for the recovery of arrears of rents, including royalties, cesses and interest, due to an outgoing proprietor or tenure-holder of an estate or tenure vested in the State of Bihar in consequence of the operation of the provisions of the Reforms Act.

Sub-section (1) of section 3 of Bihar Act III of 1953 says that, where an estate or tenure of a proprietor or tenure-holder

vests in the State in consequence of the operation of the provisions of the Reforms Act, the outgoing proprietor or tenure-holder of such estate or tenure may, if he so desires, at any time within three months from the 17th day of December, 1952, or from the date of vesting, whichever is later, make to the Collector in the prescribed manner, an application in the prescribed form requesting that all arrears of rents, including those for which a decree has been passed by a competent court, due to him from tenants or lessees of such estate or tenure for any period prior to the date of vesting, which were recoverable by him in respect of such estate or tenure and the recovery of which is not barred by any law of limitation, may be recovered by the State Government and that, out of the actual collection of such arrears of rents, a sum equivalent to fifty per centum may be delivered to him, after deducting therefrom the arrears of cesses, including interest, referred to in section 4, and the remainder retained by the State Government to meet the cost of collection and other incidental expenses incurred by it in connection therewith.

Sub-section (7) of that section states that the amount of the arrears of rent recoverable by the State Government under this Act shall be deemed to be a public demand payable to the Collector and shall be recoverable under the procedure provided in the Bihar and Orissa Public Demands Recovery Act, 1914.

Sub-section (8) of that section is very important. It lays down that, notwithstanding any application made by an outgoing proprietor or tenure-holder under sub-section (1) of section 3, such proprietor or tenure-holder may, until the application has been admitted by the Collector under clause (a) of sub-section (5), sue the defaulting tenant or lessee under the provision of any other law for the time being in force for any arrears of rent included in the application. Section 5 of that Act provides that no suit shall be brought in any Civil Court in respect of any order passed by the Collector under the Act in respect of any matter relating to the method of collection or the correctness or otherwise of the amount collected or the payment of any amount to a proprietor or tenure-holder. There is a proviso to this section which is very important. It lays down that no order of the Collector rejecting an application under clause (b) of sub-section (5) of section 3 shall be deemed to bar the jurisdiction of the Civil Court from entertaining a suit for the recovery of the arrears of rents in respect of which such application was made.

This Act, therefore, definitely recognises the rights of the outgoing proprietor or tenure-holder to sue for recovery

of arrears of rent from the defaulting tenant. Such a provision could not have been made in this Act, if the realisation of rent being a charge on the tenure or holding was intended to be covered by sections 4(d) and 14 of the Reforms Act. In this view of the matter, it is abundantly clear that the proprietor was not required in law to go to the Claims Officer under section 14 of the Reforms Act for recovery of the arrears of rent.

9. The charge created under section 65 of the Bihar Tenancy Act or section 60 of the Tenancy Act is, in my view, not such a charge which could be destroyed because of section 4(a) of the Reforms Act. Even if a provision like section 4(a) of the Reforms Act would not have been in that Act, the charge under section 60 of the Tenancy Act in the present case would have been destroyed on cessation of the relationship of landlord and tenant between the parties. It is too well established by now that in order to have the rent a charge on the tenure or holding, the relationship of landlord and tenant must exist at the time of the suit as well as at the time of the decree and the execution of that decree. If the relationship of landlord and tenant ceases to exist even prior to the execution of the decree, the decree has not the force of a rent decree and the charge created by the Tenancy laws cannot be enforced.

If any authority is needed, reference may be made to a Privy Council decision in *Arthur Henry Forbes v. Maharaj Bahadur Singh*, AIR 1914 PC 111. It was pointed out by their Lordships in that case that, to acquire the right which section 65 of the Bengal Tenancy Act gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interest vested in him. In other words, the right to bring the tenure or holding, as the case may be, to sale exists so long as the relationship of landlord and tenant exists. Their Lordships further pointed out as follows:—

"It seems to their Lordships clear on an examination of the different sections bearing on the subject that the right to bring the tenure or holding to sale under section 65 appertains exclusively to the landlords, and that a person to whom certain rents are due, and who obtains a decree therefor after he has parted with the property in which the tenancy is situate, has no such right. The contrary view, their Lordships think, would give rise to a very anomalous situation. A zamindar to whom certain arrears are due, as in the present case, may sell his property, without assigning, for purposes of his own, the back-rents as he is entitled to do; he may then sue for those back-rents; before

any decree is made in this suit, the tenant falls into arrears to the new landlord who brings a similar suit. Both the ex-landlord and the present landlord obtain decrees for their respective arrears. In whose decree and on whose application is the tenure to be sold? The question admits of only one answer — that it is the existing landlord alone who can execute the decree; the ex-landlord is an outsider, and, whilst he can execute his decree against the debtor as a money decree, he has no remedy against the tenure itself."

Their Lordships also observed that the conception that either from the nature of the debt being arrears of rent, or the decree being for arrears of rent, the tenure becomes ipso facto hypothecated so to speak for the debt and that consequently the person to whom the debt is due, although he has ceased to be the landlord, and is, to all intents and purposes, so far as other rights and obligations under the law are concerned, a total stranger to the property with which those rights and obligations are inseparably connected, he has the special remedy given to the landlord to recover arrears attached to the tenure, seemed to their Lordships untenable, for the charge created by section 65 is clearly in favour of the landlord.

In a Bench decision of this Court, to which I was a party, in Mathura Prasad Singh v. Binda Prasad Sinha, 1961 BLJR 38, the same view was taken, and it was held that, in order to acquire the right which section 65 of the Bihar Tenancy Act gives for sale of the holding, not only the person obtaining the decree must be the landlord at the time of the passing of the decree but the person seeking to execute the decree by sale of the holding must have the landlord's interest vested in him at the time of the execution case and that the right to bring the holding to sale exists only so long as the relationship of landlord and tenant exists, and it is the existing landlord alone who can execute the decree as a rent decree. It was further pointed out that this principle applies equally to a case where a landlord ceased to be a landlord after he obtains a decree for arrears of rent and before he seeks to enforce it against the tenure or holding. A Special Bench of the Calcutta High Court in Krishna Pada Chatterjee v. Sm. Manada Sundari Ghose, AIR 1932 Cal 321 also took a similar view and there also it was held that, in order to acquire the right which section 65 of the Bengal Tenancy Act gives, not only the person obtaining the decree must be the landlord at the time but the person seeking to execute it by sale of the tenure or holding must have the landlord's interest vested in him that the right to bring the tenure or holding to sale exists so long as the relationship

of landlord and tenant exists and that it is the existing landlord alone who can execute the decree, applies equally to a case where a landlord ceases to be landlord after he obtains a decree for arrears of rent and before he seeks to enforce it against the tenure or holding as to a case where he ceases to be landlord before he institutes his suit for rent. In either case there is no relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced. The right to bring the tenure or holding to sale exists so long as the relationship of landlord and tenant exists.

It would be unreasonable to allow a landlord to file his petition for execution, part with his interest and still claim the benefits of Chapter 12 of the Act in respect of the subsequent sale. The sale is as much the act of the Court as the issue of the sale proclamation. The question is one between landlord and third parties for even a sale under money decree will pass the tenants' interest. It was further pointed out that the principle of the statute is that only the landlord can bring the holding to sale and this involves that a sale held after his charge has ceased does not pass the holding as distinct from the tenants' right, title and interest therein. In Ramkali Kuer v. Ram Bujhawan Singh, AIR 1952 Pat 42, a Bench of this Court held that a suit for arrears of rent is a suit of a double character. It is ordinarily a suit to enforce the charge upon the holding which is created by the provisions of section 65 of the Bihar Tenancy Act; and a decree which has the effect of enforcing this charge can only be made when the plaint is framed in such a manner as to comply exactly with the provisions of section 143 of the Bihar Tenancy Act. The suit is also a suit to enforce the personal liability of the tenant to pay a certain sum of money to the landlord and a decree may be made enforcing this liability where a decree cannot be made enforcing the charge under section 65 of the Act.

From the authorities quoted above, it is manifest that a landlord has got a right to recover arrears of rent by enforcing the charge on the tenure or the holding. He may also, without claiming to enforce the charge or where he is not entitled in law to enforce the charge, on account of cessation of the relationship of landlord and tenant, or on any other ground, sue the tenant on the personal covenant to pay the rent. Such a suit obviously cannot be barred under Ss. 4(a) and 4(d) of the Reforms Act, and the recovery of the arrears of rent, after obtaining a decree for the same by execution against the right, title and interest of the tenant in any property is not controlled by section 14 of the Reforms Act.

10. It is true, as rightly urged by Mr. Lalnarayan Sinha for the respondent, that neither sub-section (8) of section 3, nor the proviso to section 5 of Bihar Act III of 1953, can be construed as an independent provision conferring right on an ex-landlord to recover arrears of rent as if it were a charge on the holding or tenure, as the case may be, if there is no such right under the law for the time being in force dealing with the subject. But here we are concerned with the question of examining the true scope and content of clauses (a) and (d) of section 4 and section 14 of the Reforms Act, especially the true meaning to be given to the word "charge" occurring in clause (d) of section 4 and Section 14 of that Act. If the expression "charge" be construed in the wider sense, as urged by Mr. Lalnarayan Sinha, so as to include a charge created either under section 60 of the Tenancy Act or section 65 of the Bihar Tenancy Act, the Legislature could not possibly have made such a provision as is found in sub-section (8) of section 3 or the proviso to section 5 of Bihar Act III of 1953. Aid can, therefore, be taken of these provisions with a view to clear any ambiguity that may be found in the aforesaid provisions of the Reforms Act, as disclosing the legislative intent.

11. In 1962 BLJR 928 the appellant brought a suit against the respondent for recovery of mokarrari rent on the basis of a registered mokarrari deed. During the pendency of the suit, the proprietary interest of the intermediary vested in the State of Bihar on the 30th March, 1955, under the provisions of the Reforms Act and the tenure-holder's interest of the judgment-debtor vested in the State on the 1st May, 1954. The suit, however, was decreed on the 17th January, 1955, and the appellant filed an application for the execution of that decree on the 24th June, 1956. An objection was raised on behalf of the respondent as to the execution of the decree, and it was held by the executing Court, the learned Subordinate Judge, that the decree obtained by the appellant was a nullity in view of section 4(d) of the Reforms Act and the execution case could not, therefore, proceed and the appellant had the sole remedy of realising the amount of the decree from the compensation which might be allowed under section 14 of the Reforms Act. It was held in that case that a suit for mokarrari rent did not fall within the purview of section 4(d) of the Reforms Act, and the reason was that the "charge" referred to in section 65 of the Bihar Tenancy Act was not such a "charge" as is defined in section 100 of the Transfer of Property Act. It was further pointed out that the expressions "charge" and "mortgage" in section 4(d) of the Reforms Act should be construed with reference

to the provisions of the Transfer of Property Act where the same expressions have been used; and if the language of section 4(d) of the Reforms Act is interpreted in the context of the provisions of the Transfer of Property Act, it is manifest that a suit for mokarrari rent is not hit by the mischief of section 4(d) of the Reforms Act.

It was further held that the appellant did not have the status of a landlord at the time of passing of the decree and so the decree he obtained was not a rent decree and there was no charge created under section 65 of the Bihar Tenancy Act. It followed that section 14 of the Reforms Act had no application to that case and the Claims Officer had no jurisdiction to proceed under section 14 of the Reforms Act and make an order for compensation under the provisions of that section. Their Lordships further held that the claim was entertainable under section 14 of the Reforms Act only if the creditor had a debt which was secured by a mortgage of, or was a charge on, the estate or tenure which had vested under sec. 3 of the Reforms Act, and that was a condition precedent to the jurisdiction of the Claims Officer for proceeding under section 14 of the Reforms Act; and, in the absence of that condition, the Claims Officer had no jurisdiction to make an order for compensation under that section.

Following the above decision, the same view was taken by another Bench of this Court in 1963 BLJR 779. Those two cases have taken the view that the charge created under section 65 of the Bihar Tenancy Act, which is equivalent to section 60 of the Tenancy Act, does not come within the purview of "charge" defined in section 100 of the Transfer of Property Act. This view, if I may be permitted to say with due respect, is the correct view, and I have not been able to find out any reason to differ from that view. It may be noted here that Bihar Act III of 1953 does not appear to have been brought to the notice of their Lordships in those two cases, on the basis of which alone the non-applicability of section 4(d) and section 14 of the Reforms Act could have been decided. The correctness of the decisions in those cases is further supported by the provisions of Bihar Act III of 1953, which, as already observed, has made provisions for recovery of arrears of rent by the outgoing landlords, making it perfectly clear that proceedings for recovery of such arrears of rent are not controlled by sections 4(d) and 14 of the Reforms Act.

12. As a result of the above discussions, the law on the point appears to me to be clear that section 14 of the Bihar Land Reforms Act does not apply to the case of rent or rent decree charged upon

a tenure under the provisions of section 60 of the Chota Nagpur Tenancy Act, and the two Division Bench cases of this Court reported in 1962 BLJR 928 and 1963 BLJR 779 were correctly decided. I, therefore, answer question No. 1 in the negative and question No. 3 in the affirmative. In view of the decisions on those two questions, question No. 2 does not arise for consideration, and I, therefore, do not propose to answer that question.

13. The case will now go back to the Division Bench for disposal.

14. NARASIMHAM, C. J. : I agree.

15. SAHAI, J. :— I agree.

GGM/D.V.C. Reference answered accordingly.

AIR 1969 PATNA 7 (V 56 C 2)

U. N. SINHA, J.

Hari Narain Choudhary and others.
Petitioners v. Ramnehi Kuer and others,
Opposite Party.

Civil Revn. No. 1381 of 1966, D/- 11-8-1967, from order of 1st Addl. Sub-J., Muzaffarpur, D/- 10-8-1966.

Civil P. C. (1908), O. 20, R. 18(2) —
Transfer made after preliminary decree —
Such transfer should not be ignored at
time of allotment.

If transfers made before the preliminary decree in a partition suit is passed can be taken into consideration, there is no reason why transfers made after that stage should be ignored altogether. All that happens by the preliminary decree is that the shares of the parties are determined. But when the question as to equitable distribution of the properties between the several parties arises the court should also consider the question of allotment of any particular property which may have been transferred by a particular defendant, after the preliminary decree was passed, to a bona fide purchaser. (Para 2)

Prem Lall, Parmeshwar Pd. Sinha and Bishwanath Agrawal, for Petitioners; S. C. Mukherjee, for Opposite Party.

ORDER :— This application has been filed by some purchasers of some properties from some of the defendants of a partition suit. The parties to the partition suit have been mentioned in paragraphs 2 and 3 of this petition. It appears that, apart from the members of the joint family of Dharkhan Choudhary and others, certain transferees were added as parties on the ground that they had purchased some of the joint family properties involved in the litigation. The preliminary decree of partition was passed on

the 30th August, 1952. During the course of the preparation of the final decree, the present petitioners filed their applications in 1965, alleging that they had also purchased some of the joint family properties from some of the defendants, subsequent to the passing of the preliminary decree. The contention of these petitioners was that, as some of the defendants had sold some particular properties to these petitioners, the question of allotment of those properties in the patties of the vendors may be considered in the final decree proceeding. These applications have been rejected by the learned Additional Subordinate Judge, substantially on the ground that, on the 8th April, 1964, by order no. 80, he had come to the conclusion that only purchases made before the preliminary decree was passed will be taken into consideration in the preparation of the final decree, but no purchases made after the preliminary decree had been passed will be taken into consideration. Apparently, in view of this order, the Pleader Commissioner had ignored the transfers made after the 30th August, 1952, in favour of the present petitioners.

2. It is urged by the learned Counsel for the petitioners that there is no reason at all to ignore the transfers made after the preliminary decree had been passed, if transfers made before that stage have been taken into consideration. It is argued that the Pleader Commissioner and the Court below should have considered the case of the petitioner on merit, before rejecting it because of the previous order dated the 8th April, 1964. I am of the opinion that the contentions raised by the learned Counsel are valid. If transfers made before the preliminary decree was passed can be taken into consideration, I do not see why transfers made after that stage should be ignored altogether. All that had happened by the preliminary decree was that the shares of the parties were determined. But now the question as to equitable distribution of the properties between the several parties has arisen and the Court should also consider the question of allotment of any particular property which may have been transferred by a particular defendant, after the preliminary decree was passed, to a bona fide purchaser. Therefore, I would set aside the order dated the 10th August, 1966, only with respect to the contention raised by the present petitioners regarding the question of allotment of the properties purchased by them in the years subsequent to 1952. The learned Judge should now consider the questions raised by the present petitioners on merit, that is to say, the question whether the properties purchased by the present petitioners can be conveniently

and equitably given in the allotment of their vendors.

3. The application, is, therefore, allowed and the case remitted to the Court below for reconsideration in view of the observations made above. In the circumstances of the case, the parties should bear their own costs of this Court.

VGW/D.V.C.

Application allowed;
Case remitted.

AIR 1969 PATNA 8 (V 56 C 3)

RAMRATNA SINGH AND
ANWAR AHMAD, JJ.

The Belsand Sugar Co. Ltd., Appellant
v. Thakur Girja Nandan Singh, Respondent.

A. F. A. D. No. 114 of 1963, D/- 22-1-1968, against decision of Dist. J., Muzaffarpur, D/- 5-12-1962.

(A) Bihar Sugar Factories Control Act (7 of 1937), Ss. 18(2) and 19(2) — Bihar Sugar Factories Control Rules, 1938, R. 42A — Act and rules framed thereunder void after coming into force of Essential Commodities Act — Civil Court has jurisdiction to try suits touching a contract in the form prescribed under the Act. AIR 1959 Pat 398 & AIR 1959 Pat 403, Not foll.—(Civil P. C. (1908), S. 9) — (Essential Commodities Act (1955), S. 16 (1)(b))—(Constitution of India, Arts. 254(2), 372 and 366 (10) and Entry 33 of List III of Schedule 7).

R. 42A of the Bihar Sugar Factories Control Rules prescribing arbitration by Cane Commissioner in matters touching an agreement referred to in Ss. 18(2) and 19(2) of the Bihar Sugar Factories Control Act and the said Sections 18 and 19 are void and inoperative after the Essential Commodities Act came into force on 1-4-1955. Therefore, an arbitration agreement between parties to a contract in the form prescribed under S. 18(2) of the above Bihar Act entered into in November 1955 is also inoperative and the civil court has jurisdiction to try the disputes touching the contract. The arbitration agreement cannot also be treated independently of the Act and the rules since the form of the contract is one prescribed under S. 18(2) of the Act bringing in the Cane Commissioner as the arbitrator.

(Paras 3 to 5)

The above Bihar Act and the rules framed under it were existing law within the meaning of Cl. (10) of Art. 366 of the Constitution and continued to be in force under Art. 372. But when the Central Act, viz., the Essential Commodities Act passed in exercise of the powers conferred by Entry 33 of List 3 of Schedule 7 to the Constitution came into force the provisions of the Bihar Act became in-

operative and the State Legislature's attempt to extend the life of the said Act beyond '30-6-55 was of no effect since it had not followed the procedure prescribed under Cl. (2) of Art. 254 of the Constitution. Cr. W. J. C. Nos. 11 and 31 of 1966, D/- 4-7-1966 (Pat) & Misc. J. C. No. 1344 of 1964, D/- 20-7-1966 (Pat), Foll; AIR 1956 SC 676, Dist.; AIR 1959 Pat 398 & AIR 1959 Pat 403, Not Foll.

(Paras 3 to 5)

(B) Arbitration Act (1940), S. 34 — Waiver — Plea that the Court has no jurisdiction in the matter should be taken before the written statement is filed — Such a plea taken in the written statement will be of no effect. (Para 6)

Cases Referred: Chronological Paras

(1966) Misc. Juri. Case No. 1344 of 1964, D/- 20-7-1966 (Pat), Sugauli Sugar Works Pvt. Ltd. v. Co-operative Development and Cane Marketing Union 2, 3
(1966) Cri. Writ Juri. Case Nos. 11 and 31 of 1966, D/- 4-7-1966 = 1968 Pat LJR 179, A. K. Jain v. Govt. of India 2
(1959) AIR 1959 Pat 398 (V 46), Sugauli Sugar Works v. Cane Commissioner 3, 4
(1959) AIR 1959 Pat 403 (V 46) = ILR 38 Pat 431, Sasamusa Sugar Works v. Cane Commissioner 3, 4
(1956) AIR 1956 SC 676 (V 43) = 1956 SCR 393, Tika Ramji v. State of U. P. 3

Lalnarayan Sinha and Ramji Saran, for Appellant; Janardan Sinha and Surendra Dubey, for Respondent.

JUDGMENT:— This appeal by the plaintiff arises out of a suit by a Sugar company, having a sugar factory, for recovery of a loan on the basis of a promissory note for Rs. 2000 executed by the defendant respondent in favour of the plaintiff on the 11th February, 1957. The defendant took two main pleas: (1) the suit did not lie on the ground that it was barred by rule 42A of the Bihar Sugar Factories Control Rules, 1938, made in pursuance of certain provisions of the Bihar Sugar Factories Control Act, 1937, and (2) the loan on the basis of the promissory note was not an independent one, inasmuch as this transaction was connected with the supply of sugarcane to the plaintiff company. Both the courts upheld the defence, but they did not record any finding on the other issues arising out of the pleadings.

2. Mr. Lalnarayan Sinha, who appeared for the appellant, has contended that rule 42A is invalid, because the Bihar Act has been found by this court to be unconstitutional in the unreported decision in Cr. WJC Nos. 11 and 31 of 1966 (Pat) A. K. Jain v. Government of India decided by a Bench of this court on 4-7-1966

and rule 42A has been found to be invalid by another unreported bench decision of this court in Misc. JC No. 1344 of 1964 (Pat) Sugauli Sugar Works Pvt. Ltd. v. Co-operative Development and Cane Marketing Union disposed of on 20-7-1966.

3. Rule 42A contains the provision for arbitration by the Cane Commissioner of Bihar in respect of any dispute touching an agreement referred to in Section 18(2) or Section 19(2) of the Bihar Act, and, it excludes the jurisdiction of the civil and the revenue courts in respect of any such dispute. The relevant portion of Section 18 reads as follows:—

"18(1) A Cane grower or a cane growers' co-operative society in a reserved area may offer, in the form and by the date described, to supply to the occupier of the factory, for which the area is reserved, cane grown by the cane-grower or by the members of such cane-growers' Co-operative Society, as the case may be, not exceeding the quantity, if any, prescribed for such grower or Cane growers' Co-operative Society.

(2) The occupier or manager of a factory for which an area is reserved shall enter into agreements, in such form, by such date and on such terms and conditions as may be prescribed, to purchase the cane offered in accordance with sub-section (1)".

Sub-sections (1) and (2) of Section 19 enact:

"(1) The Cane Commissioner may, after consulting the advisory committee or committees (if any) of the area concerned and the occupier of the factory and after considering any objections that may be raised, issue an order declaring any area to be an assigned area for the purposes of the supply of cane to a particular factory:

Provided that in the case of a factory situated outside the State of Bihar such declaration shall only be made on receipt by the Cane Commissioner of an application in the prescribed form from the occupier of such factory requesting that an area shall be declared to be an assigned area for the purposes of the supply of cane to such factory.

(2) Subject to the provisions of sub-section (5), the occupier of a factory for which an area has been assigned, shall enter into agreements for the purchase in the assigned area, of such quantity of cane as may be fixed by the Cane Commissioner."

It is unnecessary to refer to or quote sub-section (5) of this section, as it is not relevant nor is the proviso to sub-section (2) relevant. The courts below acted on the assumption that rule 42A was valid; and in support of their finding Mr. Janardan Sinha relied on the case of Tika Ramji v. State of Uttar Pradesh, AIR

1956 SC 676 and two decisions of this court, viz. Sugauli Sugar Works v. Cane Commr., AIR 1959 Pat 398 and Sasamusa Sugar Works v. Cane Commr., AIR 1959 Pat 403. One of the questions raised before the Supreme Court was whether the U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953, was intra vires of the State Legislature or it was unconstitutional on account of the enactment of the Essential Commodities Act by the Parliament in 1955 in exercise of the Legislative powers conferred upon it by Entry 33 of List 3. It was held by the Supreme Court that the U. P. Act of 1953 was intra vires.

It is unnecessary to discuss the Supreme Court decision in detail, because the position regarding the Bihar Act is different from that of the U. P. Act and the question as to the constitutionality or otherwise of the Bihar Act has been discussed in detail and decided by a bench of this court in the aforesaid writ jurisdiction case disposed of on 4-7-1966. In this connection, paragraphs 38 and 39 of this decision are important. The Bihar Sugar Factories Control Act, which is Bihar Act 7 of 1937, was originally enacted to remain in force until the 30th June, 1941. Its life was extended from time to time by different amending Acts up to the 30th June, 1950. Its life was further extended up to the 30th January 1955 by Bihar Act 6 of 1950. This Act received the assent of the Governor on 6-1-1950, but it came into force on 9-1-1950, the date when the assent was first published in the Bihar Gazette Extraordinary, as it has been laid down in section 6 of the Bihar and Orissa General Clauses Act, 1917 that a Bihar Act, when it is not expressed to come into force on a particular date, shall come into operation on the day on which the assent to the Act is first published in the official Gazette. Inasmuch as Bihar Act 6 had come into force on 9-1-1950, Bihar Act 7 of 1937 and the rules framed thereunder were existing law within the meaning of clause (10) of Article 366 of the Constitution; and under Article 372 after the commencement of the Constitution, such a law was to continue in Bihar until altered, repealed or amended by a competent Legislature.

Ultimately, by Bihar Act 7 of 1955, Section 1(3) was amended, and by that amendment certain words were removed, as a result of which Bihar Act 7 of 1937 was to remain in force for an indefinite period even beyond 30-6-55. Bihar Act 7 of 1955 received the assent of the Governor on 30-3-55, but it came into force on 20-4-55, when the assent was first published in the Bihar Gazette. However in the meantime, Central Act 10 of 1955, i. e. the Essential Commodities Act had been enacted, and on receipt of the as-

sent of the President it came into force on 1-4-55. S. 16(1)(b) of the Central Act expressly provided that any other law in force in any other State immediately before the commencement of this Central Act in so far as such law controls and authorises the control of the production, supply and distribution of trade and commerce in, any essential commodity was repealed. In other words, Bihar Act 7 of 1937, as it stood before 1-4-55 and the rules made thereunder stood repealed and became unenforceable in view of the provisions of Article 372 of the Constitution. Further, that part of Bihar Act 7 of 1937 which related to the control of sugar industry and the rules in respect thereof came to an end on 30-6-55 as the Bihar Legislature was not competent to extend their life beyond that date by enacting Bihar Act 7 of 1955.

Their Lordships, therefore, distinguished the decision of the Supreme Court in the Uttar Pradesh case, as it was not dealing with the repeal of an existing law, like the Bihar Act, as it stood prior to 1-4-55. It was further held by their Lordships of this court that even the validly separate part of the Bihar Act relating to production, supply and distribution of sugarcane will fall under Entry 33 of List III, a matter within the concurrent legislative competence of both the Parliament and the State Legislature and the latter was not competent to enact Bihar Act 7 of 1955 and to extend the life of even the severable part of Bihar Act 7 of 1937, without taking recourse to the procedure prescribed in clause (2) of Article 254 of the Constitution, but, unfortunately, Bihar Act 7 of 1955 did not receive the assent of the President, and, therefore, being repugnant to certain provisions of the Central Act, it could not have any effect, and it was void on this ground as well.

Following this decision, it was held by another bench of this Court on 20-7-1966 in Misc. J. C. No. 1344 of 1964 (Pat) that rule 42A of the Bihar Sugar Factories Control Rules, 1938, was void. Mr. Janardan Sinha had no answer to these decisions, which are binding on us.

4. Mr. Janardan Sinha also cited two bench decisions of this court, viz., AIR 1959 Patna 398 and AIR 1959 Pat 403. But the question now raised was not discussed at all in the case of Sugauli Sugar Works, and it was assumed that the Bihar Act and the rules were valid. In the other case AIR 1959 Pat 403, there is an observation in paragraph 8 of the report that the validity and constitutionality of the Bihar Rules of 1938 have been upheld by this court in the earlier case, i. e., AIR 1959 Pat 398; but actually that question was not discussed in either of the two cases and the Bihar

rules were assumed to be valid and constitutional. Mr. Lalnarayan Sinha's contention that rule 42A of these rules and the relevant sections of the Bihar Act are void must, therefore, prevail.

5. An alternative argument of Mr. Janardan Sinha was that the promissory note, on the basis of which the plaintiff instituted the suit, was not independent of the contract entered into between the appellant and the respondent. Exhibits C and C-1 dated 2-11-55 and 4-11-55 are agreements in the prescribed form—Ext. C1 being in Form XI under section 18(1) in respect of the offer by a cane grower in a reserved area for supply of cane to the factory and Ext. C being in Form XIII under section 18(2) between the factory and the cane grower in a reserved area. These forms are in Appendix III to the Rules made under Ss. 18(1) and 18(2), respectively, of the 1937 Act, read with rules 25 and 28 of the Rules of 1938. The respondent executed these agreements in favour of the appellant company. Ext. C1 was required to be executed by the respondent only as a canegrower. Ext. C was to be executed by the respondent as well as by the factory representative, but the signature of the latter is wanting. There is a clause in Ext. C to the effect that any dispute between the parties regarding the quality and condition of the cane, the place of delivery, the instalments and other matters pertaining to this agreement, shall be referred to the Cane Commissioner for decision or if he so directs to arbitration in the manner provided for in the rules; and that no suit shall lie in a civil or revenue court in respect of any such dispute. In pursuance of this clause, it is alleged by the respondent, the dispute regarding the promissory note has been already referred to the Cane Commissioner; but, as was rightly contended by Mr. Lalnarayan Sinha, in view of the decision that Rule 42A, which provides for arbitration, and Section 18 of the Bihar Act became void after 1-4-55, the agreements in pursuance of that section entered into between the parties sometime in November, 1955, are also void, and therefore, the arbitration clause mentioned in Ext. C became inoperative. (In the portion of the judgment that followed it was held that there was nothing in the agreements or in the promissory note that one is dependent or connected with the other. Judgment then proceeds.)

Mr. Janardan Sinha, however, submitted that the agreements should be interpreted as contracts between the parties independently of the Act and the rules as well. Even if that contention be accepted the respondent has not adduced evidence in the suit for the purpose of showing that he has supplied sugarcane to cover the whole or part of the dues of the company based on the promissory

note and the advance for implements and manures. We are unable to agree with Mr. Janardan Sinha that the arbitration clause mentioned in Ext. C should also be treated as an agreement independent of the Act and the Rules. But it will be noticed that the arbitration clause was incorporated in Ext. C because the agreement form itself was prescribed under subsection (2) of Section 18. It is, therefore, difficult to accept the contention of Mr. Janardan Sinha that such an arbitration clause bringing in the Cane Commissioner as arbitrator would have been incorporated by the parties in the contract independently of the form prescribed by Section 18(2) of the Act.

6. Mr. Lalnarayan Sinha submitted also that section 34 of the Arbitration Act is a bar to the respondent's plea about the arbitration clause, because the respondent did not apply to the trial court to stay the proceedings of the suit on account of the arbitration clause before filing his written statement. Mr. Janardan Sinha submitted that the jurisdiction of the court was questioned in paragraph 14 of the written statement where it was alleged that the jurisdiction of the civil court was ousted and the Cane Commissioner was the only proper authority to decide the dispute. But Section 34 of the 1940 Act lays down that such a plea should be taken before the written statement is filed. This contention of Mr. Lalnarayan Sinha should, therefore, prevail.

7. In view of the foregoing discussions, the judgments and decrees of the courts below are set aside and the suit is remanded to the trial court for disposal in accordance with law, after giving opportunities to the parties to adduce further evidence and also to place their arguments. The suit was instituted in 1958, and, therefore, the trial court must dispose of the same by the 30th April, 1968. Counsel for the parties, in whose presence, this judgment has been dictated, have been asked to write to their clients to appear in the trial court by the 18th March, 1968, at the latest and take necessary steps. The appeal is allowed, as indicated above. Costs will abide the result. TVN/D.V.C. Appeal allowed.

AIR 1969 PATNA 11 (V. 56 C. 4)

**R. L. NARASIMHAM, C. J. AND
B. D. SINGH, J.**

Rama Shankar Singh and others, Petitioners v. The Principal, Darbhanga Medical College and others; Respondents.

Civil Writ Jurisdiction Cases Nos. 97, 104 and 111 of 1968, D/- 5-4-1968.

**(A) Constitution of India, Art. 14 —
Medical Council of India, Regulations —**

EL/HL/C405/68

Classification between B. Sc. (Honours) candidates and other B.Sc. candidates — Classification held violative of Article.

The direction that all candidates having B. Sc. (Honours) degree should be admitted straightway and should thus be preferred to candidates with B. Sc. (Pass) degree irrespective of the marks obtained by them is unreasonable and violative of Article 14. Undoubtedly, it is right in saying that B. Sc. (Honours) candidates may be taken as a separate group or class by themselves; but there seems no reasonable nexus between the principle on which the classification is made and the object to be achieved by the impugned regulations, viz., securing suitable candidates for admission to the Medical course. (Para 8)

Hence, a blanket order, directing automatic admission to the Medical course of a B. Sc. (Honours) graduate, irrespective of the marks obtained by him, will not satisfy the test of "reasonableness" of the nexus between the basis of the classification and the object to be achieved. If the marks obtained are completely ignored and B.Sc. (Honours) candidates are admitted straightway, it may be very unfair to those B.Sc. (Pass) candidates who have got much higher marks. (Para 8)

(B) Medical Council Act (1956), S. 19A (as amended in 1964) — Draft regulation — Sanction by Central Government — Advisory value.

Sub-section (2) of section 19A requires that every draft regulation should first be sent to all State Governments for their opinion, and they have to be subsequently sanctioned by the Central Government. In the absence of any evidence that these were formally sanctioned by the Central Government, they have only advisory value. (Para 6)

(C) Constitution of India, Art. 226 — Medical Council Regulations — Constitutionality of circular under challenged — Relief.

The right of proper consideration of an application for admission according to valid instructions after ignoring the unconstitutional part of the same is a right distinct from the right of securing admission. When admissions have already taken place and the students who have been admitted have joined the medical course and paid the necessary fees it will not be proper to cancel all their admissions, even though those admissions might have been based on the impugned circular which has been held to be unconstitutional. AIR 1968 Pat 3 (FB), Rel. on. (Paras 9, 10)

Cases Referred: Chronological Paras
(1968) AIR 1968 Pat 3 (V. 55)=ILR
46 Pat 616 (FB), Umesh Chandra
Sinha v. V. N. Singh

Basudeva Prasad, Karuna Nidhan Keshav, Ravi Nandan Sahay and Narendra Prasad, for Petitioners; Addl. Govt. Pleader, and M/s. Baidyanath Prasad No. II, Bindeshwari Prasad Chaudhary, Keshari Singh, Rameshwar Nath Rai, Rajendra Deo, Narayan Prasad Singh, Parmeshwar Prasad Sinha and Arun Bihari Mathur, for Respondents.

NARASIMHAM, C. J. :— These three writ petitions deal with the same questions of law and fact, and hence were heard together, and will be disposed of in one judgment. The number of the Annexures given in this judgment are those given in Civil Writ Jurisdiction Case No. 97 of 1968.

2. There are two Government Medical Colleges in the State of Bihar, one at Darbhanga and the other at Ranchi, where students are admitted for the M. B. B. S. Course. Sometime in October, 1967, applications were invited for admissions to the said course. The qualifications prescribed for such admissions were as follows (Annexure A): The applicants should have passed either (i) the First Year Science of Three-year Degree Course with Physics, Chemistry and Biology, or (ii) Pre-medical or Pre-Professional Examination or any other examination equivalent thereto. In the prospectus for admission, it was further stated that "Candidates with B. Sc. (Honours) are admitted straightway to the course provided Honours has been obtained in one of the following subjects: (a) Physics, (b) Chemistry, (c) Botany, and (d) Zoology" — see paragraph 2 of Annexure E (hereinafter referred to as the impugned circular). It is admitted that this circular about the admission of B. Sc. (Honours) candidates straightway was issued by the Government of Bihar.

The three petitioners had all passed the First Part of the Three-year Degree Course with Physics, Chemistry and Biology from the Bihar University, and the total marks obtained by them were 57.2 per cent (petitioner in C. W. J. C. 97), 57.8 per cent (petitioner in C. W. J. C. 104) and 57 per cent (petitioner in C. W. J. C. 111). They were, however, not admitted, and respondents Nos. 6 to 20, who had passed B. Sc. (Honours), were admitted, even though the percentage of marks obtained by them was very much lower than the percentage of marks obtained by the petitioners. This was mainly because of the impugned circular (mentioned above), which directed that B. Sc. (Honours) applicants should be admitted straightway, irrespective of the marks obtained by them.

The petitioners have challenged this action of the authorities on two grounds.

(i) The impugned circular is invalid because it is inconsistent with the sta-

tutory regulations made by the All India Medical Council, prescribing the minimum marks for admission to the Medical Course; and

(ii) Even if it be held that the qualifications prescribed by the All India Medical Council have no statutory force, nevertheless the impugned circular is unconstitutional as violative of Article 14 of the Constitution.

3. The All India Medical Council (hereinafter referred to as the Council) is a statutory body constituted under the provisions of the Indian Medical Council Act, 1956 (hereinafter referred to as the Act). That Act underwent extensive amendments by the Indian Medical Council (Amendment) Act, 1964. A new section 19A, which was inserted in the Act, may be quoted:

"Minimum standard of medical education."

19A. (1) The Council may prescribe the minimum standards of medical education required for granting recognised medical qualifications (other than post-graduate medical qualifications) by Universities or medical institutions in India.

(2) Copies of the draft regulations and of all subsequent amendments thereof shall be furnished by the Council to all State Governments and the Council shall, before submitting the regulations or any amendment thereof, as the case may be, to the Central Government for sanction, take into consideration the comments of any State Government received within three months from the furnishing of the copies as aforesaid.

(3) The Committee shall from time to time report to the Council on the efficacy of the regulations and may recommend to the Council such amendments thereof as it may think fit."

Consequential amendments were also made to section 33 of the Act, conferring power on the Council to make regulations and a new clause (i) was inserted in that section to the following effect:

"the courses and period of study and of practical training to be undertaken, the subjects of examination and the standards of proficiency therein to be obtained, in Universities or medical institutions for grant of recognised medical qualifications;"

Sometime in Nov., 1964, the Council adopted the following regulations (omitting immaterial portions), dealing with admission to Medical Course (Annexure G):—

"PROFESSIONAL EDUCATION RECOMMENDATIONS OF THE MEDICAL COUNCIL OF INDIA

Adopted by the Medical Council of India on 22/27th November, 1964 (Under-Graduate Medical Circular).

1. ADMISSION TO THE MEDICAL COURSE:

No candidate should be allowed to begin the medical curriculum proper until:

(ii) He has passed:

(a) The Intermediate examination in the medical group of an Indian University which includes a practical test; or

(b) The Intermediate examination in Arts or Science of an Indian University with Physics, Chemistry and Biology and which shall include a practical test in these subjects; or

(c) B.Sc. examination of an Indian University if Physics, Chemistry and Biology have been taken in the Intermediate examination with a practical test in these subjects.

NOTE:— A student who has passed the B. Sc. examination with two of the three subjects mentioned above, would be admitted to the Medical course if he passed the third subject in pre-professional or

(f) The Pre-Professional Examination (Pre-Medical) after passing either the Higher Secondary School Examination or the Matriculation or equivalent examination and the Pre-University examination with Physics, Chemistry, Biology and English.

(iii) And the candidate has passed the above examination with compulsory English.

Note:— (1)

(2) Candidates should have obtained not less than 45% marks at any of the University examination, mentioned under 1(ii).

(3)

These regulations were described as "recommendations of the Medical Council of India" dealing with Under-graduate Medical curriculum. It will be noticed that, though B.Sc. examination of an Indian University is prescribed as one of the qualifications, B.Sc. (Honours) examination is not expressly referred to; but it is stated on affidavit by one Shri Baleswar Prasad Singh on behalf of the Government of Bihar that the main difference between B.Sc. (Pass) and B.Sc. (Honours) in Bihar lies in the fact that, in the B.Sc. (Honours) course, advanced course of study is prescribed in the subject offered for the Honours examination and minimum pass mark of 45 per cent is required in that subject. It may, therefore, be taken as unchallenged that the main difference between B.Sc. (Pass) and B.Sc. (Honours) in Bihar is in the higher standard and proficiency required for the Honours course in the subject offered; but, in respect of all other subjects, the standard is just the same.

Further difference arises as regards the minimum percentage required for passing the examination. A candidate offering

B.Sc. (Honours) must obtain, at least, 45 per cent of the marks in the subject offered; whereas such a higher minimum percentage is not required for B. Sc. (Pass). The significance of this difference will be dealt with later.

It is also not challenged that Part I of the Three-year B.Sc. Degree Course will come within sub-clause (f) of clause (ii) of regulation 1, mentioned above. Note (2) to that regulation, however, requires that the candidate should have obtained not less than 45 per cent of the marks in any of the examinations mentioned in regulation 1, viz., either B.Sc. or Part I of B.Sc. or I. Sc. or in any other examination. A doubt arose as to whether this minimum of 45 per cent is required only in the subjects of the medical group, viz., Physics, Chemistry and Biology (which include Botany and Zoology), or else whether it should be 45 per cent in all the subjects taken together for the examination. A query was made to the Council (Annexure F), and the Executive Committee of the Council replied as follows:

"As regards No. 1 the Executive Committee was of the opinion that 45% of the marks should be of the examination as a whole and not of the optional subjects only."

By virtue of this clarification, therefore, it may be taken as well established that the minimum pass marks prescribed by the Council in its regulation are 45 per cent in all the papers taken together and not 45 per cent in Physics, Chemistry and Biology only.

4. In December, 1967, the Council was again consulted by the Government of India as to whether extra weightage should be given to B.Sc. candidates seeking admission to the Medical Course over other candidates. One of the suggestions made to the Council was that 10 per cent should be added to the marks given to the candidates of B.Sc. Degree either in second or third division; but item 38 to Annexure B shows that, though the Executive Committee of the Council had no objection to give 10 per cent weightage for B.Sc. candidates, who have passed in second division, it was not in favour of giving any weightage to B. Sc. Candidates with third division. This matter does not appear to have yet been placed before the Council, though the Executive Committee has expressed its opinion on the subject.

5. Long before the Council prescribed the minimum qualifications for admission, the Government of Bihar had, as early as 1956, directed that candidates with B. Sc. (Honours) Degree should be admitted straightway to the Medical Course, provided honours had been obtained in (a) Physics, (b) Chemistry, (c) Biology, (d) Physiology, (e) Anatomy and

(f) Anthropology. These instructions were, later on, reviewed by another committee consisting of the then Principals of Patna, Darbhanga and Ranchi Medical Colleges, and, in May, 1961, slight modification was effected, and it was recommended that only those B. Sc. (Honours) candidates who have passed B. Sc. (Honours) in Physics, Chemistry, Botany and Zoology should be admitted straightway. This recommendation was accepted by the Government, and communications were issued to all concerned sometime in October, 1961. Paragraph 2 of Annexure E (the impugned circular) is based on this decision of the Government.

In December, 1967, however, Dr. Nawab, the Principal of Darbhanga Medical College, addressed a letter (Annexure B-1) to the Director of Health Services, Bihar, saying that he and the Principal of the Ranchi Medical College "were strongly of the opinion that students with B. Sc. (Hons.) be not taken straightway and be only allowed some credit for having gone through the B.Sc. course and having secured Honours". He wanted modification of the Government instructions on the subject; but the Government did not modify the same, and hence he was compelled to make admissions on the basis of the impugned circular. Presumably, this view of Dr. Nawab was partly influenced by the regulation made by the Council regarding admission to Medical course (already quoted) and the view expressed by the Executive Committee of the Council regarding weightage to B.Sc. candidates (enclosure to Annexure B).

6. There was acute controversy between the parties as to whether the regulations contained in Annexure G have statutory force or not. Mr. Basudeva Prasad for the petitioners urged that these were made by the Council in the exercise of the power conferred by section 19A of the Act, and hence they should be held to have statutory force, and, as such, binding on the Government. The Additional Government Pleader for the State of Bihar, however, contended that these regulations are still in the recommendatory stage, and they have not been finalised as required by section 19A, and, hence, have only advisory value. In support of this contention, he filed before us a telegram in reply sent by the Council to a specific query made on the subject during the course of the hearing of these writ petitions. The Council's telegram is as follows.

"Under-graduate curriculum under consideration, Central Government for inclusion under Regulations."

In the absence of any other material, I accept this statement as correct, and hold that the regulations contained in Annexure G are still in the recommen-

datory stage, and they have not yet become statutory regulations under the Act. Sub-section (2) of Section 19A requires that every draft regulation should first be sent to all State Governments for their opinion, and they have to be subsequently sanctioned by the Central Government. In the absence of any evidence that these were formally sanctioned by the Central Government, I would uphold the contention of the Additional Government Pleader, and hold that Annexure G has only advisory value. Annexure F, being a mere clarification of note 2 of Annexure G, will also have only advisory value. Similarly, the decision of the Executive Committee regarding giving weightage of 10 per cent of the marks to those B.Sc. candidates who have obtained second class will also have only recommendatory value. The extreme contention put forward by Mr. Basudeva Prasad for the petitioners that the impugned instructions must be struck down as invalid, because they contravene the statutory regulations made by the council must be rejected.

7. But Mr. Basudeva Prasad's main contention is based on Article 14 of the Constitution. According to him, the classification of B.Sc. (Honours) candidates as a separate class may be rational; but any direction to the effect that they should be admitted straightway irrespective of the marks obtained by them either in the subjects in which honours course was offered or in the other subjects, ignoring the claims of the candidates who have passed B.Sc. (Pass) or Part I of B.Sc. (Pass) with higher percentage of marks, would be unreasonable, and that, consequently, there was no reasonable nexus between the basis of the classification on the one hand and the object to be achieved on the other.

8. Even though the regulations contained in Annexure G may not yet have obtained statutory force, nevertheless great weight should be attached to the opinion of the Council as regards the minimum marks required for admission to the Medical course. The Council required 45 per cent as the minimum in the entire examination taken as a whole and not in the subjects in the medical group viz., Physics, Chemistry and Biology (including Botany and Zoology) only. The Council also did not indicate any special preference to any of these subjects over the other. Thus, the Council did not say that Biology should be preferred to Chemistry or else that Chemistry should be preferred to Physics. The difference between B. Sc. (Pass) and B.Sc. (Honours) is only in respect of specialisation in the particular subject in which the honours degree is offered. Thus, a B.Sc. (Pass) candidate, taking Physics, Chemistry and Biology and a B.Sc. (Honours) candidate.

offering honours in Biology only, will be taking the same examination in the other two subjects; viz., Physics and Chemistry, though, in Biology the latter's knowledge will be of an advanced nature, and he will have to answer extra papers. Moreover, a person can pass in B. Sc. (pass course), even though the total marks obtained by him may be below 45 per cent; whereas the B.Sc. (Honours) candidate cannot pass unless he secures 45 per cent in the subject in which honours course is offered. But there is no such minimum in respect of the other subjects offered by him.

Thus, we may meet with some instances where a B.Sc. (Pass) candidate has secured say 80 per cent in Physics, Chemistry and Biology, whereas a B. Sc. candidate, who, offering honours in Biology, has secured the minimum of 45 per cent in that subject and less than 45 per cent in Physics and Chemistry, in which subjects he has answered the same papers as the B. Sc. (Pass) candidate. The only distinction between the two is in the fact that, in the honours subject, viz., Biology he studied for an advanced course and answered extra papers. The crucial question for consideration is whether, on account of this difference, it will be reasonable to direct that all candidates having B. Sc. (Honours) degree should be admitted straightway, and should thus be preferred to candidates with B.Sc. (Pass) degree irrespective of the marks obtained by them. It appears to me that such a direction will be unreasonable and violative of Article 14. The Additional Government Pleader is, undoubtedly, right in saying that B. Sc. (Honours) candidates may be taken as a separate group or class by themselves; but there seems no reasonable nexus between the principle on which this classification is made and the object to be achieved by the impugned regulations, viz., securing suitable candidates for admission to the Medical course.

In considering the reasonableness of the nexus, the view expressed by such an expert body as the All India Medical Council in note (2) to regulation 1 of the Under-graduate Medical Curriculum (Annexure G) as clarified by the Executive Committee of the Medical Council in annexure F should be given great weight. The Council has insisted that the minimum qualification should be 45 per cent marks in all the subjects taken together, irrespective of whether the qualifying examination is I.Sc. or B.Sc. or Pre-Professional Examination (Pre-Medical). The impugned circular, however, directs the admission of a B.Sc. (Honours) graduate if he has secured the minimum of 45 per cent in the subject offered and the minimum pass marks (below 45 per cent) in

the other subjects. The primary object to be achieved by the impugned circular (Annexure E) and Annexure G is to see that merit is the main basis for admission to the Medical course subject, of course, to the requirement about minimum qualification. Hence, a blanket order, directing automatic admission to the Medical course of a B.Sc. (Honours) graduate, irrespective of the marks obtained by him, will not satisfy the test of "reasonableness" of the nexus between the basis of the classification and the object to be achieved. If the marks obtained are completely ignored and B.Sc. (Honours) candidates are admitted straightway, it may be very unfair to those B.Sc. (Pass) candidates who have got much higher marks.

Moreover, as pointed out by Dr. Nawab in his letter to the Director (Annexure B-1), a large number of candidates (amounting to 165) with B.Sc. (Honours) degrees filed applications for admission. If all of them are to be given seats straightway, very few seats may be left for candidates with other qualifications, such as those who have passed B.Sc. (Pass) course or B.Sc. Part I. In some years, no seats may be available to such candidates and the other qualifications prescribed by the Medical Council for admission to the Medical Course will become a dead letter. It is true that those who have taken advanced study in one of the subjects of the medical group, viz., Physics, Chemistry or Biology, should be given some preference, and this seems to be the reason why the Government of India also were tentatively of the view that some weightage in the marks may be given to them in making the selection. The Executive Committee of the Council also was willing to accept such weightage to B.Sc. candidates except those who passed in third division; but to go further and say that B.Sc. (Honours) candidates should be admitted straightway would mean, in effect that a majority of the seats in these Colleges, would be reserved for B.Sc. (Honours) candidates, leaving very few seats for candidates with lesser qualifications. Both the Principals of the Medical Colleges of Darbhanga and Ranchi were strongly against such reservation, and they supported the alternative view that they should get some weightage, though the Government of Bihar have not accepted their suggestion.

During the late stage of the argument before this Court, an affidavit was filed by an assistant of the Health Department of the Government of Bihar to the effect that his Secretary, Shri Khanna, had a telephonic talk with the Principal of the Ranchi Medical College, Dr. Mitra, and that the latter informed him on the 'phone that the reservation of seats for

B.Sc. (Honours) candidates was based on a reasonable criterion, and that he was prepared to swear an affidavit to that effect. This affidavit of the assistant of the Health Department cannot be accepted for this purpose because he has no personal knowledge of the same. The Health Secretary, Shri Khanna, has not come forward to swear an affidavit about the talk between him and Dr. Mitra. The arguments were closed on the 29th March, 1968, and the cases were reserved for judgment. On the 2nd April, 1968, however, the Additional Government Pleader for the respondents filed an affidavit of Dr. Mitra. Mr. Basudeva Prasad for the petitioner, however, objected to the consideration of the affidavit filed at such a belated stage. We, therefore, rejected the prayer of the Additional Government Pleader for the taking into consideration of the affidavit of Dr. Mitra filed on the 2nd April, 1968. On the materials on record, therefore, I am of the view that it was unreasonable to reserve seats for B.Sc. (Honours) candidates irrespective of the marks obtained by them, though weightage may be given to them. The impugned circular (paragraph 2 of Annexure E) should, therefore, be held to be unconstitutional as violative of Article 14 of the Constitution, and must be struck down.

9. It was urged by the respondents that, even if the impugned circular was struck down, the petitioners had no reasonable chance of securing admission because there are many other candidates who have secured higher marks and who will have to be preferred. This argument, however, overlooks the main relief asked for by the petitioners. They have not stated that they were entitled to admission on the basis of the marks obtained by them. All that Mr. Basudeva Prasad has urged on their behalf is that they are entitled to consideration of their applications in accordance with the rules and instructions which do not violate the provisions of the Constitution. This right of proper consideration of an application according to valid instructions after ignoring the unconstitutional part of the same is a right distinct from the right of securing admission. This distinction was pointed out in *Umesh Chandra Sinha v. V. N. Singh*, AIR 1968 Pat 3 (FB), paras. 7, 12 and 14. Mr. Basudeva Prasad is prepared to take the risk involved if, even after rejecting the impugned circular, candidates with better qualifications are preferred to the petitioners.

10. The next question for consideration is the nature of the relief that should be given to the petitioners. These applications were filed on the 8th February, 9th February and 13th February, 1968. In Civil Writ Jurisdiction Case No. 104 of 1968, on the 12th March, 1968, the

Additional Government Pleader for the respondents gave an undertaking that the status quo would be maintained. This undertaking was recorded in all the three writs. Till then, however, many admissions have already taken place, and the students, who have been admitted, must have joined the medical course, and paid the necessary fees. It will not be proper to cancel all their admissions even though those admissions might have been based on the impugned circular which has been held to be unconstitutional. The petitioners are partly to blame for this result.

As early as October, 1967, the authorities had intimated to the intending candidates that the qualifications for admission would be those provided in the prospectus, and, in the said prospectus, the provision contained in the impugned circular was clearly mentioned. Hence, the petitioners should have moved the court soon afterwards for striking down the unconstitutional portion of the circular; but this was not done. They took the risk of applying for admission on the basis of the existing prospectus (including the impugned circular), and it was only when their applications were rejected that they moved this Court in February. The undertaking of the Additional Government Pleader was obtained only nearly a month later on, viz., on the 12th March, 1968. Under these circumstances, I am not inclined to direct the cancellation of the admissions already made prior to the 12th March, 1968, viz., the date on which the Additional Government Pleader gave the undertaking that the status quo would be maintained. All admissions made prior to that date will stand. But the number of seats which remained unfilled on that date should be filled up in accordance with law after ignoring the impugned circular, viz., paragraph 2 of Annexure E. Candidates with B.Sc. (Honours) degree should not be admitted straightway, though weightage may be given to them as suggested in the enclosure to Annexure B. There will be no order for costs.

11. The three writ petitions are, accordingly, allowed.

12. B. D. SINGH, J. :— I agree.

MOVJ/D.V.C.

Petitions allowed.

AIR 1969 PATNA 16 (V 56 C 5)

RAMRATNA SINGH AND
SHAMBHU PRASAD SINGH JJ.

Prabhu Halwai and others, Appellants
v. Fulchand Khandelwal and another,
Respondents.

A. F. A. D. No. 1113 of 1963, D/- 7-9-1967, from decision of 1st Sub J., Dhanbad, D/- 3-12-1963.

KK/BL/D465/68

(A) Civil P. C. (1908), S. 11 — Principle of res judicata — Applicability — Applies also between two stages of same litigation — Decision in earlier stage must be final.

Apart from S. 11, the principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the final court or a higher court, having at an earlier stage decided the matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceeding. But in the earlier stage of the litigation the decision must be final in the strict sense of the term. AIR 1960 SC 941, Ref. (Para 7)

(B) Civil P. C. (1908), S. 105(2) — Scope and effect of — High Court remanding case for decision of question of maintainability of claim for eviction — Lower court passing decree for eviction — Second appeal before another Bench against decree — Bench held competent to decide maintainability of claim for eviction — S. 105(2) held no bar.

Sub-section (2) of S. 105 contains a special provision which is an exception to the provision contained in sub-s. (1). In view of this exception no court (other than a higher Court) can entertain any challenge to the correctness of any final decision in the order of remand made by the High Court. Provision of sub-s. (2) cannot be read to the effect that an issue about which nothing is said in the order of remand cannot be agitated thereafter before the same judge when the case comes to him on appeal, for the second time, from the order or decree made after remand.

Where the single judge of the High Court did not decide the question of maintainability of the claim for eviction of tenant finally but left it by an order of remand for the court of appeal below to decide whether a decree for eviction could ultimately be passed or not and after remand the court of appeal below passed a decree for eviction and a second appeal against the decree for eviction came up before Bench of High Court.

Held, that if the case had come up in appeal against the decree for eviction before the single judge he would have been competent to decide whether the claim for eviction was maintainable or not. The Bench of High Court being a court of co-ordinate jurisdiction was also competent to entertain it. AIR 1966 Pat 209 (FB), Foll. (Para 7)

(C) Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11(1)(d) — Action for eviction under — Non-service of notice under S. 106, T. P. Act — Action is premature. AIR 1964 Pat 401 (FB), Foll. (Para 7)

Cases Referred: Chronological Paras

- (1966) AIR 1966 Pat 209 (V 53)=
ILR 45 Pat 840 (FB), Bandhu v. Rahman 4
- (1964) AIR 1964 Pat 401 (V 51)=
ILR 43 Pat 91 (FB), Niranjana Pal v. Chaitanyalal Ghosh 3
- (1962) AIR 1962 Pat 72 (V 49)=
ILR 40 Pat 817 (FB), Baijnath Prasad v. Ramphal 7
- (1962) Second Appeal No. 392 of 1958, D/- 26-11-1962 (Pat), Badri Narain v. Dropadi Devi 9
- (1960) AIR 1960 SC 941 (V 47)=
(1960) 3 SCR 590, Satyadhyana v. Smt. Deorajin Debi 7
- (1960) AIR 1960 Pat 418 (V 47), Lalbati v. Satchitanand 4
- (1957) AIR 1957 Pat 534 (V 44)=
1957 BLJR 603, Sunder Ahir v. Phuljharra 4
- (1953) AIR 1953 Trav. Co. 70 (V 40)=
ILR (1952) Trav. Co. 361, Francis Paul v. Fakir Ummerkutty 8
- (1952) AIR 1952 Mad 590 (V 39)=
1951-2 Mad LJ 663, Rama Subbiah v. C. J. Cole 8
- (1952) AIR 1952 Mad 827 (V 39)=
1952-1 Mad LJ 289, Panduranga Rao v. Gopala Rao 8
- (1951) AIR 1951 Mad 343 (V 38)=
1950-2 Mad LJ 579, In re, Nava-neethammal 8
- Ramnandan Sahai Sinha, for Appellants;
S. B. Sanyal and Choudhary, S. N. Misra, for Respondents.

JUDGMENT :— The appellants, who are full brothers, are tenants of a building owned by the respondents. They were sued for eviction from a house and for arrears of rent by the respondents in September, 1959. The grounds of eviction, as given in the plaint, were two-fold, viz., (1) that the building was required for personal occupation of the landlords, and (2) that the defendants had defaulted in the payment of rent for more than two months. The rent of the building, according to the admitted case of the parties, was Rs. 15 per month originally. It was thereafter enhanced by the landlords to Rs. 51 per month. An application was made by the tenants before the House Controller. The House Controller, acting under the relevant provisions of Bihar Act III of 1947, determined the fair rent at Rs. 25 per month from the 11th September, 1954. This order was passed on the 25th May, 1957. There was an appeal against this order to the Deputy Commissioner who, by his order dated the 15th January, 1959, reduced the rent to Rs. 20 per month with effect from the same date, i. e., 11-9-1954. The courts below found that the tenants had defaulted, inasmuch as the deposit of Rs. 238 made by them on 1-8-1957 was invalid and, therefore, they granted a decree for eviction as also for arrears of rent. The claim for eviction on the ground

of personal occupation was, however, rejected. Then, the tenants i. e., the present appellants came up in Second Appeal No. 492 of 1962 to this court, and Ahmad J., who heard that appeal, confirmed the decree for arrears of rent but held that there was no default, inasmuch as Rs. 213, which was a part of Rs. 238 deposited subsequently with the House Controller, had been remitted in time towards the rent by a money-order to the respondents, because the tenancy was, according to the English calendar and not according to the Sambat Calendar, as contended by the landlords. His Lordship further held that on account of the tender or remittance of Rs. 213, there was no default up to the 19th June, 1957.

But, as it was contended on behalf of the landlords that there had been several defaults on the part of the tenants in payment of the rent between June, 1957 and the date of the suit, viz., 11-9-1959, his Lordship sent back the case to the Court below for further consideration in regard to the claim of eviction on the ground of the alleged defaults after the 19th June, 1957. The judgment and decree of the court of appeal below were, therefore, set aside. His Lordship, however, made it clear that the other findings given by that court were affirmed.

2. After this remand, the court of appeal below found that there had been defaults for more than two months even after 19-6-1957, and a decree for eviction was granted under section 11(1)(d) of the said Act. The tenants have, therefore, preferred the present second appeal. Mr. Ramnandan Sahai Sinha, who appeared for the appellants, challenged the judgment and decree of the court below on two grounds, viz., (1) the claim for eviction is not maintainable in absence of a notice under section 106 of the Transfer of Property Act, and (2) there was really no default on the part of the tenant even after 19-6-1957, in view of the fact that the rent had been reduced to Rs. 20 per month by the Deputy Commissioner with effect from 11-9-1954.

3. In support of the first ground, Mr. Sinha relied on a Full Bench decision of this court in *Niranjan Pal v. Chaitanyalal Ghosh*, AIR 1964 Pat 401(FB). It was held in this case, firstly, that where the plaintiff-landlord did not determine the tenancy by giving a notice under section 106 of the Transfer of Property Act, his action for eviction under section 11 of Bihar Act III of 1947 is premature; secondly, that it was for the plaintiff-landlord to mention in his plaint the fact of determination of the lease as one of the facts constituting the cause of action, which he is required to give under Rule 1 of Order 7 of the Civil Procedure Code, and also to prove the fact; and, thirdly,

in a case where the plaintiff had not taken this plea in the plaint, the tenant can urge the ground that the claim for eviction was premature, even at the second appellate stage.

4. On behalf of the respondents, in order to overcome the effect of this decision, Mr. Sanyal submitted that, so far as the question of maintainability of the suit for eviction for any reason whatsoever is concerned, the decision of Ahmad J. in the earlier second appeal operates as constructive *res judicata*; and in support of this submission he relied on some decisions of this court and on sub-section (2) of section 105 of the Code of Civil Procedure. A Full Bench of this court considered, in *Bandhu v. Rahman*, AIR 1966 Pat 209 (FB) the effect of a remand order, after considering several earlier decisions, including *Sunder Ahir v. Phuljaria*, AIR 1957 Pat 534 and *Lalbat v. Satchitanand*, AIR 1960 Pat 418. Their Lordships also considered section 105 of the Code which reads thus:

"105. (i) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (i), where a party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

Their Lordships approved the following observations made in the aforesaid case of *Sunder Ahir*, AIR 1957 Pat 534 :—

"On a consideration of the above decisions, therefore, in my judgment, the guiding principles which can be extracted therefrom, are :—

(i) That if a Bench of the High Court remands a case to the lower Court under its inherent powers, the matters finally disposed of by the order of remand cannot, any of them, be re-opened, when the case comes back from the lower court but, if at the time of remand, no final decision is given on a point, though some observations only are made in respect of it, it is open to another Bench, a court of co-ordinate jurisdiction, when finally determining the case, to come to its own conclusions on it; and (ii) that even in a case decided by the first court of appeal other than a case decided by the High Court, if a judge on appeal decides certain points and remands the case, his decision is binding on his successor, before whom the case comes up again on appeal from the judgment after remand, because such a court is a court of co-ordinate

jurisdiction, and, therefore he cannot go behind the earlier final decision of his predecessor before remand.

The test, therefore, in such a case, to ascertain if a particular finding given by the Judge on appeal is a final decision or not is to find out, if, by the order of remand, the Judge on appeal, has remanded the suit for determination of all the points at issue, or, it has determined some points in controversy, and remanded the suit for determination of the remaining points, which may include the question of maintainability of the plaintiffs' suit itself, in which case the decree of the first court has to be set aside, and, the suit remitted to the Court below for a fresh decision of the case according to law."

Their Lordships further observed that although *Sunder Ahir's case*, AIR 1957 Pat 534 was considering the power of the court of appeal below on the second occasion, there was no distinction in principle in respect of the power of the High Court in such an appeal, as will appear from the decision of a Division Bench of this court in the case of *Lalbat* AIR 1960 Pat 418. The aforesaid decisions do not, however, touch the question of *res judicata*; rather, they deal with the effect of the provision of sub-section (2) of section 105 of the Code. On that principle, in the instant case too, as there was no appeal against the judgment of Ahmad J., any finding contained therein cannot be questioned before us.

5. We have, therefore, to see what was decided by Ahmad J.; and it is clear from a perusal of the same that the only points decided by his Lordship were: (1) the tenancy was according to the English calendar as distinguished from the *Sambat* calendar; (2) the tenants in this case had not defaulted in payment of rent up to 19-6-1957; and (3) all the findings of the court below on other disputed questions were correct. But his Lordship sent the case on remand to the court of appeal below to decide whether the tenants had incurred any liability for eviction on account of defaults in payment of rent for two months or more subsequent to 19-6-57. A perusal of the judgment of the court of appeal below which was before his Lordship as well as that of his Lordship does not indicate that there was any decision about the maintainability of the claim for eviction, nor was there any observation in respect of that question. Hence, on the authority of the said Full Bench decision, this Bench is competent to consider the question of maintainability of the claim for eviction on account of the defaults by the tenants subsequent to 19-6-1957.

6. Mr. Sanyal, however, submitted that, by implication, Ahmad J. decided that the claim for eviction was maintainable, inasmuch as his Lordship allowed

the appeal and sent the case back on remand for decision on the question of eviction. But the further consideration of the claim for eviction against the tenants itself included a decision on the maintainability of that claim on account of the absence of notice under section 106 of the Transfer of Property Act; and, therefore, we do not agree with Mr. Sanyal.

7. Mr. Sanyal relied on a Full Bench decision of this Court in *Bajinath Prasad v. Ramphal*, AIR 1962 Pat 72 (FB) in support of his contention that the plea of non-maintainability of the claim for eviction now taken by Mr. Sinha is barred by the principles of *res judicata*, as the same was not raised before Ahmad J., and it would be deemed to have been decided in favour of the landlords by his Lordship. In the case of *Bajinath Prasad* AIR 1962 Pat 72 (FB), aforesaid it was decided by the Full Bench that the doctrine of constructive *res judicata* applies to execution proceedings and that if a party takes an objection at a certain stage of a proceeding and does not take another objection which it might and ought to have taken at the same stage, it must be deemed that the court has adjudicated upon the other objection also and has held against it. In *Satyadhyan v. Smt. Deorajin Debi*, AIR 1960 SC 941, the Supreme Court said that, primarily, the principle of *res judicata* "applies as between past litigation and future litigation as embodied in Section 11 of the Code of Civil Procedure in relation to suits; apart from this section, this principle "applies also as between two stages in the same litigation to this extent that a court, whether the final court or a higher court having at an earlier stage decided the matter in one way will not allow the parties to reargue the matter again at a subsequent stage of the same proceeding." But in the earlier stage of the litigation "the decision must be final in the strict sense of the term." Section 11 does not, in terms, apply to the instant case, as the decision of Ahmad J. was given in the present litigation. It is manifest in the instant case that it would have been open to the parties to question the findings of Ahmad J. but for the bar contained in section 105(2) of the Code; and, if this bar did not stand in the way of the aggrieved party, the decision of his Lordship would not be final. Sub-section (2) of section 105 lays down that, in a case where an order of remand is appealable, if a party aggrieved by such an order does not appeal therefrom, he is precluded from disputing its correctness in a subsequent appeal from the decree in the suit. It will be noticed that this sub-section contains a special provision which is an exception to the pro-

vision contained in sub-section (1) of section 105, which provides that no appeal shall lie from any order unless such right is especially given by the Code, although any error, defect or irregularity in any interlocutory order, may be challenged in an appeal from the decree. But for this exception, an order of remand, even though final in certain respects, could have been challenged. In view of this exception, however, no court (other than a higher Court) can entertain any challenge to the correctness of any final decision in the order of remand made by the High Court. Such a provision must be construed strictly and, therefore, we are not prepared to read in sub-section (2) of section 105 a provision to the effect that an issue about which nothing is said in the order of remand cannot be agitated thereafter before the same judge when the case comes to him on appeal, for the second time, from the order or decree made after remand. In the instant case, as stated earlier, Ahmad J. did not decide the question of maintainability finally, inasmuch as he left it for the court of appeal below to decide whether a decree for eviction could ultimately be passed or not; and if the case had come up in appeal against the decree for eviction, his Lordship would have been competent to decide whether the claim for eviction was maintainable or not. Hence, this Bench, being a court of co-ordinate jurisdiction is also competent to entertain it. Thus, there is no merit in the contention of Mr. Sanyal and it must be rejected. It follows, therefore, that the claim for eviction in the instant case cannot lie on account of the admitted non-service on the tenants of a notice under section 106 of the Transfer of Property Act, inasmuch as the claim is premature.

8. In support of the second ground, Mr. Sinha submitted that, in consequence of the reduction of rent by the appellate authority from Rs. 25 to Rs. 20 per month with effect from 11-9-1954, the amount already tendered by the tenants to the landlords in this case was sufficient to discharge the rent due and, therefore, the appellants did not default in the payment of rent for two months or more. Mr. Sinha, however, frankly conceded that if the rent had not been reduced by the appellate authority, the appellants should have been in arrears for more than two months. The question is whether the reduction of rent by the appellate authority with retrospective effect removed the liability incurred by the appellants at any time after June, 1957 and before the 15th January, 1959. In this connection, sections 8(2) and 11(1)(d) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act 3 of 1947) are relevant. Section 8(2) enacts:

"When the fair rent of a building has been determined or re-determined, any sum in excess or short of such fair rent paid, whether before or after the date appointed by the Controller under sub-section (3), in respect of occupation for any period after such date shall, in case of excess, be refunded to the person by whom it was paid or at the option of such person be otherwise adjusted and, in case of shortage, be realised by the landlord as arrears of rent from the tenant:

Provided that if a building is let out subsequent to the determination or re-determination of fair rent, on a rent which is less than the fair rent, so determined or re-determined the landlord shall not be entitled at any time to realise the difference between the fair rent and the rent at which the tenant was admitted to occupation."

Section 11(1)(d) makes a tenant liable to eviction and enacts:

"Where the amount of two months' rent lawfully payable by the tenant and due from him is in arrears by not having been paid within the time fixed by contract or, in the absence of such contract, by the last day of the month next following that for which the rent is payable or by not having been validly remitted or deposited in accordance with section 13;"

Mr. Sanyal submitted that once the appellants had incurred the liability to eviction, the same cannot be removed by the order of the appellate authority dated 15-1-1959, even though it was with retrospective effect. On the other hand, Mr. Sinha submitted that this liability was removed, inasmuch as the foundation for the liability to eviction was done away with by the order of the appellate authority reducing the rent with retrospective effect. Several decisions were cited by Mr. Sanyal in support of his submission, viz., *Francis Paul v. Fakir Ummerkutty*, AIR 1953 Trav-Co. 70. In *re. Navaneethammal*, AIR 1951 Mad 343, *Rama Subbiah v. C. J. Cole*, AIR 1952 Mad 590 and *Panduranga Rao v. Gopala Rao*, AIR 1952 Mad 827. In the case of *Francis Paul*, AIR 1953 Trav-Co. 70 following the aforesaid Madras decision, a learned Single Judge of the Travancore-Cochin High Court took the view that the default in payment or tender of rent which is the cause of action for ordering eviction arises as on the date or dates when the payment or tender should have been made which precedes the application of the landlord. The order for eviction merely declares that cause of action arose on the particular date or dates and enables the landlord to have the benefit thereof. No substantive right accrues to the landlord on the date or on account of the order for eviction which only operates to enforce an already existing right.

Hence, the tenants' plea that, as the fair rent was fixed at a very much lower rate, there was an ample fund with the landlord by way of excess collected by him as rent and which could be adjusted towards the arrears of rent and, therefore, the order of eviction based on default in payment of rent could not be justified, is unsustainable. In the case of Panduranga Rao, AIR 1952 Mad 827, the provision contained in section 7(2) of the Madras Buildings (Lease and Rent Control) Act (25 of 1949), which corresponds to Section 8(2) of the Bihar Act, was considered. This section in the Madras Act reads as follows:

"A landlord who seeks to evict his tenant shall apply to the Controller, for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied —

(2) that the tenant has not paid or tendered the rent due by him in respect of the building, within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord, or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable, the Controller shall make an order directing the tenant to put the landlord in possession of the building and if the Controller is not so satisfied, he shall make an order rejecting the application."

Subba Rao, J. (as he then was), relying on the Bench decision in the case of Navaneethammal, AIR 1951 Mad 343 took the view that section 7(2) does not compel a landlord to adjust the excess amounts in his hands towards any arrears of rent, if the said amounts were not paid by the tenant towards the rent of any particular month. It is true that on the date, when a tenant authorises the landlord to adjust the amounts with him towards the rent of any particular month, or months, the amount will be deemed to have been paid on that date towards rent. But till that adjustment is made and the amount is so appropriated, any amounts in excess of the rent due with the landlord will only be payments made in suspense. The fact that such excess came into the hands of the landlord by reason of the Rent Controller's order fixing the fair rent does not really affect the question. The amount not paid towards rent of any particular month and the amount not agreed to be adjusted towards any rent of a particular month is not payment of rent within the meaning of Sec. 7(2)(1). These decisions do support the contention of Mr. Sanyal, though the facts in all these cases were somewhat different from those of the instant case.

9. On the other hand, there is an unreported decision of a Bench of this court

in Second Appeal No. 392 of 1958 (Pat) Badri Narain v. Dropadi Devi, decided on 26-11-1962. While interpreting section 8(2) of the Bihar Act, it was held by the Bench that the question of adjustment by the tenant could come only after the landlord had made an offer to refund the excess amount, and inasmuch as no such offer was made to the tenants in that case, it would be wrong to call the tenants in arrears simply because they did not signify to the landlords their option for adjustment of the excess amount towards the arrears. In that case, the default by the tenants had occurred after the order of the House Controller determining the fair rent. It will be noticed, therefore, that the facts of the instant case are different. It is, however, not necessary to decide the question raised by Mr. Sinha in the second ground raised by him, because the suit as well as the appeal can be finally disposed of on the view taken by us in the first ground.

10. In the result, the appeal is allowed and the suit is dismissed in respect of the claim for eviction for want of notice under section 106 of the Transfer of Property Act; but the decree for arrears of rent already passed and confirmed by Ahmad J. shall stand. Parties will bear their own costs throughout, except that the plaintiffs shall be entitled to proportionate costs in respect of the decree for arrears of rent up to the stage when Title Appeal No. 119/52 of 1960/61 was dismissed by Mr. K. P. Sinha, Subordinate Judge, 1st Court, Dhanbad, before the second appeal to this court which was disposed of by Ahmad J.

GMJ/D.V.C.

Order accordingly.

AIR 1969 PATNA 21 (V 56 C 6)

R. K. CHOUDHARY AND
S. N. P. SINGH, JJ.

Bijali Bala Das, Appellant v. Charu Bala Ash, Respondent.

A. F. A. O. Nos. 415 and 416 of 1961, D/- 3-5-1967, from order of Dist. J., Dhanbad, D/- 26-9-1961.

Civil P. C. (1908), Ss. 11, 47, O. 21, Rr. 22, 64 — Principles of constructive res judicata — Execution of mortgage decree — Property sought to be sold — Objections taken by judgment debtor in 1958 rejected by executing court — Appeal and second appeal therefrom also dismissed — Fresh objection in 1960 — Plea of non-saleability of homestead land — Plea not taken in 1958 — Plea held barred by principles of constructive res judicata — Objection not taken on service of notice under O. 21, R. 22 cannot be

HK/IK/C191/67

subsequently raised — AIR 1962 Pat 72 (FB), Appld. (Para 5)

Cases Referred: Chronological Paras
(1963) AIR 1963 SC 605 (V 50)=1963

BLJR 267, Jyotish Thakur v.

Tarakant Jha

6

(1962) AIR 1962 Pat 72 (V 49)=

1962 BLJR 110 (FB), Baijnath

Prasad Sah v. Ramphal Sahni

4

(1956) AIR 1956 SC 87 (V 43)=

1955-2 SCR 938, Merla Ramanna

v. Nallaparaju

6

(1950, AIR 1950 Pat 465 (V 37)=

ILR 29 Pat 732, Sham Sundar

Singh v. Dharendra Nath Chandra

3

Sudhir Chandra Ghose, for Appellant;

R. S. Chatterji and H. R. Das, for Respondent.

S. N. P. SINGH, J.:— These two appeals by the judgment-debtor arise out of Miscellaneous Cases Nos. 77 and 78 of 1960.

2. The material facts may briefly be stated as follows. Sometime in the year 1954 the respondent obtained two mortgage decrees against one Kalipada Das (since dead), the husband of the appellant. The decree-holder respondent put the decrees into execution by filing two execution cases, namely, execution cases Nos. 42 and 43 of 1958, against the appellant as well as the minor sons and daughter of Kalipada Das. The appellant filed objection petitions in both the cases and they were numbered Miscellaneous Cases 31 and 32 of 1958. The executing court rejected both the objection petitions by its order dated the 29th of November, 1958. Being aggrieved by the order of the executing court, the appellant preferred appeals (Miscellaneous Appeals Nos. 1/4 and 2/5 of 1959), which were dismissed by the 1st Subordinate Judge, Dhanbad, on the 28th of July, 1959. The appellant then preferred Miscellaneous Second Appeals Nos. 287 and 288 of 1959 in the High Court. On the 30th of June, 1960, both the appeals were dismissed for non-compliance of certain orders passed by the Bench. After the disposal of the two appeals in the High Court, the appellant filed fresh objection petitions under section 47 of the Code of Civil Procedure in the two execution cases before the executing court and these were numbered Miscellaneous Cases 77 and 78 of 1960.

The only objection raised in the two miscellaneous cases was that the property sought to be sold by the decree-holder was not saleable in view of the provisions of the Bihar Privileged Persons Homestead Tenancy Act, hereinafter referred to as "the Act". The executing court by its order dated the 7th of January, 1961, dismissed the two miscellaneous cases on the following two grounds, namely, that the provision of the Act was not applicable in the present case as the property sought to be sold was situate within the Notified

Area Committee close to the Chirkunda Bazar and that the plea that the property was not liable to be sold under the provisions of the Act was barred by the principles of constructive res judicata. Two miscellaneous appeals, namely, Miscellaneous Appeals Nos. 9 and 10 of 1961, were preferred by the appellant judgment-debtor against the decision of the executing court in the two miscellaneous cases. These appeals were heard by the District Judge of Dhanbad. The learned District Judge by his order dated the 26th of September, 1961, dismissed the two appeals holding, in agreement with the executing court, that the plea that the land sought to be sold is not saleable under the provisions of the Act is barred by the principles of constructive res judicata, as that plea was neither raised nor agitated by the appellant in the two previous Miscellaneous Cases. The learned District Judge, however, held on fact that the judgment-debtor was really a privileged tenant as defined in the Act and as such no portion of her homestead land was liable to be sold in execution of any decree or order except a decree for arrears of rent with respect to the holding itself. The appellant then preferred these two miscellaneous appeals in this Court.

3. The sole point for determination in the present appeals is whether the objection of the appellant judgment-debtor is barred by the principles of constructive res judicata. It appears that in the previous miscellaneous cases (Nos. 31 and 32 of 1958) objections were raised by the appellant on the point of limitation and also on the point that the decrees were not executable in view of the provisions of section 4 of the Bihar Money-Lenders Act and in view of the provisions of section 67A of the Transfer of Property Act. Although the property sought to be sold had been specified in the two execution applications, no objection regarding the non-saleability of the property was taken by the appellant judgment-debtor. The learned District Judge held that the question as to whether a person is entitled to exemption of the sale of his homestead land under the provisions of the Act is not a pure question of law but a mixed question of fact as well as law and the facts have to be proved. Relying on the decision of this Court in the case of Sham Sundar Singh v. Dharendra Nath Chandra, AIR 1950 Pat 465, the learned District Judge held that the principles of constructive res judicata were applicable to the present case and the plea about the non-saleability of the property was barred as the appellant had not raised the objection in the two previous execution cases.

4. The point whether the principles of constructive res judicata apply in execution cases has been settled by this

Court in the Full Bench decision of this Court in the case of Baijnath Prasad Sah v. Ramphal Sahni, AIR 1962 Pat 72. In that case also objection had been raised by one of the judgment-debtors about the non-saleability of his land in view of the provisions of section 49-M of the Bihar Tenancy Act as amended by the Bihar Tenancy (Amendment) Act 1955. That objection regarding the non-saleability of the land had been taken by him after the confirmation of the sale. It was held, according to the majority decision, that the judgment-debtor was barred by the principle of *res judicata* from raising the objection on the ground of non-saleability of the Kasht lands. In that case Sahai, J., who spoke for the majority, pointed out the five important stages in a proceeding for execution of a money decree by attachment and sale of the judgment-debtor's immoveable property. The learned Judge observed as follows:

"In a proceeding for execution of a money decree by attachment and sale of the judgment-debtor's immoveable property, there are five important stages. Under the Patna amendment of Rule 22 of Order XXI, the Court has to issue notice in every case to the person against whom execution is levied, requiring him to show cause why the decree should not be executed against him. Rule 23 reads:

'(1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the court why the decree should not be executed, the court shall order the decree to be executed.

(2) Where such person offers an objection to the execution of the decree, the court shall consider such objection and make such order as it thinks fit'.

This is the first stage. If the notice under Order XXI, Rule 22 is not served upon the judgment-debtor, that is a different matter; but, if the notice is served upon him, he must raise all his objections to the executability of the decree at that stage. If he does, the Court's decision on those objections will operate as *res judicata* in all further proceedings. If, in spite of service of notice he fails to raise an objection which he might and ought to have raised at that stage, for instance, an objection on the ground of limitation, the court, in passing the order for execution of the decree, must be deemed to have decided the objection against him.

Ordinarily, however, the court does not pass an express order to the effect that the decree be executed. That order is implied in the order for issue of attachment which is the next stage. In the present case also the order under Rule 23 (1) is implied in order for issue of attachment. All objections to the executability of the

decree have to be raised in such cases before the order for issue of attachment. The third stage is one when the court orders sale of the judgment-debtor's property. Rule 64 of Order XXI provides that an executing court may order the sale of any property attached by it, provided that the property is liable to sale. As the Court has come to a decision at this stage that the property in question is liable to sale, any objection on the ground of non-saleability of the property must be raised before that stage. If an objection relating to saleability is raised, the court's decision will be binding upon the parties. In case the judgment-debtor fails to raise any such question, the court must be deemed to have decided it against him by passing an order for sale of the property because, unless it is liable to sale it cannot pass that order."

5. Mr. Sudhir Chandra Ghose, learned counsel appearing for the appellant, contended before us on the basis of the observation, referred to above, that only at the third stage when the court orders sale of the judgment-debtor's property, an objection on the ground of non-saleability of the property has to be raised and not at the earlier two stages. In my opinion, it is not possible to accept the contention of learned counsel. There is nothing in the observation of Sahai, J., referred to above, which would indicate that the objection on the ground of non-saleability of the property is to be taken only at the third stage. On the contrary, the observation indicates that the objection on the ground of non-saleability of the property must be raised before the court orders sale of the judgment-debtor's property under Order 21, Rule 64 of the Code of Civil Procedure. In my opinion, according to the view expressed in the observation quoted above, if a judgment-debtor in spite of service of notice under Order 21, Rule 22 of the Code of Civil Procedure fails to raise an objection which he might and ought to have raised at that stage, he is precluded from raising that objection subsequently. As I have already pointed out, the property sought to be sold was specified in the two execution applications. The judgment-debtor, therefore, when she raised other objections in the two previous miscellaneous cases, might and ought to have raised the objection about the non-saleability of the homestead land specified in the execution applications at that stage. As such, her subsequent objection about the non-saleability of the property under the provisions of the Act must be held to be barred on the principles of constructive *res judicata*.

6. Mr. Sudhir Chandra Ghose, learned counsel appearing for the appellant, in course of his argument referred to the decisions of the Supreme Court in the

case of Merla Ramanna v. Nallaparaju, AIR 1956 SC 87 and the case of Jyotish Thakur v. Tarakant Jha, 1963 BLJR 267 = (AIR 1963 SC 605). In my opinion, these two cases referred to by learned counsel are absolutely of no assistance to him because the question whether the principles of constructive res judicata would apply in an execution proceeding was not the subject-matter of decision in these two cases.

7. For the reasons stated above, I hold that the objection of the appellant judgment-debtor about the non-saleability of the property was barred by the principles of constructive res judicata and the executing court rightly dismissed the two miscellaneous cases.

8. In the result, both the appeals are dismissed with costs.

9. **CHOUDHARY, J. :—** I agree.
SSG/D.V.C. Appeals dismissed.

AIR 1969 PATNA 24 (V. 56 C 7)

U. N. SINHA, J.

Asarfi Mandal and others, Appellants v. Mt. Parvati Devi and others, Respondents.

A. F. A. D. No. 529 of 1965, D/- 24-7-1967, from order of 1st Addl. Sub. J., Bhagalpur, D/- 24-4-1965.

Succession Act (1925), S. 214 — Proof of representative title — Absence of — Objection raised for the first time at the hearing of second appeal — Held, decree could not be set aside for want of succession certificate and that plaintiff should be given opportunity to obtain succession certificate before appeal could be disposed of. AIR 1924 Pat 525, Disting.

(Para 4)

Cases Referred: Chronological Paras
(1924) AIR 1924 Pat 525 (V. 11) =

5 Pat LT 504, Zabur Mian v. Puran Singh 4

(1918) AIR 1918 Cal 336 (V 5) = 27

Cal LJ 339, Girijanath Roy v. 4

Kanai Lal Mitra

J. C. Sinha and Awadh Kishore Pd., for Appellants; Prem Shankar Sahay, and J. N. P. Varma, for Respondents.

JUDGMENT :— This appeal has been filed by the defendants. It arises out of a suit instituted by the original plaintiff, named Sadho Mandal, for realisation of Rs. 2343-12-0 as principal plus Rs. 140 as interest, on the basis that the defendants had purchased 75 maunds of rice on the 15th April 1961. Sadho Mandal died during the pendency of the original suit and the present respondents were substituted in his place. The trial court decreed the suit for the principal amount of Rs. 2343-12-0 and rejected the claim for the consolidated interest charged.

Future interest was granted. On appeal the trial court decree has been affirmed.

2. The relevant facts are as follows: The original plaintiff had alleged that the defendants were members of a joint Hindu family governed by the Mitakshara School of Hindu law and they had a joint family business dealing in grains. They had purchased 75 maunds of rice on credit on the 15th April, 1961, promising to pay the price within a month after selling it. It was alleged that the defendants had sold the rice, but they had not paid the price thereof. The suit was contested by the defendants and in substance, their case was that they did not have any business of dealing in grains and they had never purchased grain on credit. The alleged purchase was denied and reasons were advanced for instituting this suit falsely. All the facts have been found against the defendants by both the courts below.

3. Learned counsel for the appellants has submitted, that before entering into the evidence led by the plaintiffs regarding the disputed transactions, the court of appeal below had really come to a finding of fact that the plaintiff's case was correct, in paragraph 8 of its judgment, and therefore the judgment of the court of appeal below is not in accordance with law. The following sentence in the judgment has been relied upon for his contention:—

"Therefore, the moment the defendants failed to prove that the present suit was instituted as a result of grudge and enmity on account of land dispute, the case of the plaintiffs regarding sale of rice to the defendants as alleged must be believed."

That is to say, according to the learned counsel the court of appeal below prejudged the respective cases of the parties before considering the evidence on the record. But, having considered the whole of the judgment of the court of appeal below, I do not think that the learned Judge has proceeded for his conclusions, on anything except the materials on the record. As the question of grudge and enmity had been raised by the parties, that had to be gone into. But the actual case of advance of grains has been dealt with on the evidence adduced by the parties and the evidence of the plaintiff's witnesses has been believed. The learned counsel for the appellant has urged that the question of benefit to all the defendants has not been considered properly. But this question has also been dealt with by both the courts below. As a matter of fact the trial court has stated in paragraph 19 of its judgment that the defendants were joint and there was no denial that the other defendants were not in any way benefited by the purchase from the deceased plaintiff. The matter has been

referred to by the court of appeal below in paragraph 11 of its judgment. Therefore, there is no validity in the contention that the judgment has been vitiated for non-consideration of this aspect of the matter.

4. Lastly learned counsel for the appellants has made an argument based on a fresh ground filed today, although the hearing of the case commenced on the 21st July, 1967. For the first time it is urged today that in view of section 214 of the Indian Succession Act, no decree could have been passed in favour of the respondents, who claimed to be the heirs of Sadho Mandal, for want of succession certificate. I do not think that at this stage this ground should be allowed to be urged. This ground was not taken in the trial court, where the suit was decreed. This ground was not taken in the court below and the appeal failed there. This ground was not taken in the memorandum of appeal presented in this court on the 20th July, 1965. It is clear that investigation of facts is necessary on the point whether this case was of succession of survivorship, of at least the sons. In any case, the decree cannot be set aside for want of succession certificate, if section 214 of the Indian Succession Act applies, as further opportunity must be given to the plaintiffs to obtain succession certificate before the appeal can be disposed of. This appeal has been pending for two years and no attempt has been made during this time to raise this ground. Learned counsel has relied upon the case of Zabur Mian v. Puran Singh, reported in 5 Pat LT 504=(AIR 1924 Pat 525). This decision is quite distinguishable as in that case after the trial court had decreed the suit, this ground was agitated in the first court of appeal, as a result of which the suit was dismissed. The plaintiffs had come here on appeal and before this court they produced a succession certificate, as a result of which the trial court's decree was restored. In the instant case, if the appellants had taken up this point in 1965, either the respondent might have produced a succession certificate, if they had already taken one, or they may have had time to obtain one. If the point urged at this stage is allowed to be urged successfully, it would only mean postponement of the appeal for years. Therefore, I do not think that this question should be allowed to be agitated at this stage. Learned counsel for the appellants has also relied upon the case of Girijanath Roy v. Kanai Lal Mitra reported in AIR 1918 Cal 336. That was also a case where an objection to the invalidity of an award was taken in a first appeal. It was held, there, that an objection to the validity of a reference as well as to the award on the ground that all the parties concerned did not

join in the reference related to the jurisdiction of the court to make a reference. That decision is also clearly distinguishable. If all the parties concerned did not join in the reference, then no reference could have been made as against those who did not join. But, in a case of the nature under consideration there is no defect in the suit itself, as was pointed out by this Court in 5 Pat LT 504=(AIR 1924 Pat 525) and a succession certificate could be produced at any stage before the litigation came to an end. Therefore, the decision of the Calcutta High Court is not *pari materia*. As I have already indicated above, the consideration of the present question will require consideration of the facts as to what was the actual case led by the parties in court. Therefore, I do not think that this ground should be permitted to be urged now.

5. In the result, the appeal fails and it is dismissed with costs.

VGW/D.V.C.

Appeal dismissed.

AIR 1969 PATNA 25 (V 56 C 8)

CHOUHARY, J.

The State of Bihar, Appellant v. Smt. Daulat Kumari and others, Respondents.

A. F. O. O. No. 40 of 1963, D/- 3-8-1967, from order of Addl. Sub. J., Hazaribagh, D/- 13-11-1962.

Civil P. C. (1908), S. 104, O. 41, Rr. 14, 21, O. 27, Rr. 4, 5 — Service of notice on Government Pleader is valid service of notice on State Government — State Government not putting appearance — Case transferred — Omission to give notice of transfer — Held not a sufficient cause for non-appearance — Application under O. 41, R. 21 — Dismissal — Exercise of discretion, not perverse — Order not interfered with, in appeal — AIR 1918 Pat 341 (SB), Dist.; AIR 1940 Mad 53, Foll. (Paras 3 and 4)

Cases Referred: Chronological Paras (1940) AIR 1940 Mad 53 (V 27)=

(1939) 2 Mad LJ 568, Natesa Ayyar v. Venka Lakshmi Ammal 4

(1918) AIR 1918 Pat 341 (V 5)=3

Pat LJ 218 (SB), Ram Sukul Pathak v. Kesho Pd. Singh 4

S. Sarwar Ali, Addl. Govt. Pleader, for Appellant; T. K. Prasad and Uday Sinha, for Respondents.

JUDGMENT :— Plaintiff-respondent No. 1 instituted a suit for recovery of royalty from respondents 2 to 4. During the pendency of the suit, the State of Bihar (the appellant here) was made party in the suit. Ultimately, the suit was decreed in part against respondents 2 to 4. It was, however, held in the suit that, since after the vesting of the estate

of the plaintiff in the State of Bihar on the 26th January, 1955, the State of Bihar was entitled to realise the royalty. The decree that was passed in the suit for recovery of arrears of royalty was, therefore, passed for the period prior to the 26th January, 1955. The plaintiff preferred an appeal in the lower appellate court against the portion of the decree dismissing her claim for royalty for the period subsequent to the 26th January, 1955. The State of Bihar was made respondent no. 4. The notice of the appeal was served on the Government Pleader; but the State of Bihar did not choose to appear in the appeal. Prior to the date fixed for the hearing of the appeal, it was transferred to the court of the Subordinate Judge, but no notice of the transfer of the appeal to that court was given either to the Government Pleader or to the State of Bihar. Ultimately on the 13th March, 1961, the appeal was heard and allowed ex parte so far as the State of Bihar is concerned. The State of Bihar, therefore, filed an application under Order 41, R. 21, of the Code of Civil Procedure for a rehearing of the appeal. This application was, however, dismissed by the Court below, and hence this appeal has been preferred by the State of Bihar in this Court.

2. Learned Additional Government Pleader raised three points in support of the appeal, namely:—

(i) that no notice of the transfer of the appeal from one court to another having been given to the State of Bihar or to the Government Pleader, there was sufficient cause for the State of Bihar not to appear at the time of the hearing of the appeal before the transferee court, within the meaning of Order 41, Rule 21, of the Code of Civil Procedure;

(ii) that service of notice of the appeal on the Government Pleader was not a valid service on the State of Bihar; and

(iii) that it was a fit case in which the discretion of the court should have been exercised in favour of the State of Bihar.

In my opinion, there is no substance in any of these contentions.

3. I will first take up the second point about the validity of the service of notice on the State of Bihar. The notice was served on the Government Pleader on the 28th September, 1960; but the State of Bihar did not choose to appear. Order 27, Rule 4, of the Code of Civil Procedure states that the Government Pleader in any court shall be the agent of the Government for the purpose of receiving processes against the Government issued by the Court. Therefore, under the above provision, the service of notice of the appeal on the Government Pleader was a valid service of notice on the State of Bihar itself.

Learned Additional Government Pleader, however, has referred to Rule 5 of that order, which lays down that the Courts, in fixing the day for the Government to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channel, and for the issue of instructions to the Government Pleader to appear and answer on behalf of the Government, and may extend the time at its discretion. True it is that, in the present case, after the service of the notice on the Government Pleader, a short time of about two weeks was given to the State of Bihar to appear in the appeal; but actually the appeal was taken up for hearing on the 13th March, 1961, more than five months after the service of the notice on the Government Pleader. There was thus sufficient time for the Government to issue instructions to the Government Pleader to appear and answer on behalf of the Government in the appeal. There is thus no merit in this contention.

4. With respect to the first point, namely, that notice of the transfer of the appeal from one court to another ought to have been given to the State of Bihar or to the Government Pleader; learned Additional Government Pleader has relied on a Special Bench decision of this court in *Ram Sukul Pathak v. Kesho Pd. Singh*, AIR 1918 Pat 341; and it has been contended that the omission to give notice of the transfer must be taken to be a sufficient cause for the non-appearance of the State of Bihar in the lower appellate court. In that case, the respondent had already appeared and had been present in the Court from which his case had been transferred to the other court on a date prior to the date fixed for the hearing of the case. In those circumstances, it was held that notice of the transfer was essential and the omission to give notice of the transfer was a sufficient cause for his non-appearance at the time when the case was called out for hearing.

In the present case, the State of Bihar, in spite of the service of the notice of the appeal on the Government Pleader, did not choose to appear, and, as such, no notice of the transfer of the case could be given to it or to the Government Pleader. The principle of the decision in the Special Bench case referred to above does not, therefore, apply to the facts of the present case. This view gains support from a Single Judge decision of the Madras High Court in *Natesa Ayyar v. Venka Lakshmi Ammal*, AIR 1940 Mad 53, wherein it has been held that where an applicant is served with a notice in the appeal and he omits to put in an appearance and chooses to let the appeal be decided ex parte and the appeal is transferred to the subordinate Judge from the

District Judge, it cannot be said that, by the Subordinate Judge's omission to give notice to him of the transfer of the appeal from the District Court, he was prevented by sufficient cause from appearing. There is thus no merit in this point also.

4A. Lastly, it was submitted that the court should have exercised its discretion in favour of the State of Bihar in the circumstances of the case. The court below has considered the facts and the circumstances of the case and has not chosen to exercise its discretion in favour of the State of Bihar. This court, therefore, cannot interfere with the exercise of the discretion by the court below, which cannot to be said to be a perverse exercise of discretion.

5. There is thus no merit in this appeal, which is, accordingly, dismissed with costs.

SSG/D.V.C.

Appeal dismissed.

AIR 1969 PATNA 27 (V 56 C 9)

H. MAHAPATRA, J.

Shanti Devi, Appellant v. Ramesh Chandra Roukar and others, Respondents.

Misc. Appeal No. 315 of 1965. D/- 15-9-1967.

(A) Hindu Marriage Act (1955), Ss. 23 (1)(d) and 9 — Application for restitution of conjugal rights by husband after ten years from withdrawal by wife from his society — No satisfactory explanation given for such inordinate delay — Decree for restitution of conjugal rights in favour of husband not sustainable.

(Para 3)

(B) Hindu Marriage Act (1955), Ss. 13 (1)(ix) and 9 — Decree for restitution of conjugal rights in favour of husband — Failure by husband to take steps to give effect to it for more than 2 years — Wife is entitled to ask for divorce and decree for restitution of conjugal rights becomes ineffective when she does so. (Para 4)

(C) Hindu Marriage Act (1955), S. 9 — Application for restitution of conjugal rights by husband — Court must give serious consideration to evidence of wife and her parents and cannot refuse to do so on ground of their being interested witnesses. (Para 5)

Kumar Bahadur, for Appellant.

JUDGMENT :— This appeal arises out of a proceeding under section 9 of the Hindu Marriage Act, 1955 (25 of 1955), in which the husband made an application for restitution of conjugal rights on the ground that his wife who is appellant here, had without reasonable excuse withdrawn from his society. In defence the appellant alleged cruelty, desertion by and

invitality of the husband. The Court below on consideration of the evidence allowed a decree for restitution of conjugal rights in favour of the husband. The present appeal is directed against that.

2. Apart from assailing the findings as given by the Court below, learned counsel urged two other points. He contended that according to the respondents' case the appellant had left his society in 1955 and lived since then with her parents. The proceeding under section 9 was initiated by the husband in 1964. For a period of about ten years no step had been taken by the husband for restitution of conjugal rights. This aspect has not been taken into account by the court below and according to learned counsel the decree for restitution of conjugal rights, as passed, has been vitiated.

3. Section 23(1)(d) of the Hindu Marriage Act states "In any proceeding under this Act, whether defended or not, if the court is satisfied that there has not been any unnecessary or improper delay in instituting the proceeding, then, and in such a case, but not otherwise, the court shall decree such relief accordingly." It was thus incumbent upon the court below to be satisfied that the long delay of about ten years as suffered by the husband before coming to the court had been substantially explained or was otherwise justified. On a perusal of the entire judgment I do not see that this aspect of the case had at all come to the mind of the court. In the plaint itself the husband had stated that the wife had gone away at the instance of her parents in 1955 and under their influence she was staying with them all the time. This being the admitted position it was necessary for the husband to explain the inordinate delay before coming to the court for redress. In that view alone the judgment cannot be sustained.

4. Another point contended was that since the decree for restitution of conjugal rights was passed on the 9th August 1965 no step had been taken by the husband to give effect to that, although more than two years by now has elapsed. This fact will provide justification for her to obtain the divorce. Section 13(1) of the Act lays down "Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties." Clearly enough, the wife is now entitled to ask for divorce and the judgment for restitution of conjugal rights as passed by the court below

will become ineffective, when she does so. In that view of the matter I am not inclined to sustain the judgment.

5. Thirdly, the evidence as given by the parties before the court below, I am afraid, have not been properly assessed, inasmuch as the most important witness, namely appellant (P. W. 8) was not seriously considered on the ground that she was an interested witness. Who else other than the accused party in such a case will be more competent to speak about the relevant facts? Her parents were equally interested, no doubt, but all the same were entitled to a proper consideration by the court on their evidence. Two witnesses were only examined on behalf of the husband. The husband was equally an interested person. If his evidence is weighed in the same scale as was applied by the court below to the evidence of wife, then there was almost no support for the appellant's case. No doubt, the plaintiff produced six money order acknowledgment forms showing that he had sent money for some months to the wife. Post cards written by his mother-in-law were also exhibited. But all those incidents were of a time just before the proceeding of the suit. There is much force in the contention advanced by the wife that those things were brought into existence for the purpose of leading support to the plaintiff's case, when he decided to go to the court of law.

6. For all these reasons given above I think that the judgment for restitution of conjugal rights cannot be upheld, and, is therefore set aside; the appeal is allowed. As there is no appearance for the other side there will be no order for costs.

CWM/D.V.C.

Appeal allowed.

AIR 1969 PATNA 28 (V 56 C 10)

R. K. CHOUDHARY, J.

Jwala Singh and another, Appellants
v. Laboo Ram, Respondent.

A. F. A. O. No. 250 of 1967, D/- 24-7-1968.

Provincial Insolvency Act (1920), S. 42 (1)(a) — Applicability — Insolvent, in petition for order of absolute discharge taking exception provided in S. 42(1)(a) — Onus to prove exception is on him — Absence of objection to the averment in petition — Does not make S. 42(1)(a) inapplicable — (Evidence Act (1872), Ss. 101 to 104).

Under S. 42(1)(a), the Court is bound to refuse to grant absolute discharge if the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities. To that, how-

ever, there is an exception if the insolvent satisfies the court that the above fact has arisen from circumstances for which the insolvent cannot justly be held responsible. The onus is on the insolvent to prove this exception. Where he fails to prove the same, the law laid down in section 42 (1)(a) to refuse to grant an absolute order of discharge has to take its course. The fact that no objection has been taken to the averment in the petition of the insolvent for discharge, does not make the provisions of S. 42(1)(a) inapplicable as there is no provision in law to file such objection. (Para 3)

Cases Referred: Chronological Paras

(1928) AIR 1928 Pat 338 (V 15)=ILR

7 Pat 375 (FB), Gopal Ram v.

Magni Ram

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Jyotirmoy Ghosh and Girijapati Sanyal, for Appellants; Deba Prasad Mukherjee and Nripendra Narayan Roy, for Respondent.

JUDGMENT :— Respondent Laboo Ram, on his own application, was adjudged insolvent on the 29th August, 1961, and he was directed to apply for discharge within four years. In the meantime, he was directed to pay Rs. 10 per month, and, from the 29th June, 1965, the amount was increased to Rs. 40 per month to be paid to the appellants, who were the two unsecured creditors of the insolvent. On the 15th September, 1965, a little over four years after, the insolvent applied for absolute discharge. The appellants objected to that application and requested to court to extend the time for absolute discharge by three or four years so that the realisation towards their debts may come to at least eight annas in a rupee. The objection was overruled by the Subordinate Judge, and an order was passed for absolute discharge of the insolvent. This order was affirmed by the Additional District Judge in appeal filed by the creditors. Being thus aggrieved, the creditors have filed this appeal.

2. A preliminary point was taken by Mr. Deba Prasad Mukherjee, appearing for the respondent, that the appeal was not maintainable, and, in support of this contention, he relied on sub-section (3) of section 75 of the Provincial Insolvency Act (hereinafter referred to as "the Act"). Sub-section (1) of section 75 makes provision for an appeal to the High Court on grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure in a case where an order has been passed by a Court subordinate to the District Court and that order has been affirmed or set aside on appeal by the District Court. Under section 75(1) of the Act, the debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction has a

right to prefer an appeal. Sub-section (3) of section 75 lays down that any such person aggrieved by any other order made by a District Court otherwise than in appeal from an order made by a subordinate court may appeal to the High Court by leave of the District Court or of the High Court. I am surprised how the learned counsel has referred to this sub-section for an argument of the present appeal being not maintainable where the present appeal has been filed against an order of the District Court affirming in appeal a decision of a subordinate Court.

Learned counsel has also relied on a Full Bench decision of this Court in *Gopal Ram v. Magni Ram*, ILR 7 Pat 375 = (AIR 1928 Pat 338) (FB). That was a case where the impugned order was passed by the District Court otherwise than in an appeal. Consequently, sub-section (3) of section 75 was applicable to such a case. But, as already observed, it cannot apply to a case where the appeal was filed to the High Court, as in the present case, from a decision of the District Court affirming in appeal the decision of the subordinate Court. The preliminary objection is, accordingly, overruled.

3. Mr. Ghosh, appearing for the appellants, has advanced an argument that the order of the learned Additional District Judge in appeal affirming the decision of the Subordinate Judge making an order for absolute discharge of the insolvent is bad in law as it has violated the provisions of section 42 of the Act. He has based his argument on clause (a) of sub-section (1) of section 42, which reads that "42(1) the court shall refuse to grant an absolute order of discharge under section 41 on proof of any of the following facts, namely :— (a) that the insolvent's assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible." In the present case, it is an admitted fact that on the date of the application for discharge the assets of the insolvent were only Rs. 490, whereas the unsecured liability of the insolvent in respect of the appellants amounted to Rs. 2,360/-.

It is thus conceded even by the learned counsel for the insolvent-respondent that the assets of the insolvent on the date of the application for discharge were less than eight annas in the rupee of the unsecured liability. Counsel for the insolvent has, however, urged that the order of discharge cannot be interfered with, unless the Court finds that the fact that the assets of the insolvent are not of a value equal to eight annas in the rupee

on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible. In my judgment, this argument is based on confusion. True it is that in his application for discharge the insolvent had practically quoted the wordings of the section; "That the assets of your petitioner are not (of a value) equal to eight annas wrongly stated as four in the rupee on the amount of his unsecured liabilities and the same has arisen out of the circumstances for which your petitioner cannot justly be held liable." It is also true that no regular objection has been filed by the creditors to the ground made in the application for discharge. There are, however, certain petitions by which the creditors requested the Court to extend the date of discharge so that the realisation towards their dues may come to at least eight annas in the rupee.

It has been seriously urged on behalf of the insolvent that, no objection having been taken to the averment in the petition of the insolvent for discharge, it should be held that the provisions of S. 42 (1) of the Act were not applicable for refusing to grant the order of absolute discharge. I am not inclined to accept this argument. There is no provision in law to file objection to a petition like the one that was filed by the insolvent. Under section 42(1)(a) of the Act, the Court is bound to refuse to grant absolute discharge if the insolvent's assets were not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities. To that, however, there is an exception if the insolvent satisfies the Court that the above fact had arisen from circumstances for which the insolvent could not justly be held responsible. Beyond mentioning in the petition itself, no material has been placed on the record of the case by the insolvent for satisfying the Court on this point. The onus was on the insolvent to prove this exception, and he having failed to prove the same, the law laid down in section 42(1)(a) to refuse to grant an absolute order of discharge has to take its course. The Courts below, therefore, have erred in law in passing an order of absolute discharge of the insolvent, on the facts and the circumstances of the case.

4. The result, therefore, is that the appeal is allowed, the judgments and orders of the courts below directing absolute discharge of the insolvent are set aside, and the application made by the insolvent for his absolute discharge is dismissed. It will be open to the insolvent to file another application for his discharge after two years. In the circumstances, there will be no order for costs of this court.

YPB/D.V.C.

Appeal allowed.

AIR 1969 PATNA 30 (V 56 C 11)

S. C. MISRA AND B. D. SINGH, JJ.

Smt. Suraj Kumari, Appellant v. The State of Bihar, Respondent.

A. F. O. O. No. 162 of 1962, D/- 16-7-1968, from order of Dist. J., Hazaribagh, D/- 2-6-1962.

(A) Criminal Law Amendment Ordinance (38 of 1944), S. 3 — Charge of defalcation of Govt. fund — Attachment of property under — Property if procured out of fund — Question is immaterial — Property must be that of accused.

When an application is made under section 3 of the Criminal Law Amendment Ordinance for attachment of the property of the person concerned, it is not necessary to establish on behalf of the State that the property is procured by means of the offence, but the real question for determination by the District Judge is whether the property is that of the accused. The first part of section 3 no doubt refers to money or property procured by means of the offence, but the second part clearly refers to any other money or any other property of the accused person. (Para 4)

Thus where a person was charged with defalcation of Government fund and his house was sought to be attached under section 3 of the Ordinance for the realisation of the money defalcated, the date of the construction of the house was immaterial in order to establish whether it was built out of the defalcated money. It was sufficient to prove that the house was that of the accused. (Para 4)

(B) Criminal Law Amendment Ordinance (38 of 1944), S. 5(2) — Words "some interest in property attached" under — Should mean independent right of objector — Onus is on objector to establish such right failing which his claim under S. 5 is vitiated — (Evidence Act (1872) Ss. 101 to 104).

The procedure laid down under section 5 of the Ordinance is that of a title suit and the burden is thrown upon the objector to show that on the date of attachment the objector has any independent interest in the property to be attached failing which the objector would be precluded from raising any question as to the competence of the proceedings in regard to the property. The word 'some' no doubt occurs in clause 2 of section 5, but that can reasonably be taken to mean the quantum and not nature of the interest which can only imply a right independent of the right to it of the person proceeded against in the Criminal Court. (Para 5)

If, therefore, the wife of a person, proceeded against under section 3 of the Ordinance, objects to the attachment on

the ground that the house sought to be attached is her own house and not that of her husband, mere fact that her name is entered in the Municipal papers would not make it her personal property in the absence of any evidence to show that she spent money of her own in building the said house. Her living in the house as wife cannot be taken in the eye of law to have any independent interest of her own which would bring her claim within the ambit of clause 2 of section 5 of the Ordinance and hence she has no locus standi to raise objection under section 5. (Para 5)

Cases Referred: Chronological Paras

(1960) AIR 1960 Cal 549 (V 47),

Ranjit Ghosh v. Damodar Valley Corporation

5

(1957) AIR 1957 Pat 10 (V 44)=

1956 BLJR 513, Subodh Ranjan Ghosh v. Fertilisers and Chemicals Ltd.

5

J. C. Sinha, Ramnandan Sinha and Swaraj Prasad, for Appellant; Lal Narayan Sinha, Krishna Nandan Prasad Sinha and S. Sarwar Ali, for Respondent.

MISRA J. :— Appellant Srimati Suraj Kumari is the wife of Sri A. P. Sinha who was employed as Head Clerk-cum-Accountant in the Damodar Valley Corporation. He was charged with defalcation of Government fund of a large amount exceeding Rs. 2,30,062/5/- and a prosecution was started against him. He was believed to have acquired properties also out of the amount of defalcation and an application was filed under section 3 of the Criminal Amendment Ordinance No. XXXVIII of 1944 for attachment of plots Nos. 1148 and 1149 of khata No. 52 khewat no. 2/2 on the Ratu Road of Ranchi town together with a pucca building standing thereon being Municipal Holding no. 2944 Ward No. 1B within the Ranchi Municipality, and a pucca building standing on plot no. 8 being Municipal Holding No. 373 of Ward no. 8 within the Monghyr Municipality. As provided under section 3 of the Ordinance the State of Bihar was to obtain an order of attachment by the District Judge where Damodar Valley Corporation was situated and where A. P. Sinha was employed. In order to make the attached property available for realisation of the amount, if any procured by the accused person by committing one of the scheduled offences, the procedure provided for investigation under section 5 of the Ordinance was followed by the District Judge, Hazaribagh and after having recorded the evidence, both oral and documentary led by the parties, he came to the conclusion that the appellant, the wife of A. P. Sinha who objected to the attachment of the property on the ground that it was her own personal property and her

husband had no concern with it was unfounded. The learned District Judge held that property was acquired by A. P. Sinha and the claim of the appellant that it was her personal property was not substantiated. This appeal is directed against the judgment and order passed by the learned District Judge.

2. Mr. J. C. Sinha appearing on behalf of the appellant has raised a number of questions in support of his contention. He has urged in the first place that the Court below was in error in holding that this house was built by A. P. Sinha out of the money which he defalcated from the fund of the Damodar Valley Corporation. His argument is that although A. P. Sinha joined the service of the Damodar Valley Corporation in the year 1950, the land was acquired much earlier. Plot no. 1149 was purchased from Juthari Munda under exhibit 1/a on the 15th June, 1949 in the name of this lady and plot no. 1148 was purchased from Orjunaon under Exhibit 1 on the 22nd July 1950. Plot no. 1147 was acquired under Exhibit 1/b on the same date. The total considerations conveyed under plots nos. 1148 and 1149 was Rs. 3250. According to the appellant, she purchased this land out of her own money consisting partly of dowry obtained by her for her son's marriage and partly out of the money she received by selling her gold and silver ornaments. Bricks were laid for the constructions of this house in 1947 and after the house came to be completed, Grihpravesha at this Ratu house was held on the 14th May, 1952. The marriage of her eldest son took place on the 7th June 1951. The period for which charge was framed against her husband for defalcation of the amount was December 1952 to March 1953. Hence it was clear that this property could not have been acquired by her husband out of any money which the criminal Court may have found him to have defalcated as an employee of the Damodar Valley Corporation. Learned Counsel for the appellant has drawn my attention in this connection to certain documents which are Exhibits 5 and 5/a. Exhibit 5 was the application filed by the lady for purchase of materials for construction of the house dated the 10th December 1951 and another application is Ext. 5/a dated the 26th February, 1951. Exhibit D was an application by A. P. Sinha dated the 3rd February 1951 filed before the Subdivisional Officer, Ranchi, applying for a gun license as a burglary was committed in his house by some desperate criminals. The document was filed to show that this house was already ready in February 1951.

3. Our attention has also been drawn by the learned Counsel to the evidence of opposite party witness No. 2, Jugal

Kishore Singh, who was posted at Ranchi Kotwali Station from 1947 to 1952. He has stated as follows:—

"In 1952 the marriage party of the son of Sri A. P. Sinha had started from that house. I remember that I had attended that marriage party.

In 1948 a burglary case had been reported for his rented house also situated on Ratu Road. I had conducted the investigation of that case."

Further in cross-examination he stated as follows:—

"I was familiar with A. P. Sinha, I don't remember how many times I saw him looking after the construction of his house. This was in 1951-1952, but I do not recollect the month or month when I saw him looking after the construction.

.....
Opposite party witness no. 8 also stated as follows:

"I do not remember the date or year or month of attending the Grih Pravesha ceremony. I received an invitation card."

Mr. Sinha had endeavoured to built up his argument on the date of the construction of the house with reference to the above statement made by the witnesses examined on behalf of the State of Bihar. It may be stated that neither the petition of objection filed by the appellant set out the actual date of construction of the house nor the witnesses examined on her behalf including herself and her two sons say when the house was constructed. Thus there is a great lacuna in the evidence adduced by the appellant in view of the provision of section 5(2) of the Ordinance that any person making an objection under section 4 shall be required to adduce evidence to show that at the date of the attachment he had some interest in the property attached. The omission to mention the date of construction by the appellant who was an objector would lead to an inference adverse to her

Mr. Sinha has, however, contended that since the above two witnesses for the opposite party have made statements which lend reasonable support to his contention that the house was ready in 1952, and so an inference can be drawn that it was completed prior to the period of defalcation from December 1952 to March 1953 for which period the husband of the appellant was found guilty of the offence, it is clear that the house was not built out of any part of the amount alleged to have been procured by her husband by committing any act of cheating the Damodar Valley Corporation of any amount.

We have considered the evidence of opposite party witness no. 4 Tulsi Ram to the effect that A. P. Sinha, was a tenant living in his house for sometime and shifted to the new house after leaving

his house. The witness stated that he came to stay in his house in 1935-1936 and left his house in 1953-1954 implying thereby that A. P. Sinha shifted into the newly constructed house in Ratu Road between 1953-54 after the period for which the husband of the appellant was charged before the Criminal Court with the offence of having procured unlawfully Government money for his own use. The normal inference from the evidence on record, would no doubt be that the lady failed to establish that she built the house out of her personal fund, in the absence of any witness being examined that any dowry was advanced to the family of the appellant. There is also nothing to show as to what was the amount obtained by selling her silver and gold ornaments. This is apart from the omission on behalf of the appellant to state the exact date of the construction of the house. It is true, no doubt, that opposite party witness no. 2 made some statements that some kind of construction on this land in 1951-1952 was made but the evidence of opposite party no. 4 shows that in any case the house came to be completed in 1953-1954.

4. Mr. Sinha laid stress that the house would not be liable to be seized under Sec. 3 of the Ordinance if it could not be established that it was built out of the amount defalcated by the husband of the appellant. Section 3 of the Ordinance in so far as it is relevant runs as follows:—

"Where the State Government has reason to believe that any person has committed any scheduled offence . . . (1). . . for the attachment under this Ordinance of the money or other property which the (State) Government believe the said person to have procured by means of the offence, or if such money or property cannot for any reason be attached or other property of the said person of value as nearly as may be equivalent to that of the aforesaid money or other property." Although the first part of this section relating to attachment refers to money or property procured by means of the offence, but the second part refers to any other money or any other property of the accused persons. So in the present case the relevant point for consideration is not whether it was established on behalf of the State whether this house was built out of the amount defalcated but the real question for determination by the District Judge was whether this was the property of the accused. It is not, therefore, necessary to give any definite finding as to the date of the construction of the house, but on the evidence on record it is clear that the house may be reasonably taken to have been built by the husband of the appellant A. P. Sinha.

5. Mr. J. C. Sinha has however, urged that the question cannot be gone into in the present proceedings; as the money alleged to have been procured by A. P. Sinha by committing a scheduled offence, was the money of the Damodar Valley Corporation and not of the State of Bihar. The Damodar Valley Corporation cannot be regarded either as Government or a local authority or a person acting on behalf of any such Government authority. To support his point, he drew our attention to *Subodh Ranjan Ghosh v. Fertilisers and Chemicals Ltd.*, AIR 1957 Pat 10 and *Ranjit Ghosh v. Damodar Valley Corporation*, AIR 1960 Cal 549 and Rule 7 of Damodar Valley Corporation Rules. No doubt, it has been held in the above decisions that the Damodar Valley Corporation is neither Government nor Government authority, but an independent Corporation and as such employees of the Damodar Valley Corporation cannot be regarded as Government servants to whom the privilege of Article 311 of the Constitution of India can be made available.

The Advocate General, has however, contended in reply that it is not necessary to decide this question in the present case because the house to which the appellant laid claim had already been attached and, since section 5 of the Ordinance puts the onus upon the objector to establish his or her claim to the property attached, if the finding be that the house did not belong to her, the objector would be precluded from raising the question as to whether it was liable to attachment in terms of the Ordinance. Mr. Sinha has contended that since the house stood in the name of the appellant and she was living in the house, she certainly had interest in the property which would entitle her to raise the question as to whether it was liable to attachment in accordance with the provisions of the Ordinance. In my opinion however, it is difficult to accede to the contention put forward by learned counsel for the appellant as the procedure laid down under section 5 of the Ordinance is that of a title suit and the burden is thrown upon the objector to show that on the date of attachment the objector is entitled to the property to be attached and if the objector would fail to establish the kind of interest contemplated by clause 2 of Section 5 the claim of the objector must be dismissed and the objector could not be permitted to raise any question as to the competence of the proceedings in regard to the property.

Mr. J. C. Sinha contended that the word interest should not be taken to include the whole of or title to the property standing in the name of the appellant. Even if she happened to be a mere

THE All India Reporter

1969

Punjab & Haryana High Court

AIR 1969 Punjab & Haryana 1
(V 56 C 1)

GURDEV SINGH J.

Tehel Singh and others, Petitioners v.
Superintending Canal Officer, Ferozepur
and others, Respondents.

Civil Writ No. 993 of 1968, D/- 7-5-
1968.

Constitution of India, Arts. 226 and 227
— Judicial or quasi-judicial order —
Interference — Northern India Canal and
Drainage Act (8 of 1873), S. 30-B (3) —
Revision under — Superintending Canal
Officer acts judicially and his order is
open to scrutiny under Arts. 226 and 227
of Constitution — His order must be a
speaking order — Order dismissing revision
without giving any reasons is no
order in eye of law.

In dealing with an application for revision
under S. 30-B (3) of the Act the
Superintending Canal Officer acts judicially
and the order disposing of such
an application is more in the nature of
a judicial order than an administrative or
executive order. (Para 5)

Orders passed by the Superintending
Canal Officer under section 30-B (3) of
the Act are open to scrutiny by the
High Court in exercise of its jurisdiction
under Articles 226 and 227 of the Constitution.
As such, unless the reasons
are indicated in the order, it is impossible
for the High Court to appreciate what
weighed with the Superintending Canal
Officer in making the particular order.
Though the order of a Superintending
Canal Officer may not be as detailed as
the order of a judicial officer and his
order need not be in the form of a
judgment of a Court of law, but at the
same time when he disposes of or

adjudicates upon valuable rights of the
parties and is required to act judicially
after hearing the parties and applying
his mind to the facts placed before him,
it is not only desirable but incumbent
upon him to indicate the reasons for which
he had taken a particular view. If the
Superintending Canal Officer is in full
agreement with the reasons recorded by
the Divisional Canal Officer and upholds
the latter's order in exercise of his
revisional jurisdiction it may not be
necessary for him always to reiterate or
set down those reasons but his order must
at least indicate that he had adopted the
reasoning of the subordinate authority or
on consideration of the same accepted
them as valid and sufficient to uphold
the order. (Para 10)

Where the order of Superintending
Canal Officer, is a laconic order merely
rejecting the revision without applying
his mind to the facts and without indicating
the reasons for such rejection, the order
is no order in the eye of law and the
officer was directed under Arts. 226
and 227 to rehear the parties and dispose
of the revision in accordance with law.
AIR 1967 SC 1606, Rel. on; AIR
1966 SC 1922 and AIR 1966 SC 671, Ref.
to. (Para 11)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 1606 (V 54)=
(1967) 2 SCWR 598, Bhagat Raja
v. Union of India 6, 7, 8, 9
(1966) AIR 1966 SC 671 (V 53)=
(1966) 1 SCR 468, Madhya Pradesh
Industries Ltd. v. Union of India 8, 9
(1966) AIR 1966 SC 1922 (V 53)=
(1966) SCR (Supp) 104, Nandram
Hunatram v. Union of India 8

M. M. Punchhi, for Petitioners; P. N.
Aggarwal, for Respondents 3 to 5; M. S.

Dhillon, for Advocate General, for Respondents.

ORDER: The lands of the 24 petitioners and respondents 6 to 9 are being irrigated from a common outlet RD.64522-R Daulatpur minor, situate in village Diwan Khera, district Ferozepur. Respondents Nos. 3 to 5, who used to receive water for irrigating their own lands from another outlet (RD. 58230-R) of the same minor, applied for transfer of their 19 acres of land to the outlet from which the petitioners have been irrigating their land, and the Divisional Canal Officer, Abohar Division, accepted their application by his order, dated 18th September, 1967, purporting to have been made under S. 30-B (2) of the Northern India Canal and Drainage Act No. VIII of 1873 (hereinafter called the Act). Aggrieved by this order, nine of the present petitioners preferred an application for revision before the Superintending Canal Officer, Ferozepur, availing of the provisions of sub-section (3) of Section 30-B of the Act. After hearing the parties, the Superintending Canal Officer, however, dismissed the revision application by his order, dated 10th January, 1968. This is a laconic order, the operative part of which is in these words:

"Both the parties were present and heard in detail. Decision. The appeal is dismissed."

2. It is the validity of this order which is being questioned in these proceedings under Articles 226 and 227 of the Constitution.

3. The sole contention raised by Mr. M. M. Punchhi, who appears for the petitioners, is that the impugned order of the Superintending Canal Officer, which does not mention any reason for rejecting the revision application and is not a speaking order, is no order in the eye of law and cannot be sustained, as it does not even indicate that he had applied his mind to the merits of the case.

4. In opposing the petition, the respondents' learned counsel, Mr. P. N. Aggarwal, besides contending that the impugned order is perfectly valid and it was not incumbent upon the authorities concerned to pass a speaking order, has urged by way of preliminary objection that no relief can be granted to the petitioners as no legal right vesting in them has been infringed, that some of them were not parties to the revisional proceedings before the Superintending Canal Officer and that some of the shareholders, who are interested in the outlet from which the petitioners irrigate their fields, have not been impleaded as parties. The preliminary objections raised, in my opinion, have no substance. Attachment of more land to the outlet

from which the petitioners have been irrigating their fields is bound to affect the irrigation of their own lands, and it is futile to say that the impugned order does not operate to their prejudice, especially when it is not denied that they are legally receiving water for irrigation. The mere fact that some of the shareholders have not been impleaded as parties cannot result in the dismissal of this petition as all that is prayed for by Mr. Punchhi is that a direction be issued to the Superintending Canal Officer (respondent No. 1) to rehear the revision application and dispose it of on merits by passing a speaking order.

5. The material question that calls for decision in this case is: Whether the impugned order, which is not a speaking order and contains no indication of the reasons that weighed with the Superintending Canal Officer in rejecting the revision application, is a valid order. It is not disputed that in dealing with an application for revision under sub-section (3) of section 30-B of the Act, the Superintending Canal Officer exercises judicial or at least quasi-judicial powers. In fact, he acts more like a Judge than an executive or administrative officer. The procedure prescribed for hearing the appeals and revisions under the Act and the Rules framed thereunder approximates to that which an appellate or revisional Court has to follow. In these circumstances, it cannot be disputed that in dealing with an application for revision the Superintending Canal Officer acts judicially and the order disposing of such an application is more in the nature of a judicial order than an administrative or executive order.

6. Learned counsel for both the parties have placed reliance upon the recent decision of their Lordships of the Supreme Court in *Bhagat Raja v. Union of India*, AIR 1967 SC 1606 and sought to derive support for their respective contentions from this authority. In that case, their Lordships were dealing with the validity of an order made by the Central Government in exercise of its revisional powers under rule 55 of the Mineral Concession Rules, 1960, framed under the Mines and Minerals (Regulation and Development) Act, 1957. In response to a notification issued by the Andhra Pradesh Government, Bhagat Raja, the appellant before their Lordships, and respondent No. 3 applied for prospecting licences. The Government of Andhra Pradesh preferred the latter and rejected the application of the appellant. Bhagat Raja for the mining lease. Bhagat Raja went up in revision under section 30 of the Mines and Minerals (Regulation and Development) Act, 1957.

read with rule 54, but without success. The only order of the revisional authority communicated to the appellant was that after careful consideration of the grounds stated by him in his application, the Central Government had come to the conclusion that there was no valid ground for interfering with the decision of the Government of Andhra Pradesh rejecting his application for grant of mining leases. It was contended before their Lordships in appeal by way of special leave that this order was not valid. Their Lordships of the Supreme Court, after reviewing the case-law on the subject, including earlier decisions of that Court agreed with this contention, observing as follows:

"Let us now examine the question as to whether it was incumbent on the Central Government to give any reasons for its decision on review. It was argued that the very exercise of judicial or quasi-judicial powers in the case of a tribunal entailed upon it an obligation to give reasons for arriving at a decision for or against a party. The decisions of tribunals in India are subject to the supervisory powers of the High Courts under Article 227 of the Constitution and of appellate powers of this Court under Article 136. It goes without saying that both the High Court and this Court are placed under a great disadvantage if no reasons are given and the revision is dismissed curtly by the use of the single word "rejected", or, "dismissed". In such a case, this Court can probably only exercise its appellate jurisdiction satisfactorily by examining the entire records of the case and after giving a hearing come to its conclusion on the merits of the appeal. This will certainly be a very unsatisfactory method of dealing with the appeal. Ordinarily, in a case like this, if the State Government gives sufficient reasons for accepting the application of one party and rejecting that of the others, as it must, and the Central Government adopts the reasoning of the State Government, this Court may proceed to examine whether the reasons given are sufficient for the purpose of upholding the decision. But, when the reasons given in the order of the State Government are scrappy or nebulous and the Central Government makes no attempt to clarify the same, this Court, in appeal may have to examine the case de novo without anybody being the wiser for the review by the Central Government. If the State Government gives a number of reasons some of which are good and some are not, and the Central Government merely endorses the order of the State Government without specifying those reasons which according to it are sufficient to uphold the order of the State Govern-

ment, this Court, in appeal may find it difficult to ascertain which are the grounds which weighed with the Central Government in upholding the order of the State Government. In such circumstances what is known as a 'speaking order' is called for. In this view of the matter, the order of the Central Government was struck down, and it was directed to decide the review application afresh."

7. Mr. M. M. Punchhi, appearing for the petitioners, has argued that his case stands on a better footing than Bhagat Raja's case, AIR 1967 SC 1606 (supra) as in this case the Superintending Canal Officer, while disposing of the revision application, has not even referred to the fact that the various grounds of revision urged by the petitioners were considered by him, but has merely dismissed the petition for revision without assigning any reason. He has further pointed out that the Superintending Canal Officer has not even taken the trouble of saying that he agreed with the reasons recorded by the Divisional Canal Officer whose order was being challenged before him, and in this situation, it is difficult to predicate what weighed on the mind of the Superintending Canal Officer in rejecting the petitioners' application for revision.

8. The respondents' learned counsel has, on the other hand, argued that the question whether the orders made by the Superintending Canal Officer in exercise of his powers under sub-section (3) of section 30-B must always be speaking orders, can be adopted, and it would depend upon the facts and circumstances of each case and the terms of the order passed by such authority to determine whether such an order was valid or not. According to his submission a distinction has to be made between the orders by which the decision of the Divisional Canal Officer, against which a petition for revision is directed is set aside, and an order which confirms that decision. According to him, in the latter type of cases it is not necessary for the Superintending Canal Officer to set out his reasons for rejecting the revision application and maintaining the order of the Divisional Canal Officer as the affirmance of the order of the Divisional Canal Officer implies the acceptance of his reasoning and it is only in those cases, as Mr. Aggarwal urged, in which the order of the Divisional Canal Officer is interfered with, set aside or modified that reasons will have to be given in his order by the Superintending Canal Officer. For these contentions, he sought to derive support from an earlier decision of their Lordships of the Supreme Court in Nandram Hunatram v. Union of India, AIR 1966 SC 1922. This authority has

been noticed in Bhagat Raja's case, AIR 1967 SC 1606 and was distinguished by their Lordships in these words:

"The last portion of the passage was relied by the counsel for the respondents in support of his argument that as the order in review is merely in confirmation of the action of the State Government reasons need not be given. But the above dictum cannot be considered dissociated from the setting of the circumstances in which it was made. There it was plain as a pike-staff that the State Government had no alternative but to cancel the lease; the absence of any reasons in the order on review could not possibly leave anybody in doubt as to whether what the reasons were. As a matter of fact in the setting of facts, the reasons were so obvious that it was not necessary to set them out. There is nothing in this decision which is contrary to M. P. Industries Ltd. v. Union of India, AIR 1966 SC 671."

9. The decision in M. P. Industries Ltd., AIR 1966 SC 671 was also noticed in detail. Observations from both the minority and the majority judgments were set out by their Lordships in Bhagat Raja's case, AIR 1967 SC 1606, and the legal position was summed up in these words:

"As has already been said, when the authority whose decision is to be reviewed gives reasons for its conclusion and the reviewing authority affirms the decision for the reasons given by the lower authority, one can assume that the reviewing authority found the reasons given by the lower authority as acceptable to it, but where the lower authority itself fails to give any reason other than that the successful applicant was an old lessee and the reviewing authority does not even refer to that ground, this Court has to grope in the dark for finding into reasons for upholding or rejecting the decision of the reviewing authority. After all a tribunal which exercises judicial or quasi-judicial powers can certainly indicate its mind as to why it acts in a particular way and when important rights of parties of far reaching consequence to them are adjudicated upon in a summary fashion, without giving a personal hearing where proposals and counter-proposals are made and examined, the least can be expected is that the tribunal should tell the party why the decision is going against him in all cases where the law gives a further right of appeal."

10. It is not disputed that the orders passed by the Superintending Canal Officer under section 30-B (3) of the Act are open to scrutiny by this Court in exercise of its jurisdiction under Arts. 226

and 227 of the Constitution. As such, unless the reasons are indicated in the order, it is impossible for this Court to appreciate what weighed with the Superintending Canal Officer in making the particular order. Though I agree with Mr. Aggarwal that the order of a Superintending Canal Officer may not be as detailed as the order of a judicial officer and his order need not be in the form of a judgment of a Court of law, but at the same time when he disposes of or adjudicates upon valuable rights of the parties and is required to act judicially after hearing the parties and applying his mind to the facts placed before him, it is not only desirable but incumbent upon him to indicate the reasons for which he had taken a particular view. I also agree with Mr. Aggarwal that if the Superintending Canal Officer is in full agreement with the reasons recorded by the Divisional Canal Officer and upholds the latter's order in exercise of his revisional jurisdiction, it may not be necessary for him always to reiterate or set down those reasons but his order must at least indicate that he had adopted the reasoning of the subordinate authority or on consideration of the same accepted them as valid and sufficient to uphold the order. Coming to the case in hand, we find that by the impugned order the Superintending Canal Officer has merely rejected the revision application. He has not only failed to indicate the reasons for such rejection but has also not taken the trouble of recording that he agreed with the reasons given by the Divisional Canal Officer in the order which was the subject matter of the revision petition.

11. For all these reasons, I am of the opinion that the impugned order of the Superintending Canal Officer is no order in the eye of law, and it appears that he had not applied his mind to the facts of the case. Accordingly, I accept the petition with costs and direct the Superintending Canal Officer to re-hear the parties and dispose of the petition for revision in accordance with law. The parties are directed to appear before him on 30th May, 1968.

KSB

Petition allowed.

AIR 1969 Punjab & Haryana 4
(V 56 C 2)

S. B. CAPOOR
AND SHAMSHER BAHADUR, JJ.

Ram Chander, Petitioner v. The State of Punjab and others, Respondents.

Letters Patent Appeal No. 298 of 1966,
D/- 13-11-1967, from judgment of P. C. Pandit, J. in Civil Writ No. 2417 of 1965
D/- 9-8-1966.

FL/IL/C788/68

Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 16 (1) — Displaced Persons (Compensation and Rehabilitation) Rules, R. 34 (d) — Financial arrangement between Central Government and State Government whereunder property in compensation pool was transferred to State Government—State Government paying stipulated price — Held Central Government had power to enter into such agreement and although it was not executed in form prescribed under Art. 299 (1) of the Constitution was all the same binding on parties concerned. AIR 1954 SC 236, Rel. on; AIR 1963 Punj 405, Foll. — Further held that though Settlement Commissioner as delegate of Central Government could not after the said transaction pass any order under R. 92 (4) yet the rules promulgated by State Government itself justified the order passed by Settlement Commissioner as delegate of State Government—Civil Writ No. 2417 of 1965 D/- 9-8-1966, Reversed. (Paras 6, 8)

Cases Referred: Chronological Paras

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| (1964) Civil Writ No. 402 of 1964 (Punj), Banta Singh v. Settlement Commissioner | 4, 7 |
| (1963) AIR 1963 Punj 405 (V 50) = 65 Pun LR 674, Lajya Ram Kapur v. Union of India | 7 |
| (1962) Civil Writ No. 918 of 1962, D/- 2-3-1964 (Punj) | 7 |
| (1954) AIR 1954 SC 236 (V 41) = 1954 SCR 817, Chatturbhuj Vithaldas v. Moreshwar Parashram | 5 |

Pitam Singh Jain with N. C. Jain, for Petitioner; C. D. Dewan, for the State; D. C. Gupta (for No. 4) and M. R. Aggarwal (for No. 5), for Respondents.

SHAMSHER BAHADUR, J: This is an appeal under Clause 10 of the Letters Patent from the judgment of Pandit J. who dismissed the writ petition of Ram Chander appellant on 9th of August, 1966.

2. The facts, on which there is no dispute, are these. In village Ram Nagar of Thanesar tehsil, certain evacuee lands were put to auction. We are concerned in this appeal only with two lots; one measuring 1 acre 6 kanals and 6 marlas was sold as Lot No. 2 for Rs. 1075/- in open auction to Bhushan Chand and his brother Rulia Ram, respondents 4 and 5 respectively, on 14th May, 1963. On the same day another parcel numbered as Lots No. 4 and 5 measuring 10 acres 5 kanals and 17 marlas was sold to the same respondents for a sum of Rupees 2750/-. Objections were filed by various persons including the appellant. It seems that the objectors were required to deposit some amount before the confirmation of sales. The sales, however, were confirmed on 6th of July, 1963. The objec-

tors, including the appellant, took the matter before the Settlement Officer (Sales) who passed an elaborate and detailed order in their favour on 29th of July, 1963. This order was, however, set aside subsequently by the Settlement Commissioner, Punjab, on 11th of October, 1963, on the ground that the respondents who had been adversely affected by it had not been heard. Thereafter, two of the objectors, including the appellant, filed separate revision petitions before the Settlement Commissioner, both directed against the orders of confirmation of sales made on 6th of July, 1963. The appellant before this functionary made a statement on 4th of November, 1963, that he was prepared to make a bid of Rs. 6000/- for land covered by lots 4 and 5 which had been sold to respondents 4 and 5 for a sum of Rupees 2750/-. With regard to the other parcel of land covered by lot No. 2, he made an offer of Rs. 2,500/- against the sum of Rs. 1075/- for which it had been sold in favour of respondents 4 and 5. Earlier on 29th of July, 1963, the Settlement Officer (Sales) had also set aside the sales at the instance of the appellant who had made similar offers before him that day, though for lesser amounts, and in pursuance thereof a consolidated sum of Rs. 5,200/- had actually been deposited. The Settlement Commissioner, in his order of 4th November, 1963 (Annexure C) while holding that the higher bids of the appellant in themselves did not constitute a ground for setting aside the sales, allowed his petition for revision for the reason that material irregularity had been committed inasmuch as the notice of sale which was to be issued 15 days before the date of the sale, did not include the lands which were being put to auction and whose sale was confirmed by the Tehsildar (Sales) on 6th of July, 1963. In the words of the Settlement Commissioner:

"It is therefore, clear that at the time of publication, certain Khasra numbers were published to be auctioned which in fact did not exist... I feel that this is a material irregularity which coupled with a substantial higher initial bid of Shri Ram Chander objector, should be sufficient to hold that the sale of two lots made in favour of the respondents is liable to be set aside."

In the result, it was directed that the land should be put to re-auction and the first bids of Lot No. 2 and lots 4 and 5 were to be of Ram Chander for Rupees 2500/- and Rs. 6,000/- respectively. Should the petitioner fail to make these bids the sum of Rs. 5,200/- which had been deposited by him "shall stand forfeited".

3. Aggrieved by this order passed on 4th of November, 1963, by the Settlement Commissioner (Annexure C), respondents

4 and 5 moved this Court for the issuance of a writ of certiorari under Articles 226 and 227 of the Constitution. An assertion was made in this petition that the State Government had made certain rules for the sale of lands and these had been fully complied with. It was mentioned in sub-paragraphs (e) and (f) of paragraph 11 that the Settlement Commissioner under these rules had the power to rectify errors or mistakes and also to withhold the confirmation of sale if any material irregularity had been committed in its publication or conduct. It may be mentioned in passing that the State Government in its written reply acknowledged the existence of such rules by saying that the contents of paragraph 11 as also of sub-paragraphs were admitted. In the writ petition which kept pending in this Court for some time, Mr. D. S. Nehra, counsel for the respondent State made a statement on 29th of July, 1965, before Gurdev Singh, J. that "on reconsideration of the matter the Government have decided not to interfere in the sale of the land already made in favour of the petitioners Bhushan Chand and Rulia Ram. In view of these instructions which are reproduced in Annexure 'D', a letter from the Deputy Secretary to Punjab Government, to Mr. D. S. Nehra of 28th July, 1965, Gurdev Singh J. dismissed the petition as infructuous on 29th July, 1965. Though the appellant Ram Chander was a party in this writ petition as a respondent, he was not present at the time when the statement was made by Mr. Nehra and the order of dismissal passed by Gurdev Singh J.

4. As the sale of 6th of July, 1963, stood resuscitated in consequence of the order passed by Gurdev Singh J., Ram Chander appellant filed the present writ petition, Civil Writ No. 2417 of 1965, in this Court alleging that the dismissal of Civil Writ No. 2264 of 1963, had worked into an injustice and the order had been passed without any information to him and behind his back. Pandit J. dismissed this writ petition for two reasons, firstly, on the ground that the evacuee properties in the compensation pool having been transferred to the Punjab Government, the officials of the Central Government ceased to exercise any powers under the Displaced Persons (Compensation and Rehabilitation) Act (hereinafter called the Act) and the orders passed by the Settlement Commissioner on 4th of November, 1963, had consequently become ineffective and inoperative, the powers of this authority, as a delegate of the Central Government having ceased to exist. The second ground on which the petition has been dismissed by learned Judge is that the appellant failed to appear before Gurdev Singh J. to raise the objections which

have now been raised. So far as the first point is concerned, it is common ground that the surplus evacuee land has been acquired by the Punjab State from the Central Government under what is called a 'package deal'. In the connected writ petition of Banta Singh v. Settlement Commissioner, Civil Writ No. 402 of 1964 (Punjab), which has been heard along with this appeal, a letter from the Chief Settlement Commissioner addressed to the Secretary to Punjab Government, (Annexure R-1) of 3rd June, 1961, has been filed and there are reproduced in it the terms of this transaction. An area of about 80,000 standard acres of surplus land was sold by the Central Government to the Punjab Government at a flat rate Rs. 445/- per standard acre. Likewise, surplus rural houses, tauris, ghair mumkin land and other land, which was not fit for cultivation, were transferred to the Punjab Government on specified terms. The entire price of these properties was to be paid by the Punjab Government within a period of three years commencing from the 1st of April, 1961, in half-yearly instalments. The 'package deal' was described in an affidavit filed by the Deputy Secretary to Punjab Government as a financial arrangement between the two Governments inter se about the disposal of the acquired evacuee properties, for which no instrument of conveyance under Article 299 of the Constitution has been drawn up. It is not disputed that a considerable amount as the stipulated price of this property has been paid by the Punjab Government in six half-yearly instalments as contemplated in the agreement.

5. The learned Single Judge having taken the view that the package deal divested the Central Government and its officers of any authority over lands which had been transferred to the Punjab State has found that the orders of the Settlement authorities as delegates of the Government of India on which reliance has been placed by the appellant are no longer binding or operative. Mr. Jain, on the other hand, submits that no instrument of conveyance having been executed under Article 299 (1) of the Constitution and the package deal being only a financial arrangement the provisions of the Act continued to apply. It is to be observed that sub-section (1) of section 16 of the Act empowers the Central Government to "take such measures as it considers necessary or expedient for the custody, management and disposal of the compensation pool in order that it may be effectively utilised in accordance with the provisions of this Act". In the Displaced Persons (Compensation and Rehabilitation) Rules there is a provision for transfer of properties in R. 34 and the date

for each transfer is to be reckoned as provided for in the four sub-clauses. The relevant provision for our purposes is sub-clause (d) which says that:

"Where any property is transferred to any person under this chapter, the property shall be deemed to have been transferred to him:

- (a)
- (b)
- (c)

(d) in any other case, from such date as the Central Government may, by general or special order, specify."

Under this provision it seems to us that the Central Government is competent to make a disposal or transference of the properties under the compensation pool in whatever manner it feels disposed and from the contents of the letter of 3rd of June, 1961, there seems to be no doubt that the Punjab Government had been made an owner of the evacuee properties and it does not seem to be disputed that the price of these properties had been paid off by April, 1963. It is futile in the circumstances to urge that Article 299 (1) of the Constitution, by which "all contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor . . . and . . . shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise", puts the transaction of 1961 outside the pale of consideration as the constitutional instrument had not been executed in due form. The transference was made under the statute itself, this being the Displaced Persons (Compensation and Rehabilitation) Act, 1954, and it seems to us that the provisions of Article 299 (1) would not be applicable in a transaction of this nature. In *Chatturbhuj Vithaldas v. Moreswar Parashram*, AIR 1954 SC 236, Mr. Justice Bose, speaking for the Court, observed that:

"The provisions of Article 299 (1) were not inserted for the sake of mere form. They are there to safeguard Government against unauthorised contracts. If in fact a contract is unauthorised or in excess of authority it is right that Government should be safeguarded. On the other hand, an officer entering into a contract on behalf of Government can always safeguard himself by having recourse to the proper form. In between is a large class of contracts probably by far the greatest in numbers, which though authorised are for one reason or other not in proper form. It is only right that an innocent contracting party should not suffer because of this and if there is no other defect or objection Government will always accept the responsibility."

6. What is true of contracts between Government and individuals also holds good in the case of the present contract which was between the Central Government and the State of Punjab. The details of the transaction of transfer had been settled between the two Governments and these conditions set out in detail in the letter of 1961 have been fulfilled and the transaction completed. It has not been disputed that the entire amount due to the Central Government has been paid and it would be pointless in such a situation to contend that the transfer, not having been executed in the form envisaged in Article 299 (1) becomes void and inoperative altogether. As Mr. Justice Bose observed, the provisions of Article 299 (1) are meant to safeguard the interests of the Government and there can be contracts which though not executed in the form contemplated in Article 299 (1) are all the same binding on the parties concerned. In our view, therefore, the package deal put an end to the ownership of the Central Government of the properties comprised in the compensation pool and the State Government thereafter had full authority to dispose them.

7. I had occasion to deal with this question sitting singly in *Lajja Ram Kapur v. Union of India*, AIR 1963 Punjab 405, and was of the view that the 'package deal' as a result of the memorandum of 10th March, 1961, resulted in a transfer of the properties in the compensation pool from the Central Government to the State Government. *Narula J.*, in the referring order in Civil Writ No. 402 of 1964 (Punjab), which is being heard with this case, made reference to an unreported judgment of *D. K. Mahajan J.* of 2nd March, 1964, in Civil Writ No. 918 of 1962 (Punjab). No definite conclusion was reached by the learned Judge on this aspect of the case and it was said that the State Government having denied that the property had ceased to vest in the Central Government the question for determination did not arise. In this appeal, as well as in the connected writ petition, the existence of the 'package deal' has been admitted before us and all that is said on behalf of the Union of India and the State Government is that the legal consequences of this transfer do not justify the contention which has been raised that the orders passed by the authorities as delegates of the Central Government are not binding and operative. In our opinion, the package deal has the effect of transferring the property from the Central Government to the Punjab State and the logical result which flows from it is that the Settlement authorities as delegates of the Central Government could not pass any orders under the Act.

8. It follows, therefore, that though the order was passed by the Settlement Commissioner under the Act as a delegate of the Central Government, its validity would not be affected if it had been in contemplation of the Rules framed by the State Government governing such sales. As has been pointed out earlier, respondents 4 and 5 in Civil Writ No. 2264 of 1963 had themselves stated in subparagraphs (e) and (f) of paragraph 11 of the petition that the State Government had made certain rules for the sale of lands and the existence of these rules was impliedly admitted as the State Government had admitted the contents of this paragraph. It follows therefore, that the rules contemplated that the sale could be set aside if the authority concerned found, as has been done in the present instance, that the subject-matter of the sale was not actually included in the notice of sale. Mr. Jain is, therefore, right in his submission that though after the package deal, clause (4) of rule 92 of the Displaced Persons (Compensation and Rehabilitation) Rules, empowering the Settlement Commissioner to set aside any sale if he is satisfied that any material irregularity or fraud in the conduct of sale has resulted in substantial injury to any person, stood abrogated, yet the rules promulgated by the Punjab Government itself in respect of such sales justify the order which has been passed in favour of the appellant by the Settlement Commissioner as a delegate of the State Government.

9. The question still remains whether the appellant could challenge the order passed by Gurdev Singh J. on 29th of July, 1965, dismissing the writ petition of respondents 4 and 5 as infructuous? It seems plain to us that the appellant having got the sale set aside and the sum of Rs. 5,200/- paid by him in pursuance of his own higher bids still remaining in deposit with the Government, is and always had been vitally interested in the result of the petition filed by respondents 4 and 5. It is stated at the Bar that the appellant was represented by late Mr. Shamair Chand who at the time of hearing was not well enough to be present in Court, when the case was taken up immediately after the instructions which had been received by Mr. Nehra a day earlier from the Government. The Government seems to have adopted a policy of non-interference with the sales which had already taken place and in furtherance of that policy instructed the counsel to submit to the Court that they would not object to the sale in favour of respondents 4 and 5 being upheld. In the setting and background of this case, we consider that it would be an act of manifest injustice if the sale

is allowed to stand merely on the ground that the appellant failed to put an appearance before Gurdev Singh J. In our view, the appellant has made good his case to have the sale of 6th of July, 1963, in favour of respondents 4 and 5 set aside, and we would accordingly, allow this appeal and direct that the authorities concerned should re-auction the properties in accordance with the directions which had been given in the impugned order of the Settlement Commissioner (Annexure C) passed on 4th of November, 1963. In the circumstances, there would be no order as to costs of this appeal.

10. S. B. CAPOOR, J.: I agree.
RSK/D.V.C. Appeal allowed.

AIR 1969 Punjab & Haryana 8
(V 56 C 3)

MEHAR SINGH C. J. AND
SHAMSHER BAHADUR, J.

R. N. Oswal Hosiery and Mahabir Woollen Mills, Ludhiana, Applicant v. Commissioner of Income Tax, Punjab, Patiala, Respondent.

Income Tax Ref. No. 3 of 1964, D/- 28-3-1968.

Income Tax Act (1922), S. 66 (1) — Two firms having same partners and identical shares — If the businesses are separate they can be assessed as different units. (1946) 14 ITR 272 (Bom), Diss. from.

There is nothing in law to preclude common partners constituting two separate firms for the purpose of the Income-tax Act. Whether there are two firms or only one firm is a question of fact which can only be determined by the Tribunal itself giving emphasis on the nature of the two businesses of which the same set of partners constituted different firms. If there are two separate businesses by the two firms composed of the same partners having identical shares they are two different assessable units, and can be assessed distinctly. AIR 1929 Cal 753 (SB) & AIR 1950 Bom 198 and (1955) 28 ITR 454 (Bom), Rel. on; (1946) 14 ITR 272 (Bom), Diss. from.

(Para 7)

Cases Referred: Chronological Paras
(1955) 1955-28 ITR 454 (Bom),

Jeshingbhai Ujamshi v. Commr. of Income Tax, Bombay 7, 8

(1953) AIR 1953 SC 455 (V 40) =
1953-24 ITR 405, Commr. of Income Tax, West Bengal v. A. W. Figgis and Co. 7

(1950) AIR 1950 Bom 198 (V 37) =
1950-18 ITR 23, Jeshingbhai Ujamshi v. Commr. of Income Tax, Bombay
Mofussil 7, 8

(1946) 1946-14 ITR 272 (Bom),
 Vissonji Sons and Co. v. Commr.
 of Income Tax, Central 6, 7, 8
 (1931) 5 ITC 334 (Lah), Krishna
 Ginning and Pressing Factory v.
 Commr. of Income Tax, Punjab 7
 (1929) AIR 1929 Cal 753 (V 16) =
 50 Cal LJ 300 (SB), In re, Martin
 and Co. 6, 7, 8
 Bhagirath Dass with B. K. Jhington,
 for Applicant; D. N. Awasthy with
 Ramesh Chand for B. S. Gupta, for Res-
 pondent.

SHAMSHER BAHADUR, J.: The ques-
 tions which fall for determination in the
 reference made to this Court under sub-
 section (1) of S. 66 of the Indian Income-
 tax Act, 1922 (hereinafter called the Act)
 are these:

"(1) Whether two partnership firms
 having common partners and identical
 shares are as a matter of law one?"

(2) If yes, whether the income earned
 by such two firms is to be assessed col-
 lectively?"

The first question as framed is mani-
 festly one of law and not dependent on
 the facts but it would be necessary to
 have a background of the circumstances
 in which the reference at the instance
 of the applicant has been made by the
 Income-tax Appellate Tribunal, Delhi.

2. The assessments in respect of which
 appeals were pending before the Income-
 tax Appellate Tribunal relate to 1958-59
 and 1959-60, the previous years ending
 with 31st March, 1958 and 31st of March,
 1959, respectively. The applicant is R. N.
 Oswal Hosiery and Mahabir Woollen
 Mills, Ludhiana, which formed itself into
 a partnership under a document of 6th
 of April, 1953, consisting of five part-
 ners, each entitled to one-fifth share.
 Another partnership consisting of the
 same five partners with the same shares
 was formed under an earlier partnership-
 deed of 7th of January, 1953, with the
 name and style of Messrs. Mahabir
 Woollen Mills, also at Ludhiana. Since
 6th of April, 1953, the five persons have
 continued to remain as partners in both
 the firms. The nature of business of the
 two firms is somewhat different. Where-
 as the firm of R. N. Oswal Hosiery car-
 ries on the business of manufacture and
 sale of hosiery goods, Mahabir Woollen
 Mills carried on the business of manu-
 facture and sale of R. D. Woollen yarn.
 The two firms were registered separate-
 ly upto the assessment year 1957-58. Both
 these firms were assessed separately up-
 till the assessment year 1958-59 when the
 Income-tax Officer for the first time
 came to the conclusion that there being
 common partners of both the firms, the
 two units constituted one assessable entity
 for purposes of income-tax.

3. The assessment was made on the
 same basis in respect of the assessment

year 1959-60. It followed as a matter of
 consequence that the renewal applica-
 tions of the two firms for registration
 were declined as the assessing authori-
 ties considered these firms to be consti-
 tuting one unit only. These matters gave
 rise to four appeals, two with regard
 to the assessment orders for the years
 1958-59 and 1959-60 with which we are
 concerned, and the remaining two with
 the refusal of the authorities to renew
 registrations. The appeals were disposed
 of by a common order in favour of the
 applicant-assessee by the Appellate
 Assistant Commissioner on 16th of Fe-
 bruary, 1962. The Income-tax Appellate
 Tribunal in the appeals preferred by the
 Revenue passed an order on 6th of Febru-
 ary, 1963, by which the orders of the
 Income-tax Officer were restored and
 those of the Appellate Assistant Commis-
 sioner set aside. The order of the Appel-
 late Tribunal raises, inter alia, the abstr-
 act proposition of law which is formu-
 lated as the first question to be answer-
 ed in this reference in the statement of
 the case of 6th of September, 1963.

4. It has been contended by Mr. Bha-
 girath Dass, the learned counsel for the
 assessee, that the firms constituted by
 different partnership deeds are separate
 assessable units. Though we are not con-
 cerned with the factual details it may be
 recapitulated, as stated in the order of
 the Appellate Tribunal, that the firms
 had separate factories situated three miles
 apart; there were no common over-head
 expenses; there was no common staff;
 there were separate bank accounts and the
 nature of business of the two firms was
 different. On behalf of the Revenue, a
 pure question of law was raised that two
 partnerships having common partners and
 identical shares constituted in the eye of
 law one unit and the income earned by
 them has to be assessed collectively. Con-
 sidering this proposition of law to
 be sound, the Tribunal on basis of
 a judgment of the Bombay High Court,
 upheld the claim of the Department. It
 was only as an alternative argument that
 it was urged by the Revenue before the
 Appellate Tribunal that "there is ample
 evidence on record to prove to the hilt
 that at least both the firms in the present
 case are one as a matter of fact." It has
 to be reiterated that the alternative argu-
 ment presented before the Appellate Tri-
 bunal has not been referred to us as a
 question on which the opinion of this
 Court is invited.

5. For answering the first question in
 the reference, which is the abstract legal
 proposition with which alone we are con-
 cerned in this reference, some provisions
 of the Act may be noted. "Assessee",
 under sub-section (2) of section 2 has
 been defined to mean "a person by

whom income-tax or any other sum of money is payable under this Act, and includes every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or of the loss sustained by him or of the amount of refund due to him". Sub-section (6B) of the same section defines 'firm', 'partner' and 'partnership' to have the same meaning respectively as in the Indian Partnership Act, 1932. A 'person' under sub-section (9) of section 2 is defined to include a Hindu undivided family and local authority. Section 3 of the Act is the charging section which says:

"Where any Central Act enacts that income-tax shall be charged for any year at any rate or rates tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year of every individual Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or members of the association individually."

Pausing for a moment to see the impact of these definitions on the problem to be resolved by us, it would be noted that though a 'firm' has generally to be given the meaning assigned to it in the Indian Partnership Act, all the same it would be an 'assessee' under sub-section (2) of section 2 with all the incidents of this term, if in fact the tax is payable by it as such and in respect of which proceedings can be taken for assessment under the Act. The last clause in the charging section, which is independent of the other provisions, refers every firm or the partners of it as assessable units. It is in this background that the mechanics of assessment of a firm under sub-section (5) of section 23 is to be viewed. Clauses (a) and (b) of sub-section (5) give details of the mode of assessment of registered and unregistered firms and as observed in the Law and Practice of Income Tax by Kanga and Palkhivala, (1958 edition) Volume I, at page 566, the effect of the amendments after 1956 is this:

"Income-tax at specially low rates is now assessable on a registered firm, though no super-tax is at all assessable on it. The partners of a registered firm are liable, as before 1956, to be charged in their individual assessments to both income-tax and super-tax in respect of their shares of the firm's profits. So there is double taxation, in the case of a registered firm, so far as income-tax (but not super-tax) is concerned, and partial relief against such double taxation is afforded by section 14 (2) (aa).

When an unregistered firm is assessed as a unit, the rates of tax applicable

may be higher than those which would be applicable to the total income of a partner, inclusive of his share of the firm's profits, but a partner would not be entitled to any refund of the tax paid by the firm at the higher rates. The reason is that an unregistered firm is a distinct assessable entity for the purposes of the Act and pays the tax in discharge of its own liability and not on behalf of its partners."

Thus, both the firm and its individual partners are assessable separately under section 3 of the Act. In both the Finance Acts of 1958 and 1959 paragraph D deals with the rates of income-tax which are payable in the case of every registered firm. On the first forty thousands of total income there is no income-tax and on the next 35,000/- it is at the rate of 5% and on the next 75,000/- of total income the rate of income-tax is at the rate of 6 p.c. and so on. The point to be emphasised is that the firm as distinct from its partners, under the Act is made a unit of assessment.

6. The case of the Department is based fundamentally on the observations made by Sir John Beaumont, Chief Justice (Chagla J. concurring) in *Vissonji Sons and Co. v. Commissioner of Income-tax, Central*, (1946) 14 ITR 272 (Bom). The proposition to which the learned Chief Justice subscribed was thus stated:

"In law a firm has no existence independently of its partners, and if there are two firms consisting of exactly the same partners, the real position in law is that there is only one firm. It may carry on separate businesses, and may carry on those businesses in different names but in fact there is only one firm in law."

It appears that the earlier observations of a Special Bench of Chief Justice Rankin, Ghose and Buckland JJ. in *In re, Martin and Co.*, AIR 1929 Cal 753 (SB) were not brought to the notice of this Bench. In remitting the case to the Commissioner of Income-tax, it was observed by Chief Justice Rankin in the short judgment delivered by the Bench thus:

"In remitting the case to the Commissioner, I would point out not by way of deciding this case but entirely for the guidance of the Commissioner that this case may ultimately have to be decided upon findings which do not at present appear in the case stated. The proposition that the same persons in the same shares cannot for income-tax purposes be partners of two entirely separate firms is a highly abstract proposition. It may or may not be correct but I am not prepared as at present advised to proceed upon so very general a principle without a careful enquiry into the concrete case and into the matters above mentioned."

In the last analysis, according to Chief Justice Rankin, the matter whether the two businesses of the same set of partners are two separate units or one, is one essentially of fact, and not of abstract legal theory.

7. That in Partnership Law a firm has no legal existence apart from its partners and is merely a compendious name to describe its partners, is a well-known proposition and was reiterated by the Supreme Court in *Commissioner of Income-tax, West Bengal v. A. W. Figgis and Company*, (1953) 24 ITR 405, at page 409 : (AIR 1953 SC 455 at p. 456). Mahajan J. (later, Chief Justice Mahajan) observed in the judgment after stating this position:

"But under the Income-tax Act the position is somewhat different. A firm can be charged as a distinct assessable entity as distinct from its partners who can also be assessed individually."

For this conclusion, the learned Judge relied on section 3, which was the charging section, where also the last clause is "...and of every firm and other association of persons or the partners of the firm or the members of the association individually". On an interpretation of this section, Mr. Justice Mahajan observed at page 409 (of ITR) = (at p. 456 of AIR):

"The partners of the firm are distinct assessable entities, while the firm as such is a separate and distinct unit for purposes of assessment."

A Bench of Chief Justice Chagla and Tendolkar J. in *Jesingbhai Ujamshi v. Commissioner of Income-tax, Bombay Mofussil*, (1950) 18 ITR 23 : (AIR 1950 Bom 198) took a different view from the one adopted in (1946) 14 ITR 272 (Bom). In this judgment, Chief Justice Chagla questioned the validity of the general proposition laid down by Sir John Beaumont in (1946) 14 ITR 272 (Bom) in these words:

"With great respect to the learned Chief Justice, the actual question that he had to consider in that reference was whether a certain item which the assessee claimed as a bad debt was a bad debt or not, and the learned Chief Justice disposed of that reference by coming to the conclusion that this question was really a question of fact and the only question of law that arose was whether there was sufficient evidence to justify the finding of fact by the Tribunal."

The particular observation, to which reference has been made, according to Chief Justice Chagla, was a mere obiter. After discussing the *Calcutta* case in AIR 1929 Cal 753, and also a decision of the Lahore High Court in *Krishna Ginning and Pressing Factory v. Commissioner of Income-tax, Punjab*, (1931) 5 ITC 334

(Lah), Chief Justice Chagla reached the following conclusion:

"Therefore, we disagree with the Tribunal in the view it has taken of the law and we are of the opinion, that there is nothing in law to preclude common partners constituting two separate firms for the purpose of the Income-tax Act. Whether there are two firms or only one firm is a question of fact which can only be determined by the Tribunal itself."

The emphasis, according to Chief Justice Chagla, was to be on the nature of the two businesses of which the same set of partners constituted different firms, and this is apparent from the question which the Bench reformulated for the decision of the Tribunal, this being:

"Whether in law common partners can constitute two separate firms in respect of different businesses carried on by these partners for the purpose of the Indian Income-tax Act?"

The same Bench of Chief Justice Chagla and Tendolkar J. reaffirmed the same legal position in *Jeshingbhai Ujamshi v. Commissioner of Income-tax, Bombay*, (1955) 28 ITR 454 (Bom). Here again the reference was necessitated according to Chief Justice Chagla, by a misapprehension on the part of the Tribunal as to the law which was laid down in (1950) 18 I. T. R. 23 (Bom). The Tribunal had been repeating the view of Chief Justice Beaumont in (1946) 14 I. T. R. 272 (Bom), that if the partners are common there can only be one firm and in coming to that conclusion they had applied the principle of ordinary civil law. Chief Justice Chagla was at pains to point out that a firm was a taxable unit under the Income-tax Act, while it was not so under the ordinary civil law. Whether the business was one or separate was a question of fact which could only be determined by the Tribunal after taking into consideration all the relevant materials. If there were two separate businesses by the two firms composed of the same partners having identical shares they were two different assessable units.

The Appellate Tribunal, in the instant case, has also taken the view that no question of there being two businesses can arise if the owner of the two businesses is the same. This was the very proposition of law on which an eminent judge like Sir George Rankin had expressed doubt and two successive Benches of the Bombay High Court had agreed with him. The view taken by Sir John Beaumont in (1946) 14 I. T. R. 272 (Bom) must be regarded as solitary because Chagla J., who concurred with him in that case has so emphatically taken a totally different line in (1950) 18 I. T. R. 23 : (AIR 1950 Bom 198) and (1955) 28 I. T. R. 454 (Bom). Whether there is

interlacing or interlocking between the two firms would be a matter for decision when the question of fact comes for adjudication before the Tribunal. At the moment, we are concerned with the purely legal proposition whether the same set of partners of two different firms can ever form two different units?

8. On a consideration of the authorities, we are of the opinion that the view taken in AIR 1929 Cal 753, (1950) 18 I. T. R. 23 : (AIR 1950 Bom 198) and (1955) 28 I. T. R. 454 (Bom) is more in consonance with the provisions of the Act than the one adopted by the Division Bench of the Bombay High Court in (1946) 14 I. T. R. 272 (Bom). In the result, we would answer this question in the negative in favour of the assessee. The second question in consequence does not arise. The assessee would be entitled to get costs of this reference.

9. MEHAR SINGH, C. J.: I agree.

BNP/D.V.C.

Reference answered in negative.

AIR 1969 Punjab & Haryana 12 (V 56 C 4)

D. K. MAHAJAN
AND P. C. PANDIT, JJ.

Shri Laxmi Cotton Traders Pvt. Ltd.,
Petitioner v. State of Haryana and
others, Respondents.

Civil Writ No. 311 of 1968, D/- 17-5-1968.

(A) Sales Tax — Punjab General Sales Tax (Haryana Amendment and Validation) Act (President's Act No. 14 of 1967), section 6 — Act amending Punjab General Sales Tax Act (46 of 1948), has retrospective effect in territory comprising Haryana State prior to its existence and is not ultra vires—Constitution of India, Art. 246—State can enact law retrospectively covering period prior to coming into existence.

The State legislature is free to enact laws which would have retrospective operation. Its competence to make a law for a certain past period, depends on its present legislative power and not on what it possessed at the period of time when its enactment is to have operation. The Punjab General Sales Tax (Haryana Amendment and Validation) Act (14 of 1967) amending the Punjab General Sales Tax Act (46 of 1948), as amended by Central Sales Tax Act (74 of 1956) has a retrospective effect in State of Haryana for a period even prior to its coming into existence and is validly enacted and not ultra vires. Case Law Discussed. (Paras 7, 8)

(B) Punjab Reorganisation Act (31 of 1966), Ss. 88, 89 — S. 88 deals with territorial extent while S. 89 deals with

power of adaptation—No provision in the Act forbids passing of laws retrospective-ly.

There is no provision in the Act which specifically prohibits the inherent power in a State Legislature to enact laws retrospectively for its territories. Section 88 merely deals with the territorial extent of laws. It makes the old Punjab law as the law of the new States or territories till it is otherwise altered by the competent Legislatures. Section 89 merely gives the power of adaptation and does not forbid the passing of laws retrospectively by any of the States for its territories.

(Para 10)

(C) Constitution of India, Art. 14 — Discrimination — Old Punjab State divided into Punjab, Haryana, etc. — Haryana State amending Punjab General Sales Tax Act (46 of 1948) by Punjab General Sales Tax (Haryana Amendment and Validation) Act, 14 of 1967 to operate retrospectively in its territory for period prior to formation of Haryana State — Other territories of old Punjab State not passing similar amendments — There is no violation of Art. 14 so far Haryana State is concerned, as law in Haryana is uniform.

(Para 9)

(D) Sales Tax — Punjab General Sales Tax (Haryana Amendment and Validation) Act (President's Act No. 14 of 1967), S. 6—Central Sales Tax Act (74 of 1956), Ss. 14, 15 — Old Punjab State divided into Punjab, Haryana, etc. — Haryana State amending Punjab General Sales Tax Act (46 of 1948) retrospectively — Amendment has the effect of taxing "declared goods" twice — If any person is taxed twice he can get a relief but it does not make the amending Act bad— It is only second levy that is bad (Obiter).

(Paras 12, 13)

(E) Constitution of India, Preamble Arts. 14, 245—Constitutionality of Statute is presumed — One who challenges it must discharge the burden. AIR 1958 SC 538, Rel. on. (Para 16)

(F) Sales Tax—Punjab General Sales Tax (Haryana Amendment and Validation) Act (President's Act No. 14 of 1967), S. 6 — Defect in parent Act 46 of 1948 pointed out by Supreme Court is removed by Haryana Amendment and Validation Act, 14 of 1967 — It is impossible to make law that can cover all conceivable possibilities — If there is double levy the second levy is void but not the law.

Defect that no stage for levy of tax was fixed in the Punjab Act 46 of 1948 as noted by the Supreme Court in AIR 1967 SC 1616 has been removed by the Haryana Amending Act (14 of 1967). In a business transaction, in spite of fixing a stage, there can occur cases where the stage may be repeated a second time, for

instance, by the intervention of a non-registered dealer. In such cases, the second levy can always be struck down. From the mere fact, that a second illegal levy is struck down or is not justified, a conclusion does not necessarily follow that the Act is bad.

All that the Central law requires is that a stage must be fixed for the levy of the tax, the reason being that the tax should be levied at one point. The State law does fix the point. But in human affairs, it is next to impossible to make a law which will conceive of all possible and imaginable possibilities and it will be too much to strike down a law because it has not taken into account all such imaginable possibilities. The contention that the Act is bad because it has failed to fix a specific point of taxation regarding declared goods cannot be accepted. If a case occurs, where a double levy has been made, the Court will readily strike down the other levy.

(Para 16)

(G) Sales Tax — Punjab General Sales Tax Act (46 of 1948 as amended by Haryana Amendment Act 14 of 1967) Sch. D—Constitution of India, Arts. 301, 304 (a) — Cotton imported in Haryana taxed at stage of first sale — Cotton purchased in State taxed at stage of first purchase. — There is no discrimination in the levy on imported cotton and cotton produced in State.

Article 301 provides that trade, commerce and intercourse within the territory of India would be free, but it would be subject to the other provisions of Part XIII. It is by virtue of Article 304 that the State legislature is authorised to impose on goods imported from other States a tax to which similar goods in that State were subject and the only limitation imposed on this power of the State legislature is that by imposing the tax, it should not make any discrimination between the imported and the locally produced goods. Article 304 does not require that similar or same tax should be imposed on the imported and the local goods. If purchase tax had been levied on the local goods, it is not necessary that only purchase tax could be imposed on the imported cotton. According to Schedule 'D', on the imported cotton, the tax has to be levied on the first sale of those goods in the State of Haryana and on the local cotton, the tax has to be levied on the first purchase in the State of Haryana. It means that when the imported cotton reaches the State of Haryana, it should be treated as if it had been produced in the State of Haryana. It is only then that it would be said that they were being treated alike. The importer of the outside cotton should be treated at par with the producer of the local

cotton. When the imported cotton is sold in the State of Haryana, the tax would be levied on the sale price thereof. Similarly when the local goods are purchased for the first time in the State of Haryana, the tax would be levied on the purchase price which obviously is the first sale price. That being so, in both types of goods, tax has to be levied on the first sale price of the goods in the State of Haryana. There is thus no discrimination whatsoever between the two types of cotton and there cannot be any difference in the quantum of tax imposed on them. AIR 1963 SC 928, Disting.

(Para 18)

(H) Sales Tax—Punjab General Sales Tax Act (46 of 1948 as amended by Haryana Amendment and Validating Act 14 of 1967), S. 11AA — Central Sales Tax Act (74 of 1956), S. 15 — Option given to assessee to reopen cases which were struck down by Supreme Court decision, AIR 1967 SC 1616 — Option is not illegal.

Section 11AA added by the Haryana Amendment and Validation Act to the parent Act is an enabling provision. There is no option with the Department not to reopen each and every assessment which is contrary to the Supreme Court decision, AIR 1967 SC 1616. They will, under the law, reopen the assessment. The option is only to the assessee and totally for his benefit. He may forbid the reopening of the assessment, the moment a notice in that behalf is served on him, by saying that he does not wish it to be reopened. Such a provision, which merely favours the assessee, cannot be said to be, in any manner, illegal. The provision cannot be attacked on the ground of its being not in consonance with S. 15 of the Central Act.

(Para 21)

(I) Sales Tax — Central Sales Tax Act (74 of 1956). Pre. — Act is not ultra vires — C. A. No. 763 of 1967, D/- 18-4-1968 (SC), Rel. on. (1967) 20 S. T. C. 150 (Mad) held overruled by C. A. No. 763 of 1967, D/- 18-4-1968 (SC); AIR 1962 Andh Pra 204 held approved by C. A. No. 763 of 1967 D/- 18-4-1968 (SC).

(Para 23)

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 Phillips v. Eyre 7

H. L. Sibal, Senior Advocate with
 R. N. Narula and C. D. Garg, for Peti-
 tioner; Anand Swarup Advocate General

(Haryana) with J. C. Verma and C. D.
 Dewan, Dy. Advocate General (Haryana),
 for Respondents.

MAHAJAN, J: This is a petition under
 Articles 226 and 227 of the Constitution
 of India. In this petition, the validity
 of certain provisions of the Punjab
 General Sales Tax Act, 1948 (herein-
 after called the Act), as amended by
 Punjab General Sales Tax (Haryana
 Amendment and Validation) Act, 1967
 (hereinafter called the Amendment Act) is
 called in question.

2. The petitioner is a Private Limited
 Company and carries on business of pur-
 chase and sale of cotton at Hansi. Prior
 to the 1st of November, 1966, Hansi was
 part of Punjab State (hereinafter refer-
 red to as the Old Punjab). After the re-
 organisation of the Punjab by the Pun-
 jab Reorganisation Act, 1966 (Act No. 31
 of 1966) from the appointed day, that is
 the 1st of November, 1966, the territory
 of the Old Punjab was divided to form
 the State of Haryana, the Union Terri-
 tory of Chandigarh, the State of Punjab
 (New Punjab) and part of the territories
 were transferred to Himachal Pradesh.

3. The Reorganization Act, in S. 2,
 defines 'Old Punjab' as existing State of
 Punjab, namely the State of Punjab as
 it existed immediately before the ap-
 pointed day. The new State of Punjab
 is defined in section 2 (1) as the State
 with the same name, comprising the
 territories referred to in sub-section (1)
 of section 6. 'Successor State' in S. 2
 (m), in relation to the existing State of
 Punjab, means the State of Punjab or
 Haryana, and includes also the Union in
 relation to the Union Territory of Chan-
 digarh and the transferred territory. Sec-
 tion 2 (n) defines 'transferred territory'
 as the territory which, on the appointed
 day, is transferred from the existing
 State of Punjab to the Union territory
 of Himachal Pradesh.

4. Right up to the appointed date,
 the petitioner was governed by the
 parent Act (Punjab General Sales Tax
 Act, 1948, as amended up to date). He
 was and even now is a registered dealer.
 Before the Reorganization Act, the peti-
 tioner was liable to pay tax on his turn-
 over under the parent Act. It may be
 mentioned that in the present petition,
 we are only concerned with the sale or
 purchase of declared goods within the
 meaning of section 2 (c) of the Central
 Sales Tax Act, 1956 (Act No. 74 of
 1956). These goods are specified in
 schedule 'C' to the parent Act. In the
 instant case, we are only concerned with
 the sale or purchase of cotton which is
 a declared goods and on this, there is no
 dispute. The main provisions relating to
 the purchase of declared goods under the
 principal Act were sections 2 (ff), 2 (i),
 5 (1) and 5 (2). The Supreme Court in:

Bhawani Cotton Mills Ltd. v. State of Punjab (1967) 20 S. T. C. 290 : (AIR 1967 SC 1616 declared the levy of tax on the purchase of cotton to be ultra vires for want of prescribing a single stage for the levy of such a tax. By reason of this decision, all levies and collection of tax on the purchase of cotton from 1-4-1960 became unlawful. For facility of reference, I have taken the liberty of quoting from the High Court decision the brief history of the legislation which led to the dispute which was settled by the Supreme Court in the aforesaid case:

"..... In the Schedule attached to the principal Act, as it stood before 1958, which exempted certain commodities from sales tax, ginned or unginned cotton was included as item No. 29. In the year 1958 by the East Punjab General Sales Tax (Amendment) Act, 1958, (Punjab Act 7 of 1958), item No. 29 was deleted from the Schedule with the result that cotton (ginned or unginned) became liable to the levy of sales tax. The definition of the word 'purchase' was introduced for the first time by Punjab Act 7 of 1958 in section 2 of the principal Act. According to this definition "2 (ff) 'Purchase', with all its grammatical or cognate expressions, means the acquisition of goods other than sugarcane, foodgrains and pulses for use in the manufacture of goods for sale for cash or deferred payment or other valuable consideration otherwise than under a mortgage, hypothecation, charge or pledge: * * * * *

By Punjab Act 13 of 1959, the words 'other than sugarcane, foodgrains and pulses' were omitted. "After the amendment made by Punjab Act 24 of 1959, clause (ff) stood as follows:—

"(ff) 'Purchase' with all its grammatical or cognate expressions, means the acquisition of goods specified in Schedule C for use in the manufacture of goods for sale for cash or deferred payment or other valuable consideration otherwise than under a mortgage, hypothecation, charge or pledge."

The rate of tax as provided by the Punjab Act 7 of 1958 was 4 per cent on the sales or purchases of the commodities. The Central Sales Tax Act, 1956, was enacted in December, 1956. Section 14 of that Act declared a number of goods to be of special importance in inter-State trade or commerce. One of these was 'cotton', that is to say, all kinds of cotton (indigenous or imported) in its manufactured state, whether ginned or unginned, baled, pressed or otherwise, but not including cotton waste. Section 15, as amended by the Central Act 31 of 1958, provides—

"15.—Every sales tax law of a State shall, in so far as it imposes or authorises

the imposition of, a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions: namely:

(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed two per cent of the sale or purchase price thereof, and such tax shall not be levied at more than one stage;

(b) where a tax has been levied under that law in respect of the sale or purchase inside the State of any declared goods and such goods are sold in the course of inter-State trade or commerce, the tax so levied shall be refunded to such person in such manner and subject to such conditions as may be provided in any law in force in that State."

"As Punjab Act 7 of 1958 levied both purchase and sales tax on the same commodity at the rate of four per cent and at more than one stage in the State its vires was assailed by means of a writ petition which was decided by a Bench of this Court, the decision being reported as Raghbir Chand Som Chand v. Excise & Taxation Officer, (1960) 11 S. T. C. 149 (Punj). It was held, inter alia, that the dealers in cotton were only liable to pay tax not exceeding two per cent on sales effected inside the State and they were not liable to pay any tax at all when they exported their goods and effected sales outside the State. The State Legislature then enacted the Punjab General Sales Tax (Amendment and Validation) Act, 1960 (Punjab Act 17 of 1960). It is unnecessary to mention the amendments made by this Act because it was repealed and replaced by the Punjab General Sales Tax (Amendment and Validation) Repealing Act, 1961 (Punjab Act 28 of 1961). Yet another Act, the Punjab General Sales Tax (Amendment) Act, 1960 (Punjab Act 18 of 1960) was enacted which changed the definition of the word 'purchase'. The definition as altered reads as follows.

"2. (ff) 'Purchase' with all its grammatical or cognate expressions, means the acquisition of goods specified in Schedule C for cash or deferred payment or other valuable consideration otherwise than under a mortgage, hypothecation, charge or pledge."

By the same Act, the second proviso to section 5 (1) of the principal Act was inserted to the effect that 'the rate of tax shall not exceed two naye paise in a rupee in respect of any declared goods as defined in clause (c) of section 2 of the Central Sales Tax Act, 1956, and such tax shall not be levied on the purchase or sale of such goods at more than one stage.'

Sub-clause (vi) of section 5 (2) (a) of the principal Act, as substituted by Punjab Act 18 of 1960, stands thus—

"(vi) the purchase of goods which are sold not later than six months after the close of the year, to a registered dealer, or in the course of inter-State trade or commerce, or in the course of export out of the territory of India:

Provided that in the case of such a sale to a registered dealer, a declaration in the prescribed form and duly filled and signed by the registered dealer to whom the goods are sold, is furnished by the dealer claiming deduction.

xx xx xx xx "

The relevant provisions of the Act noticed above along with their subsequent amendments have been made an appendix to this decision for facility of reference and for the proper understanding of our decision. The Supreme Court on the 10th of April, 1967, decided *Bhawani Cotton Mills' Case*, (1967) 20 STC 290: (AIR 1967 SC 1616) and by then, dismemberment of the old State of Punjab had come about. In order to get over this decision, the Legislatures of Haryana and Punjab took steps to validate the old levies of tax which had been declared illegal by the Supreme Court.

In Haryana, the first step in this direction was by an Ordinance entitled as the Punjab General Sales Tax (Haryana Amendment and Validation) Ordinance, 1967. This Ordinance was replaced by the Amending Act which was passed by the Central Parliament acting for the Legislative Body for the State of Haryana because, in the meantime, the President's rule had intervened and the Legislature of Haryana was not functioning. It is the vires of this Amending Act which has been called in question in the present petition on various grounds which will be enumerated hereinafter. We only propose to mention those grounds out of the grounds taken in the petition which have been actually agitated before us. It is not necessary for the purposes of this petition to advert to the stand taken by the State in its return because the questions canvassed before us are purely those of law. Mr. Anand Swarup, the learned Advocate General of Haryana, also sought to raise certain technical pleas regarding the frame of the Writ petition.

But, in our opinion, those objections have no relevance so far as the questions canvassed before us are concerned. The questions agitated are of a purely legal nature. However, in order to avoid all controversy, we directed the counsel for the petitioner to file a better affidavit pleading certain facts which, according to Mr. Anand Swarup, are essential for the determination of the legal issues raised. That affidavit has been filed and so its reply.

5. The various points, that have been agitated before us, may now be stated:

(1) That the Haryana State has no power to legislate retrospectively for the area which was not Haryana prior to its creation on the 1st of November, 1966. It is not disputed that after the 1st of November, 1966, the State of Haryana can legislate both prospectively and retrospectively. But it has no power to legislate retrospectively for a period prior to the 1st of November, 1966, because prior to that period, there was no State of Haryana;

(2) That the impugned law is discriminatory and thus offends Article 14 of the Constitution. It is argued that up to the 1st of November, 1966, Punjab was one State out of which, after the 1st of November, 1966, the State of Haryana, the new State of Punjab, the Union Territory of Chandigarh and the transferred territories, that is those which have gone to Himachal Pradesh, emerged. There is no similar provision as in the Amending Act so far as the Union Territory of Chandigarh and the transferred territories are concerned. The only areas, to which the impugned Act applies, is the territory of Old Punjab, which is now part of Haryana. With regard to the territory of Old Punjab, which is now New Punjab, a somewhat similar provision has been made; but it is not *pari materia* with the Haryana law. Therefore, it is maintained that regarding the territory of Old Punjab, out of which the new States and Territories have been created, there is no uniform law on the same subject for the same persons similarly situate. The retrospective operation of the Amending Act goes back to a period when there was Old Punjab, and that is why, parallel enactments for its area now in Haryana and Punjab have been enacted and there being no similar enactment for the Union Territory of Chandigarh or for the transferred Territories there will be clear violation of Article 14; and

(3) That in spite of the Amending Act, the illegality, on the basis of which the Supreme Court quashed the previous assessments, still persists and the proceedings taken under the Amending Act are claimed to be suffering from the same vice from which they suffered when the matter went to the Supreme Court in *Bhawani Cotton Mills' case*, (1967) 20 STC 290 : (AIR 1967 SC 1616). It is further emphasized:

(i) that in spite of the retrospective operation given by the Amending Act to legalise what was invalid earlier, the Rules under the Act have not been altered. There is no machinery provided by which it can be ascertained whether the declared goods have or have not been taxed at an earlier stage; and

(ii) that the Act has made the reopening of assessments as optional; and,

therefore, the Act is not in consonance with section 15 of the Central Sales Tax Act. Moreover, the assessments, that can be reopened, are only those of Haryana. It cannot be ascertained whether the commodities sought to be assessed to sales-tax had already been subjected to it in the old Punjab minus the territory of old Punjab which is now the State of Haryana. and

(4) That the Central Act (Central Sales Tax Act, 1956) is ultra vires the Constitution of India. Reliance is placed upon the decision of the Madras High Court in *Larsen and Toubro Ltd. v. Joint Commercial Tax Officer*, (1967) 20 S. T. C. 150. It may be mentioned that a contrary view has been taken by the Andhra Pradesh High Court in (1962) 13 S. T. C. 79 : (AIR 1962 Andh Pra 204), *East India Sandal Oil Distilleries Ltd. v. State of Andhra Pradesh*.

CONTENTION No. (1):

6. So far as this contention is concerned, it is common ground that the State Legislature of Haryana has the power to enact laws prospectively as well as retrospectively. However, it is maintained by the learned counsel for the petitioner that a Legislature has no power to enact laws which have a retrospective effect prior to the date when it came into existence. In other words, the State of Haryana came into being on the 1st of November, 1966. There was no such State prior to this date. The territory of Haryana was the territory of old Punjab. Old Punjab had a Legislature which could enact laws and it enacted laws for that territory. Therefore, any law enacted by the State Legislature of Haryana which would take a retrospective effect earlier to the 1st of November, 1966, would not be within its competence and thus the Amending Act, in so far as it makes a law for recovery of sales-tax for the period prior to 1st November, 1966, is ultra vires its powers and must be struck down.

In support of this contention, the learned counsel placed reliance on Articles 1, 2, 3 and 4 of the Constitution. He also placed reliance on the provisions of the Punjab Reorganization Act and particularly on Section 2 (f), (l), (m) and (n), Sections 3, 6, 7, 50, 55, 63, 64, 65, 88, 89, 90 and 96. In addition to this, the learned counsel relied upon the following decisions: *H. H. Bhairao Rao Maloji Rao Ghorpade v. Agricultural Income-tax Officer*, 1962-46 I.T.R. 568; *N. N. Ananthanarayana Iyer v. Agricultural Income Tax and Sales Tax Officer*, AIR 1959 Ker 182; *Union of India v. Madan Gopal Kabra*, AIR 1954 S. C. 158; *State of Bombay v. R. M. D. Chamarbaugwala*, AIR 1957 S. C. 699, *Tata Iron & Steel Co. Ltd. v. State of Bihar*, AIR

1958 S. C. 452; and *Khandige Sham Bhat and K. Krishna Bhatta v. Agricultural Income-tax Officer, Kasaragod*, AIR 1963 S. C. 591.

7. After considering all the relevant provisions and the decisions cited before us, we are of the view that this contention must fail in view of the clear pronouncement of the Supreme Court in *A. Hajee Abdul Shukoor & Co. v. State of Madras*, AIR 1964 S. C. 1729. The following observations, at page 1735 of the report, clinch the matter:

"The State legislature is free to enact laws which would have retrospective operation. Its competence to make a law for a certain past period, depends on its present legislative power and not on what it possessed at the period of time when its enactment is to have operation. xx xxx xx"

To similar effect are the observations of Varadachariar J. in *United Provinces v. Atiqa Begum*, AIR 1941 F. C. 16. At p. 43 of the report, the learned Judge observed as follows:

"xx xx xx xx"
Proceeding now to the question of the invalidity of the impugned Act, it will be convenient to take up first the ground on which all the learned Judges of the Full Bench of the High Court agreed, namely, the objection based on S. 292, Constitution Act. As I understand the argument, this objection interprets section 292 not merely as enacting that the law in force in British India immediately before the commencement of Part III, Constitution Act, shall continue in force notwithstanding the repeal of the earlier Government of India Act, but as also fixing a time-limit up to which the operation of such law should not be disturbed by anything contained in any enactment that may come to be passed by any of the Legislatures in British India.

It was conceded before us and it was recognised before the High Court that a provision like S. 292 is usually inserted in similar Acts, to indicate that the repeal of the parent Act shall not be deemed to have repealed all the laws passed under that Act. (Compare S. 108, Commonwealth of Australia Constitution Act, section 129, British North America Act and section 135, Union of South of Africa Act). But laying special stress on the words 'until altered or repealed or amended' the learned counsel for the plaintiffs desired to read section 292 as containing a direction by Parliament that the law then in force must in any event continue up to a specified date, namely, the date of its alteration, repeal or amendment by a later Act of the Legislatures in India; and, it was sought to be inferred therefrom that no later

Act of such Legislatures can by words of retrospective operation antedate its effect so as to affect rights acquired under a previous law down to the date of the new legislation.

At one stage, the learned counsel for the plaintiffs even went so far as to suggest that the Legislatures in India had been deprived by this provision of the power of enacting at any time laws with retrospective effect, or they were at least incompetent to extend the retrospective operation of their enactments to a period anterior to 1st April 1937, when the Constitution Act came into operation in the provinces. These arguments were, however, not persisted in, when it was pointed out that the Indian Legislatures were, within the statutory limits assigned to them, bodies possessing plenary powers: See *Reg v. Burah*, (1878) 3 A. C. 889, *Archibald G. Hodge v. Reg.* (1883) 9 A. C. 117 at p. 132 and (1933) A. C. 156, *Croft v. Dunphy*, and that whatever might be the objection on grounds of reasonableness or expediency to retrospective legislation, there was nothing in S. 292 to deprive the Indian Legislatures of this particular incident of plenary legislative power. (Compare (1870) 6 Q.B.1, *Phillips v. Eyre*, at pp. 23, 27 relating to an Act of Jamaica Legislature; and (1915) 20 Com. LR 425, *The King v. Kidman*, relating to an Act of the Commonwealth Parliament in Australia).

The objection was then limited to the power of the Legislature to give retrospective operation to an enactment when, by so doing, it would prevent a law in existence at the date of the commencement of Part III, Constitution Act, from having its full effect up to the date of the repealing or amending Act. It was pointed out that the language employed in section 292, Constitution Act, was not identical with that to be found in the corresponding provisions in the British North America Act or in the Commonwealth of Australia Act.

But, it would appear that this language is so similar to that found in section 135, Union of South Africa Act, as to suggest that it might have been taken from it. The reason for a provision like that contained in S. 292 being the one already stated, it does not seem to me necessary or proper to lay undue stress on the word 'until' used in S. 292 and hold that the policy of this provision is different from that underlying similar provisions in the other Constitution Acts above referred to. I see no justification for drawing a distinction between the statement that the previous law shall continue in force subject to appeal or amendment by later legislation and the statement that it shall

continue in force until repealed or amended by later legislation.

The Parliament might have had some reason or motive for denying to the Indian Legislatures the power of retrospective legislation with reference to pre-existing laws seems to me to rest on mere speculation and is not a fair inference from the language used in the section.

In the judgments delivered by the learned Judges of the Full Bench of the Allahabad High Court, I find it stated in some places that section 2 of the impugned Act in effect repealed section 73 of the Act of 1926, with retrospective effect or that the provisions of the two Acts were diametrically opposed to each other. With all respect, I find some difficulty in following this view. It is true that the remission which the impugned Act sought to regularise was not one made in conformity with the provisions of section 73 of the Act of 1926.

But such regularisation would only mean the addition of a new head of remission; it may amount to an alteration or amendment of the old Act, but will not necessarily involve a repeal of S. 73 of that Act. The co-existence of two kinds of remission given for different reasons is not inconceivable or impossible. It can of course be said that the impugned Act retrospectively deprived landlords of a share of the rent to which they had already acquired a right. But if on general principles a Legislature has ordinarily power—for reasons which it is not open to the Court to investigate—to enact measures which by retrospective operation may deprive some subjects of vested rights. I see no sufficient reason for treating the present case as standing on any special footing. In this view, it will follow that there is no reason for saying (as Bajpai J. has said) that 'the impugned Act has attempted to do something indirectly, which it could not do directly.'

Reference may also be made to the decision of the Supreme Court in AIR 1954 SC 158. At p. 162, the following observations occur:

"Even so, it was contended, the Finance Act, 1950, in so far as it purports to authorise such levy is 'ultra vires' and void as Parliament was not competent under the Constitution to make such a law. The argument was put in two ways. In the first place, it was said broadly that as the Constitution could not operate retrospectively as held by this Court in *Keshavan v. State of Bombay*, AIR 1951 SC 128, the power of legislation conferred by the Constitution upon Parliament could not extend so as to charge retrospectively the income accruing prior

to the commencement of the Constitution. This is a fallacy.

While it is true that the Constitution has no retrospective operation, except where a different intention clearly appears, it is not correct to say that in bringing into existence new Legislatures and conferring on them certain powers of legislation, the Constitution operated retrospectively. The legislative powers conferred upon Parliament under Article 245 and Art. 246 read with List I of the Seventh Schedule could obviously be exercised only after the Constitution came into force and no retrospective operation of the Constitution is involved in the conferment of those powers. But it is a different thing to say that Parliament in exercising the powers thus acquired is precluded from making a retroactive law. The question must depend upon the scope of the powers conferred, and that must be determined with reference to the 'terms of the instrument by which affirmatively, the legislative powers were created and by which negatively, they were restricted. *Queen v. Burah*, (1877-78) 5 Ind App 178 (PC)". It is not necessary to multiply authorities. Mr. Anand Swarup, the learned Advocate General, drew our attention, by way of instances, to a large number of cases, where retrospective operation of law prior to the existence of the State Legislature was not struck down on the ground that such a Legislature had no power to make a retrospective law for a period when it never existed.

So far as decisions relied upon by the learned counsel for the petitioner are concerned, they are clearly distinguishable. For instance, the decision of the Mysore High Court in (1962) 46 ITR 568, is analogous to the decision of the Kerala High Court in AIR 1959 Ker 182 (FB). As a matter of fact, the Mysore decision follows the Kerala decision. The Kerala decision has been explained by P. Govindan Nair J. in *Chacko Chacko Kaithakuttu Veedu v. Board of Revenue, State of Kerala*, AIR 1966 Ker 46; and the same reason will cover the Mysore decision. While dealing with the Full Bench decision of his own Court already referred to, the learned Judge made the following observations:

"* * * There are no doubt certain passages in that judgment which may indicate that there is no power in the State Legislature to enact a law for a period with reference to a territory, which during that period was not part of the State. But the real decision in that case as well as in the case reported in *Biswambar Singh v. Collector of Agricultural Income-tax*, 1955-28 ITR 386 (Orissa) and the one in *Madangopal Kabra v. Union of India*, (1951) 20 ITR 214 :AIR 1951 Raj 94

turned on the wording of the Section of the statute which related to the imposition of agricultural income-tax. The relevant sections provide that the agricultural income must be income derived from lands situated inside the State. This necessarily meant that at the time of the accrual of the income, the land should have been inside the State. The decisions in the above cases have to be rested purely on the interpretation of the Section and certainly cannot be authorities for holding that the State legislature has no power to legislate with

retrospective effect * * * "

We are in respectful agreement with the above observations.

7-A. This leaves the decisions of the Supreme Court in AIR 1954 SC 158; AIR 1957 SC 699; AIR 1958 SC 452 and AIR 1963 SC 591. I have already dealt with *Madan Gopal Kabra's case*, AIR 1951 Raj 94. That decision does not, in any way, support the petitioner's contention. It really negatives his first contention. The other decisions do not afford any assistance to the learned counsel, and have no real bearing on the matter in dispute.

8. For the reasons recorded above, the first contention of the learned counsel for the petitioners must fail and is accordingly repelled.

CONTENTION NO. (2):

9. So far as the second contention is concerned, it really comes in conflict with the established rule that a State can retrospectively legislate regarding its territories even prior to the point of time, it came into existence. The argument of the learned counsel is that prior to the 1st of November, 1966, there was no State of Haryana. What is now State of Haryana was part of State of Punjab. The old State of Punjab has been dismembered into four bits, that is Haryana, The Union Territory of Chandigarh, the Transferred Territories that have gone to Himachal Pradesh and the new State of Punjab. In the Union Territory of Chandigarh and in the Transferred Territories, no steps have been taken to validate the levy that was struck down by the Supreme Court in *Bhawani Cotton Mills' case*, (1967) 20 STC 290 : (AIR 1967 SC 1616). Therefore, the Haryana law suffers from the vice of discrimination, as from the period prior to 1st of November, 1966, it enacts for its territories a provision, similar to which there is no provision in the territories of old Punjab which have gone over to Himachal Pradesh and the Union Territory of Chandigarh.

As already said, if effect is given to this argument, it will totally negative the rule laid down by the Supreme Court in *Hajee Abdul Shukoor's case*, AIR

1964 SC 1729. So far as the Territory of Haryana is concerned, it is not disputed that the law is uniform. As a matter of fact, this argument can only succeed if the first contention of the learned counsel had substance. If a State Legislature can make a valid law prospectively, surely it can make a valid law retrospectively. It is, therefore, not necessary to examine the further contention that the law in the new Punjab is also different from the Haryana law.

10. The learned counsel for the petitioner has drawn our attention to Sections 88 and 89 of the Punjab Reorganization Act (Act No. 31 of 1966). These provisions are quoted below for facility of reference:

"88. Territorial extent of Laws:

The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and territorial references in any such law to the State of Punjab shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day.

89. Power to adapt laws: For the purposes of facilitating the application in relation to the State of Punjab or Haryana or to the Union territory of Himachal Pradesh or Chandigarh of any law made before the appointed day, the appropriate Government may, before the expiration of two years from that day, by order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon every such law shall have effect subject to the adaptations and modifications so made until altered, repealed or amended by a competent Legislature or other competent authority.

Explanation: In this section, the expression 'appropriate Government' means —

(a) as respects any law relating to a matter enumerated in the Union List, the Central Government; and

(b) as respects any other law,

(i) in its application to a State, the State Government, and

(ii) in its application to a Union territory, the Central Government."

On the basis of these provisions, it is argued that the Reorganisation Act does not confer any power on the Legislatures of new State to pass laws with retrospective effect to cover a period prior to their birth. It may be mentioned that there is no provision in the Act which specifically prohibits the inherent power in a State Legislature to enact laws retrospectively for its territories. But

from the provisions of sections 88 and 89, it is sought to be implied that the inherent power in a State Legislature to enact retrospective laws for its territories was negatived and the power was only given to the new States to enact laws prospectively from their birth. We are unable to agree with this contention. Section 88 merely deals with the territorial extent of laws. It, in other words, makes the old Punjab law as the law of the new States or Territories till it is otherwise altered by the competent Legislatures. Section 89 merely gives the power of adaptation and does not forbid the passing of laws retrospectively by any of the States for its territories. The second contention also, therefore, has no merit and must fail.

CONTENTION NO. (3):

11. Various contentions have been advanced under this head; and they will be examined one by one:

12. The first contention is that the Amending Act is not in conformity with sections 14 and 15 of the Central Act inasmuch as no definite stage has been indicated for single point levy of tax. It is maintained that in Haryana, tax will be levied once on the last purchase or sale and so also in Punjab; and, therefore, each State, before the 1st of November, 1966, will have the right to levy such a tax for its territories. The effect may be that in the old Punjab Territory, tax may be levied on cotton which is a declared goods. There is no provision in either the Punjab or the Haryana Acts to the effect that if the same commodity had been taxed in the Punjab before division, it will not be taxed in Haryana after division and vice versa. It is maintained that this course will lead to double taxation on the same commodity for a period when the State of Punjab was one. It is no doubt true that under the Central Act, only one levy is permissible within the State on the declared goods either at the point of sale or at the point of purchase; and if the result, that is envisaged, does follow, a second levy would be invalid. That will only help the counsel if the same commodity is, in fact, taxed twice. So far as the present case is concerned, there is no averment that the same commodity has been taxed twice.

The mere fact, that the same commodity can be taxed, will not lead to the conclusion that the Act is bad. The Act does not, for its territories, say that the same commodity be taxed twice. Its object is merely to levy the tax once. But if by reason of the reorganisation of Punjab, such a result may follow, it is not because the Act is bad, but it is because a certain event has intervened, namely, the partition of Punjab; and if

the same commodity, before the 1st of November, 1966, is taxed twice and this fact is proved, there is no manner of doubt that the petitioner would be entitled to a relief. But that contingency will only arise when an assessment has been made. So far as the present case is concerned, there is no such allegation.

13. It is then maintained that if there is a possibility of double taxation, the law must be struck down. This argument loses sight of the fact that there is no possibility of double taxation under the Haryana Act. The possibility only occurs when the operation of the Punjab and the Haryana Acts is considered side by side; and that too in a class of cases, where both Punjab and Haryana are taxing the same commodity twice where either the sale or the purchase took place prior to the 1st of November, 1966. As already said, that cannot make the Punjab or the Haryana law bad. It will only make the second levy bad; and whenever such a case occurs, the second levy can always be struck down.

14. The next contention is that the Amending Act does not fix the stage of levy of tax as envisaged in Bhawani Cotton Mills' case, (1967) 20 STC 290; (AIR 1967 SC 1616). As a matter of fact the Amending Act has divided the transactions into three categories, that is:

(a) From 1st October, 1958 to 31st of March, 1960;

(b) From 1st of April, 1960 to 13th of November, 1967; and

(c) From 14/11/1967 and thereafter.

So far as the first period is concerned, the rate of tax is two paise in a rupee and is leviable and payable—

(a) where such goods were purchased for use in the manufacture of goods for sale, on the purchase thereof at the stage at which they were so purchased by the dealer liable to pay tax under this Act; and

(b) where such goods were not purchased for use in the manufacture of goods for sale, on the sale thereof at the stage of sale by the last dealer liable to pay tax under this Act.

For the second period, the tax is leviable and payable in respect of declared goods specified in clauses (ii) and (vi) of section 14 of the Central Sales Tax Act, 1956, at the stage of purchase by the last dealer liable to pay tax under this Act. For the third period, in respect of all declared goods, the tax is three paise in a rupee and is leviable and payable at the stage of sale or purchase, as the case may be, and under the circumstances specified against such goods in Schedule 'D'. Provided further, that in the case of goods specified in Schedule 'C', the tax shall be leviable and payable only on the purchase thereof.

15. For purposes of facility and by way of illustration, the relevant part of Schedule 'D', dealing with cotton is reproduced below:

SCHEDULE 'D'

Serial No.	Name of declared goods	Circumstances under which tax to be levied.	Stage of levy
1.	Cotton, that is to say all kinds of cotton (indigenous or imported) in its manufactured state, whether ginned or unginned, baled, pressed or otherwise but not including cotton waste.	(i) If imported by a dealer from outside the State of Haryana, or otherwise received by him in the State of Haryana, for sale. (ii) If purchased in the State of Haryana.	(i) First sale within the State of Haryana by a dealer liable to pay tax under this Act. (ii) First purchase within the State of Haryana by a dealer liable to pay tax under this Act.

As we are not concerned with Schedule 'C', it is not necessary to reproduce the same.

16. It is not disputed by the learned counsel for the petitioner that the Amending Act does not suffer from any vice so far as it deals with the period, 1st of October, 1958 to 31st of March, 1960. So far as the second stage is concerned, the Act is *pari materia*, with the Mysore, Andhra Pradesh, United Provinces and Madras Acts. These Acts were noticed by their Lordships of the Supreme Court in Bhawani Cotton Mills'

case, (1967) 20 STC 290 : (AIR 1967 SC 1616) while dealing with the contention that no stage in the impugned Punjab Act was fixed unlike the stage fixed in these Acts. That defect has been removed by the Amending Act and it has brought the parent Act in line with the Acts noticed by their Lordships of the Supreme Court. In a business transaction, in spite of fixing a stage, there can occur cases where the stage may be repeated a second time; for instance, by the intervention of a non-registered dealer. In such cases, the second levy

can always be struck down. From the mere fact, that a second illegal levy is struck down or is not justified, a conclusion does not necessarily follow that the Act is bad.

All that the Central law requires is that a stage must be fixed for the levy of the tax, the reason being that the tax should be levied at one point. The State law does fix the point. But in human affairs, it is next to impossible to make a law which will conceive of all possible and imaginable possibilities and it will be too much to strike down a law because it has not taken into account all such imaginable possibilities. Moreover, no doubt was cast by their Lordships on the validity of the Madras and other allied Acts, to which a reference was made; and as the impugned State Act is in line with those Acts, we are not prepared to accept the contention that the Act is bad because it has failed to fix a specific point of taxation regarding declared goods. If a case occurs, where a double levy has been made, the Court will readily strike it down. We have also no doubt that if a double levy is brought to the notice of the Sales Tax authorities, they will also strike it down.

Moreover, the tax is only levied on registered dealer; and if a dealer, who deals in goods and has, under the law, to get himself registered, does not do so and by violating provisions of the Statute renders the goods liable to double taxation, that will not make the law void. It is fundamental that a breach of the Statute cannot be taken notice of to declare it void. Therefore, we are not prepared to hold that there is no stage fixed for the second period, 1st April, 1960 to 13th of November, 1967. Moreover, there is a presumption of constitutionality of a Statute and the burden, that a certain Statute is unconstitutional, is on the person who wants it to be declared void (See the decision in *Ram Krishna Dalmia v. Justice S. R. Tendolkar*, AIR 1958 SC 538). The burden has not been discharged in the present case.

17. So far as the third period is concerned, the learned counsel for the petitioner submitted that Schedule 'D' to the Act had discriminated between the imported and the locally produced cotton inasmuch as if the cotton was imported by a dealer from outside the State of Haryana or otherwise received by him in the State of Haryana for sale, the stage, of levy of the tax has been fixed on the first sale within the State of Haryana by a dealer liable to pay tax under the Act. If, on the other hand, cotton was purchased in the State of Haryana, the tax had to be levied on the first purchase within the State of Haryana by a dealer liable to pay tax under the Act.

The sale price, according to the learned counsel, was obviously more than the purchase price and, therefore, the quantum of tax on imported cotton would naturally be more than on the locally produced goods. In that way, the imported goods were discriminated against and this legislation was hit by Article 304 (a) of the Constitution. It was also contended that the very fact that two stages had been fixed for the levy of the tax, one on the sale price and the other on the purchase price on the imported and the locally produced goods shows that the former goods had been discriminated against.

18. It is true that in Schedule 'D' which deals with declared goods and cotton being one of them, it is mentioned that if the cotton was imported by a dealer from outside the State of Haryana or otherwise received by him in the State of Haryana for sale, the tax had to be levied on the first sale within the State of Haryana by a dealer liable to pay the tax under the Act and if the cotton was purchased in the State of Haryana, the tax was levied on the first purchase within the State of Haryana by a dealer liable to pay the tax under the Act. The question, however, arises that by making this legislation, has any discrimination been made between the imported and the local goods and whether this legislation was hit by Article 304 (a) of the Constitution? The relevant part of Article 304 (a) says—

"304. Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law—

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) xx xx xx xx"
All that it means is that the imported and the local goods should be treated on the same basis and no discrimination should be made between them. Article 304 (a) figures in Part XIII of the Constitution which deals with trade, commerce and intercourse within the territories of India.

Article 301 provides that trade, commerce and intercourse within the territory of India would be free, but it would be subject to the other provisions of Part XIII. It is by virtue of Article 304 that the State legislature is authorised to impose on goods imported from other States a tax to which similar goods in that State were subject and the only limitation imposed on this power of the State legislature is that by imposing the

tax, it should not make any discrimination between the imported and the locally produced goods. It is undisputed that tax has been imposed on the cotton produced in the State of Haryana.

That being so, the State legislature was well within its rights to tax the imported cotton as well. Now the point for consideration is whether by the imposition of the tax on the imported goods has it resulted in any discrimination between those and the local goods. It is common ground that the rate of purchase tax and the sale tax is the same, that is 3 per cent. When the rate is the same, *prima facie*, there seems to be no discrimination. Article 304 does not require that similar or same tax should be imposed on the imported and the local goods. In other words, if purchase tax had been levied on the local goods, it is not necessary that only purchase tax could be imposed on the imported cotton. According to Schedule 'D', on the imported cotton, the tax has to be levied on the first sale of those goods in the State of Haryana and on the local cotton, the tax has to be levied on the first purchase in the State of Haryana.

As we have said, what is required under Article 304 (a) is that there should be no discrimination between the imported and the local cotton. That means that when the imported cotton reaches the State of Haryana, it should be treated as if it had been produced in the State of Haryana. It is only then that it would be said that they were being treated alike. The importer of the outside cotton should be treated at par with the producer of the local cotton. When the imported cotton is sold in the State of Haryana, the tax would be levied on the sale price thereof. Similarly when the local goods are purchased for the first time in the State of Haryana, the tax would be levied on the purchase price which obviously is the first sale price. That being so, in both types of goods, tax has to be levied on the first sale price of the goods in the State of Haryana.

There is thus no discrimination whatsoever between the two types of cotton and there cannot be any difference in the quantum of tax imposed on them. There is no merit in the contention of the learned counsel for the petitioner that the levy of tax on imported and local goods at two different stages, one on the first sale price and the other on the first purchase price results in discrimination. As we have already mentioned, there are no two stages in the instant case. In both the cases, as already pointed out above, the tax has to be imposed on the first sale price of the two types of cotton. It was sug-

gested by the learned counsel for the petitioner that the sale price of the imported goods would obviously be more than their purchase price, and consequently the quantum of tax would be more on the sale price than on the purchase price. There is a clear fallacy in this argument.

When the learned counsel says that the sale price would obviously be more than the purchase price, a question immediately arises, more than whose purchase price? If the suggestion was that it would be more than the purchase price of the importer himself, then obviously there was no question of any discrimination between the imported cotton and the local cotton as the comparison has to be only between these two types of cotton and on the same date. On one date, the sale price of both types of cotton should naturally be the same, otherwise there would be no market for the higher priced goods. In Schedule 'D', tax has been levied on this sale price in both the goods.

19. The whole confusion seems to have arisen, because as regards the local cotton, it has been mentioned that the tax would be imposed on the first purchase price and not on the first sale price as in the case of imported cotton. But one cannot lose sight of the fact that in the case of local cotton, obviously the first purchase price of the dealer is the same as the first sale price of the producer. Consequently in both the cases the tax would be on the first sale price. The reason why the first purchase price was mentioned regarding the local cotton was that the legislature did not want to tax the local producer, namely, the farmer. If the tax had been levied on the sale price in his case also, then he would have been required to keep regular accounts and deposit the tax in the treasury and this, it appears, they wanted to avoid.

20. The learned counsel for the petitioner contends that the decision of the Supreme Court in *Firm A. T. B. Mehtab Majid and Company's case*, (AIR 1963 SC 928) is fully applicable to the facts of the present case, and therefore, he must succeed on that basis. His argument is, substitute 'imported cotton' for 'imported hides and skins' and 'local cotton' for 'local hides and skins'. If this is done, he maintains, the result would be the same as in *Firm A. T. B. Mehtab Majid and Company's case*, (AIR 1963 SC 928). This argument, though attractive, cannot bear scrutiny. In *A. Hajee Abdul Shukoor and Company's case*, AIR 1964 SC 1729 their Lordships of the Supreme Court decided that the 'raw hides and skins' and 'tanned hides and skins' are two different commodities,

The discrimination, that is prohibited by Article 304 (a) is only between similar goods and not between different types of goods.

It is axiomatic that in view of Article 304 (a) of the Constitution of India, similar goods must be meted similar treatment irrespective of the fact whether they are locally produced or are imported. The tax burden must be the same. In Firm A. T. B. Mehta Majid and Company's case, (AIR 1963 SC 928), similar goods were discriminated, that is 'tanned hides and skins locally produced' and 'tanned hides and skins that were imported'; and that is why, the Supreme Court struck down the rule. In order to understand the implication of the Supreme Court decision, it will be proper to quote the Madras rule:

"16. (1) In the case of untanned hides and/or skins the tax under section 3 (1) shall be levied from the dealer who is the last purchaser in the State not exempt from taxation under section 3 (3) on the amount for which they are bought by him.

(2) (i) In the case of hides or skins which have been tanned outside the State the Tax under Section 3 (1) shall be levied from the dealer who in the State is the first dealer, in such hides or skins not exempt from taxation under Section 3 (3) on the amount for which they are sold by him.

(ii) In the case of tanned hides or skins which have been tanned within the State, the tax under Section 3 (1) shall be levied from a person who is the first dealer in such hides or skins not exempt from taxation under Section 3 (3) on the amount for which they are sold by him:

Provided that, if he proves that the tax has already been levied under Sub-rule (1) on the untanned hides and skins out of which the tanned hides and skins had been produced, he shall not be so liable.

(3) The burden of proving that a transaction is not liable to taxation under this rule shall be on the dealer."

Under this rule, in the case of raw hides or skins, the last purchaser is liable to pay tax on the purchase price. According to sub-rule (2), on the imported as well as local tanned hides and skins, tax on first sale is levied. If the rule had stood minus the proviso, no trouble would have arisen, as there seems to be no discrimination between imported and local tanned hides and skins. But the proviso to this rule brings in the vice of discrimination. If the hides and skins are tanned within the State and they are taxed under sub-rule (1), no tax could be levied on the tanned hides and skins in the State. It is thus that a discrimination resulted between the 'imported tanned hides and skins' and 'tanned and skins processed within the State'.

If a person deals in imported tanned hides and skins, he has to pay sales-tax. If he also purchases raw hides and skins and then gets them tanned for sale, he would only be liable to pay purchase-tax on the purchase price of raw hides and skins and no tax on the tanned hides and skins. It was this discrimination, that was brought about by the proviso, which was struck down by the Supreme Court. No such discrimination exists in the Haryana Act, so far as 'cotton' is concerned. Under the Haryana Act, a tax is levied on the first sale price in the State on both the imported and local cotton. Therefore, it is clear that the attack on the vires of the impugned provision is not justified.

21. The only other contention, that has so far remained undisposed, is whether the option given to the assessee to get those assessments reopened which were hit by the Supreme Court decision being not in consonance with Section 15 of the Central Sales Tax Act is bad. In the first instance, this is an enabling provision. There is no option with the Department not to reopen each and every assessment which is contrary to the Supreme Court decision. They will, under the law, reopen the assessment. The option is only to the assessee and totally for his benefit. He may forbid the reopening of the assessment, the moment a notice in that behalf is served on him, by saying that he does not wish it to be reopened. Such a provision, which merely favours the assessee, cannot be said to be, in any manner illegal. We see no force whatever in this contention and the same is repelled.

22. The net result, therefore, is that the third contention has no force and must fail.

CONTENTION NO. (4):

23. This contention now stands concluded by the decision of the Supreme Court in State of Madras v. N. K. Nataraja Mudaliar, Civil Appeal No. 763 of 1967, D/- 18-4-1968 (SC). The Supreme Court has reversed the decision of the Madras High Court in (1967) 20 STC 150. The contrary view taken by the Andhra Pradesh High Court to the Madras decision in (1962) 13 STC 79 = (AIR 1962 Andh Pra 204) has been approved.

24. In this view of the matter, this contention also fails.

25. For the reasons recorded above, this petition fails and is dismissed; but there will be no order as to costs.

26. P. C. PANDIT, J.: I agree.

BDB/D.V.C.

Petition dismissed.

AIR 1969 PUNJAB & HARYANA 25
(V 56 C 5)

MEHAR SINGH, C. J.,
AND B. R. TULI, J.

Smt. Dassi w/o Dhani Ram, Appellant v.
Dhani Ram Teku, Respondent.

Letters Patent Appeal No. 237 of 1963
D/- 22-7-1968, from decree of D. K.
Mahajan, J., in F. A. O. No. 15 (m) of 1962.

(A) Hindu Marriage Act (1955), Ss. 28,
3 (b), 19 and 21 — Order on petition
under S. 19 — Appeal against, to single
Judge of High Court — Further appeal
under Cl. 10 Letters Patent is also main-
tainable and not barred by Act.

An appeal under Cl. 10 of the Letters
Patent is maintainable against an order
of a single Judge of the High Court
passed in appeal against an order made
on petition under the Hindu Marriage
Act. Section 28 of that Act read with
sections 3 (b), 19 and 21 makes it clear
that the court in which proceedings are
held on petitions under the Act is the
established court and the appeals from its
decrees and orders lie to the court to
which appeals from decrees and orders
passed in civil suits will lie. The appeal
to High Court from the decrees and
orders passed in petitions under the Act
lies either under section 96 of the Code
of Civil Procedure or section 39 of the
Punjab Courts Act read with section 28
of the Act, and a further appeal from
the judgment, decree or order of a Single
Judge made in the exercise of appellate
jurisdiction lies under clause 10 of the
Letters Patent to a Division Bench and
this appeal has not been taken away by
the statute. 1913 A. C. 546 and AIR 1965
SC 1442, Rel. on; AIR 1962 SC 256, Dist.
(Paras 6 and 7)

(B) Hindu Marriage Act (1955), S. 13—
'Living in adultery' — Adultery is a
serious charge and has to be proved be-
yond reasonable doubt. (Para 8)

(C) Letters Patent (Punj) Cl. 10 —
Finding of fact — Binding in letters
patent appeal unless strong grounds are
made out for interference.

Ordinarily, in a Letters Patent Appeal,
the Bench is entitled to consider the
evidence afresh but unless very strong
grounds are made out, the Letters Patent
Bench will accept the finding of the fact
arrived at by the learned Single Judge
after due consideration of the evidence
on the record. (Para 8)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 1442 (V 52) =

(1965) 2 SCR 756, South Asia
Industries (P.) Ltd. v. S. B. Sarup
Singh 6

(1962) AIR 1962 SC 256 (V 49) =
(1962) 3 SCR 497, Union of India
v. Mohindra Supply Co. 6

IL/JL/D814/68

(1913) 1913 AC 546 = 82 LJ KB
1197, National Telephone Co. v.
His Majesty's Post Master General 6
K. C. Nayar, for Petitioner; M. C.
Sood, for Respondent.

TULI, J: Shrimati Dassi, wife of Dhani
Ram, respondent, filed a petition under
section 13 of the Hindu Marriage Act,
1955, for divorce on the ground that her
husband was living in adultery with one
Shrimati Reoti. The learned trial Court
granted to the petitioner a decree for
divorce against her husband with costs
on 24th January 1962. Against that
decree, Dhani Ram filed an appeal which
was accepted by D. K. Mahajan J., on
8th March, 1963, and the petition of
Shrimati Dassi was dismissed leaving
the parties to bear their own costs
throughout.

2. Shrimati Dassi, feeling aggrieved
from the judgment of D. K. Mahajan, J.
has filed this Letters Patent Appeal.

3. Shri M. C. Sood, learned counsel for
the respondent, has raised a preliminary
objection that the Letters Patent Ap-
peal is not maintainable as it is not pro-
vided in the Hindu Marriage Act, 1955
(hereinafter called the Act). There is no
merit in this objection. Section 19 of
the Act provides:

"Every petition under this Act shall
be presented to the district court within
the local limits of whose ordinary origi-
nal civil jurisdiction the marriage was
solemnized or the husband and wife
reside or last resided together."

4. "District Court" has been defined
in section 3 (b) of the Act as under:

"'District Court' means, in any area for
which there is a city civil court, that court,
and in any other area the principal civil
court of original jurisdiction, and includes
any other civil court which may be
specified by the State Government, by
notification in the Official Gazette, as
having jurisdiction in respect of the mat-
ters dealt with in this Act."

Section 21 of the Act provides:

"Subject to the other provisions con-
tained in this Act and to such rules as
the High Court may make in this behalf,
all proceedings under this Act shall be
regulated, as far as may be, by the Code
of Civil Procedure, 1908 (Act V of
1908)."

5. Section 28 of the Act provides that
all decrees and orders made by the court
in any proceeding under this Act may
be appealed from under any law for the
time being in force provided that there
shall be no appeal on the subject of
costs only.

6. From the provisions of the Act
cited above, it is at once clear that the
court in which proceedings are held on
petitions under the Act is the establish-
ed court and the appeals from its decrees

FL/IL/C802/68

Houses and Rents—East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 (1) and (2) — T. P. Act (1882), S. 106— Notice of eviction — Monthly tenancy in Punjab — Fifteen days' notice is necessary but it need not terminate with end of month of tenancy : AIR 1933 Lah 134, Dissent. from.

In the case of a monthly tenancy in the Punjab in the absence of a specific contract and in the absence of any statutory provision to the contrary, a monthly tenant is entitled to at least fifteen days' notice of eviction before any action for his ejectment can be brought in a competent Court or a Tribunal. Only the principle of justice, equity and good conscience contained in the first part of section 106 of the Transfer of Property Act applies to the Punjab but the technical rule of procedure contained in the second part of the provision making it necessary for the fifteen days' notice to terminate with the end of the month of tenancy cannot be invoked on principles of equity and good conscience : 1968-70 Pun LR (Delhi) 55, Foll.; AIR 1933 Lah 134, Dissent from.

(Para 8)

Unless there is an express statutory provision abrogating the requirement of the service of a notice under section 106 of the Transfer of Property Act, the mere fact that the rights of a landlord for eviction are restricted or a special machinery for enforcing them is provided in a Rent Restriction Act does not absolve a landlord from the obligation of serving the requisite notice and does not take away from the tenant a perfect defence of his not being liable to ejectment without the service of such a notice : AIR 1964 SC 1341 and AIR 1965 SC 101 and AIR 1967 SC 1419, Rel. on; AIR 1963 SC 120, Ref.; 1952-54 Pun LR 425 and AIR 1951 SC 115, Disting.

(Para 12)

The presence of the expression "before the termination of the tenancy" in sub-section (1) does not enlarge the scope of the field covered by sub-section (2) by falling in which all that happens is that the bar contained in sub-section (1) ceases to have effect. If in addition to the bar in sub-section (1) of section 13, there is any other legal impediment against the ejectment of the tenant, nothing contained in sub-section (2) appears to affect the same.

(Para 13)

Cases Referred: Chronological Paras
(1968) 70 Pun LR (D) 55, Mehra and

Sons C. L. v. Kharak Singh 8, 9
(1967) AIR 1967 SC 608 (V 54) =

(1967) 2 SCR 77, Janak Raj v. Gurdial Singh 2

(1967) AIR 1967 SC 1419 (V 54) =

(1967) 1 SCR 475, Manujendra
Dutt v. Purnedu Prosad Roy 12, 13

(1965) AIR 1965 SC 101 (V 52) =

(1964) 5 SCR 239, Mangilal v. Sukan Chand 12

(1965) AIR 1965 Punj 175 (V 52) =

67 Pun LR 45, Jagat Ram v. Shanti Sarup 7

(1964) AIR 1964 SC 1341 (V 51) =

(1964) 5 SCR 157, Abbasbhai Alimahomed v. Gulamnabi 12

(1963) AIR 1963 SC 120 (V 50) =

(1963) 3 SCR 312, Punjalal Bhagwanddin v. Bhagwatprasad 11

(1955) AIR 1955 Punj 238 (V 42) =

57 Pun LR 473, Mul Raj v. Prem Chand 9

(1952) 54 Pun LR 425, Mst. Sunder Bai

v. Mumtaz Jan 9

(1951) AIR 1951 SC 115 (V 38) =

1951 SCR 145, Brij Raj Krishna v. S. K. Shaw and Brothers 10

(1933) AIR 1933 Lah 134 (V 20) =

34 Pun LR 162, Rattan Sen v. Krishan Kaur 8

H. S. Wasu with B. S. Wasu, for Petitioner; Respondent In Person.

R. S. NARULA, J.:— This petition for revision of the order of Shri Surinder Singh Appellate Authority under the East Punjab Urban Rent Restriction Act, 1949 (hereinafter called the Act) District Judge, Jullundur upholding the order of Shri D. S. Chhina, Rent Controller, Jullundur, dated November 8, 1967, directing the eviction of Sawaraj Pal petitioner under section 13 (2) (i) of the Act was admitted to a Division Bench by the order of my Lord the Chief Justice, dated April 29, 1968, and was directed to be set down for hearing as the first case on May 6, 1968, as Janak Raj respondent accepted service of notice of the petition at the Motion stage and execution of the order for eviction was stayed till the date of hearing of the revision petition.

2. In order to appreciate all the points that have been urged before us, it appears to be necessary to survey the somewhat lengthy history of this case leading to the filing of this revision petition, though the ultimate points involved in the case do not appear to be at all complicated. The dispute relates to a portion of property No. E. Q. 253, Jullundur City, which was originally an acquired evacuee property and was purchased in a Government sale by one Gurdial Singh for Rs. 25,000/-. In execution of an ex parte decree for Rupees 500/- against Gurdial Singh, the property was put to auction and was purchased by Janak Raj respondent for Rupees 5,100/-. The ex parte decree against Gurdial Singh was later set aside and ultimately the suit in which the decree had originally been passed was dismissed. Gurdial Singh's application for setting aside the sale in favour of the res-

pondent was rejected by the trial Court and even his first appeal against that order failed. Gurdial Singh's plea was, however, successful in his regular second appeal filed in this Court and even a Letters Patent Appeal preferred against that judgment by Janak Raj was dismissed. This led Janak Raj to prefer a further appeal to the Supreme Court which succeeded. The judgment of their Lordships is reported in Janak Raj v. Gurdial Singh, AIR 1967 SC 608. We are not concerned with the merits of the controversy involved in the litigation up to the stage hereinbefore mentioned, but the same is relevant only for two purposes viz. (i) that the pendency of the said litigation is stated to be the reason for the petitioner not having paid arrears of rent to Janak Raj as the petitioner was being pressed for payment of the same even by Gurdial Singh, and (ii) that when Janak Raj took out warrant of possession of the property, the tenant gave in writing undertaking to pay rent to Janak Raj and Sawaraj Pal was thereupon allowed to continue as tenant of Janak Raj in the property. Just for the sake of completing the full history of the case, it may be added that in pursuance of certain observations made in the judgment of their Lordships of the Supreme Court, Gurdial Singh filed an application under section 144 of the Code of Civil Procedure for restoration of the property in dispute to him, which application was rejected by the trial Court, his first appeal failed in the District Court, and now his Execution Second Appeal No. 546 of 1968 is still pending in this Court.

3. The respondent, to whom I will hereinafter refer as the landlord, gave a notice, of which no copy has been produced, to Swaraj Pal, whom I will hereinafter call the tenant, which was received by the tenant on December 20, 1963, by registered post, vide postal acknowledgment exhibit A. 1. In the absence of any copy of the notice, it is impossible to say anything about its contents. The fact remains that on March 21, 1967, the landlord filed an application for the ejectment of the tenant under section 13 (2) (i) of the Act. The Rent Controller issued notice of the application returnable for April 12, 1967. When the said notice along with a copy of the application for eviction was tendered to the tenant on 31-3-1967 he raised some ill-advised frivolous objection about the spelling of his name in the notice, as a result of which the process-server returned the notice to the Controller. The Rent Controller considered this to be sufficient service of the tenant and without recording any evidence at all, proceeded to pass on April 12, 1967, an ex parte order of ejectment in favour of the landlord against the tenant. Two days later i.e.

on April 14, 1967, the tenant made an application to set aside the ex parte order. The learned Rent Controller directed notice of the application being issued to the landlord for May 2, 1967. On the same day, Mr. Chuni Lal advocate for the landlord, appeared before the Rent Controller and appears to have pointed out to him the fatal defect in the order for eviction having been passed without it being supported by any evidence. Thereupon the Rent Controller recorded the presence of Mr. Chuni Lal advocate and proceeded suo motu to set aside his ex parte order, dated April 12, 1967, for the eviction of the tenant and adjourned the main case for evidence to May 2, 1967. No notice of the proceedings fixed for May 2, 1967, was given to the landlord as he was represented at that time by his counsel. Nor was any notice admittedly given to the tenant, as the order for proceeding ex parte against him passed on April 12, 1967, stood intact and it was only the final order of ejectment which was set aside.

4. On May 2, 1967, the landlord filed his written reply to the application for setting aside the ex parte order and opposed the prayer of the tenant in that behalf. The proceedings were adjourned to May 10, 1967, for the statement of the tenant and arguments on the question of the setting aside of the said ex parte order. On May 10, 1967, the Rent Controller first directed the statement of the applicant (tenant) to be recorded but later passed another order (without recording the statement of the tenant) to the effect that the advocate for the landlord wanted to examine his client and that, therefore, the case stood adjourned for evidence and arguments to June 7, 1967. On the adjourned date, the parties appear to have agreed that the evidence on the application of the tenant for setting aside ex parte proceedings as well as the evidence of the landlord on the plea for ejectment should be recorded at the same time. The statement of the tenant was confined to the claim in his application for setting aside the ex parte proceedings. To rebut the same, the landlord examined Narain Dass process-server, who had gone to the spot and shown the notice and copy of the application for ejectment to the tenant when he had refused to accept the same. R. W. 2 Mangat Ram bailiff merely proved what is described by the learned Rent Controller as a copy of warrant of possession — exhibit R. W. 2/1 — which in fact appears to be a copy of the report of the bailiff on the warrant. The said evidence was produced to prove that the tenant had admitted Janak Raj to be his landlord for the future. The landlord himself appeared as R. W. 3 and in addition to making a statement in regard to the tenant's appli-

cation merely stated that the tenant had accepted him as his landlord and had given a writing to the same effect which was on the file and the same had been written in his presence and that the tenant had not paid him any rent thereafter. Of course, he proved the sale certificate in his favour. In answer to the only question asked from the landlord in cross-examination, he stated that he was prepared to accept the rent from the tenant according to law. By order, dated July, 26, 1967, the application of the tenant for setting aside the ex parte proceedings was dismissed but he was allowed to take part in the proceedings from the stage at which he had appeared. Tenant's appeal against that order having failed, his revision petition to this Court was dismissed by the order of Gurdev Singh, J. dated October 13, 1967. The learned Judge held that the order of the Rent Controller, dated April 12, 1967, for proceeding ex parte against the tenant was justified, that the suo motu order, dated April 14, 1967, had not been challenged, the proceedings in the case had to be resumed from the stage of recording the evidence and not from any earlier stage and that "there is no justification for setting aside the ex parte hearing against him and if he has incurred any liability for default in appearance on the first date of hearing of the case, he cannot be relieved of the same." With the above observations, the tenant's revision petition against the order, dated July 26, 1967, refusing to set aside the ex parte order of April 12, 1967 was dismissed with costs.

5. It is necessary to notice at this stage as to what happened in the meantime before the Rent Controller. As soon as the order, dated July 26, 1967, refusing to set aside ex parte proceedings was passed, the tenant offered to pay the entire arrears of rent for about five years, the total costs of the landlord and interest thereon to the landlord. The landlord accepted the amount on the same day under protest. Though he made several protests in his statement accepting the rent, it is by now settled that the only surviving dispute relates to the question whether the payment had been made within the time allowed by the proviso to section 13 (2) (i) of the Act or not. It was expressly admitted before us by Janak Raj that the amount paid to him was otherwise fully sufficient and that in all respects other than the one of the payment not having been made on the first hearing of the case, that tenant had exonerated himself of his liability to ejectment on the solitary ground on which his eviction had been sought. It was in these circumstances that the Rent Controller passed his order, dated November 8, 1967 (from which the present

petition has arisen), directing the eviction of the petitioner on the ground that the first date of hearing was April 12, 1967, and not July 26, 1967, and that the payment in question not having been made on the first date of hearing, the tenant had not absolved himself of the liability for eviction incurred under the purview of clause (i) of sub-section (2) of section 13 of the Act. In the tenant's appeal against the above-said order, two main questions were argued. The first argument advanced by the tenant about July 26, 1967, and not April 12, 1967, being the first date of hearing in the eye of law was repelled. His argument on the second question relating to the tenant not being liable to eviction without his tenancy having been terminated by a notice under section 106 of the Transfer of Property Act was repelled on two grounds viz. (a) that the Transfer of Property Act was not applicable to the State of Punjab and (b) that this point had not been raised before the Rent Controller. The tenant's appeal having thus failed and having been dismissed by the Appellate Authority (District Judge, Jullunder) on April 25, 1968, the present revision petition was filed in this Court.

6. At the hearing of this case before us, Mr. H. S. Wasu, learned counsel for the tenant, again pressed the point that in the circumstances of this case the first date of hearing within the meaning of the relevant proviso which is quoted below, was July 26 and not April 12, 1967

"13 (2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied—

(1) that the tenant has not paid or tendered the rent due by him in respect of the building or rented land within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable:

Provided that if the tenant on the first hearing of the application for ejectment after due service pays or tenders the arrears of rent and interest at six per cent per annum on such arrears together with the cost of application assessed by the Controller, the tenant shall be deemed to have duly paid or tendered the rent within the time aforesaid,
* * * * *

7. The solitary argument on which this submission of Mr. Wasu was based was that "due service" in the proviso in question means not only service of notice

of hearing but also service of a copy of the petition for ejectment on him. For this proposition, the learned counsel relied on the Division Bench Judgment of this Court in Jagat Ram v. Shanti Sarup, 1965-67 Pun LR 45: (AIR 1965 Punj 175). Though we are in full agreement with the judgment of the Division Bench in the aforesaid case, it is of no avail to the tenant in the present proceedings. It is amply proved from the evidence of Narain Dass process-server recorded on June 7, 1967, to which reference has already been made, that what was tendered to the petitioner was not only a notice of the hearing but also a copy of the petition for eviction. It has been amply proved from the statement of the process-server that the contents of the petition were got read over to the tenant and explained to him and it was only after knowing about the same that he raised the objection of the spelling of his name not being correct in the notice. Since it has been finally held right up to the stage of disposal of the revision petition of the tenant dismissed by Gurdev Singh, J. that the notice of the case was duly served on the tenant for April 12, 1967, it appears to be impossible to hold that due service of the copy of the petition for eviction was not effected on him in the same manner and in the same circumstances as the notice of the hearing. In view of the binding decision of this Court inter partes to the effect that due service had been effected on the petitioner for April 12, 1967, and in view of the fact that copy of the petition for eviction was also tendered to the tenant along with the notice of hearing, we hold that "due service" within the meaning of cl. (i) of sub-section (2) of section 13 of the Act had been effected on the tenant in this case on March 31, 1967, for April 12, 1967.

8. The arguments on the second point were split up into two parts. It was firstly contended that the finding of the Appellate Authority to the effect that no notice of ejectment is necessary in the Punjab, as the provisions of S. 106 of the Transfer of Property Act are not applicable here, is contrary to law. Counsel does not appear to be unjustified in this submission. Relevant part of S. 106 of the Transfer of Property Act is in the following terms—

"In the absence of a contract or local law or usage to the contrary . . . , a lease of immoveable property for any other purpose (other than for agricultural or manufacturing purposes) shall be deemed to be a lease from month to month terminable on the part of either lessor or lessee by fifteen days' notice expiring with the end of a month of the tenancy."

As already stated, it is the common case of both sides that the above-said statutory provision does not apply to the State of Punjab. The only question which calls for a decision on this aspect of the case, therefore, is whether the requirement of service of at least fifteen days' notice contained in section 106 of the Transfer of Property Act can be said to be based on such a principle of justice, equity and good conscience which should be enforced by the Courts in this State. The relevant provision consists of two parts. The first relates to the necessity to terminate a monthly lease by at least fifteen days' notice. The second is that the period of such a notice must be coterminous with the end of the month of tenancy. Substantially following the judgment of Bhide, J. in Rattan Sen v. Krishan Kaur, AIR 1933 Lah 134, and the very recent judgment of the Delhi High Court (S. N. Andley, J.) in C. L. Mehar and Sons v. Kharak Singh, 1968-70 Pun LR (Delhi Section) 55, I would hold that in the case of a monthly tenancy in the Punjab, in the absence of a specific contract and in the absence of any statutory provision to the contrary, a monthly tenant is entitled to at least fifteen days' notice of eviction before any action for his ejectment can be brought in a competent Court or a Tribunal. Only the principle of justice, equity and good conscience contained in the first part of section 106 of the Transfer of Property Act applies to the Punjab; but the technical rule of procedure contained in the second part of the provision making it necessary for the fifteen days' notice to terminate with the end of the month of tenancy cannot, in my opinion, be invoked on principles of equity and good conscience. I refrain from going to the length of laying down as held by Bhide, J., that even the technical procedural part of the section is applicable on principles of equity. I, would, therefore, prefer to follow the rule laid down by Andley, J. in the case of Messrs. C. L. Mehar and Sons, 1968-70 Pun LR (D) 55 (Supra). In this view of the matter, we have to reverse the finding of the learned District Judge, Jullundur, to the effect that no notice of termination of the contractual monthly tenancy was necessary, merely because the provisions of section 106 of the Transfer of Property Act have not been made applicable to the State of Punjab.

9. The second part of the argument of Mr. Wasu in relation to this question is based on a series of pronouncements by their Lordships of the Supreme Court to the effect that the relevant provisions in the various Rent Restriction Acts or Rent Control Acts are only aimed at placing further fetters on the normal contractual or statutory rights of a land-

lord to evict his tenants but do not even purport to take away the normal defences and other statutory safeguards against the eviction of the tenants unless in any particular statute any such right or defence is expressly taken away. The respondent, who appeared in person and argued his own case with requisite clarity, relied on judgment of Eric Weston C.J. in *Mst. Sunder Bai v. Mumtaz Jan*, 1952-54 Pun LR 425, wherein it was held that the notice required by clause (a) of sub-section (1) of S. 9 of the Delhi and Ajmer Merwara Rent Control Act, 1947, is not a notice terminating the tenancy, but a notice demanding arrears of rent and that if the notice given did make a demand for payment of arrears of rent and was served in the manner provided by Section 106 of the Transfer of Property Act it was a valid notice. The learned Chief Justice further held that "where the Transfer of Property Act does not apply to the locality, technical defects in the notice to quit would not have the force they might have under the Act." The judgment of Weston, C. J. does not appear to help the landlord. In that case, the notice dated July 5, 1948, served on the tenant not only demanded the arrears of rent but also directed the tenant to deliver up the possession of the premises on August 8, 1948. An objection was taken about the period of the notice not terminating with the last day of the month of tenancy. It was this objection which was repelled by the learned Chief Justice. I have already held myself following the judgment of Andley, J. in *C. L. Mehra and Sons' case*, 1968-70 Pun LR (D) 55, that the technical requirement of the notice terminating with the last day of the month of tenancy is not a principle of equity or good conscience but a technical rule of procedure, which cannot be invoked in a locality to which the statutory provisions of the Transfer of Property Act are not applicable. Same applies to the judgment of Falshaw, J. in *Mul Raj v. Prem Chand*, 1955-57 Pun LR 473 : (AIR 1955 Punj 238), where all that was held was that the notice served on the tenant ought not to be held to be invalid and the plaintiff need not be non-suited simply because the notice did not strictly comply with the technical provisions of the relevant section of the Transfer of Property Act. The learned Judge held that a notice of ejectment served in time on the tenant in accordance with Section 106 of the Transfer of Property Act cannot be held to be invalid simply on the ground that it did not strictly comply with the provisions of section 110 of the said Act by omitting to include the first day of the following month as the end of the month of the tenancy.

10. The respondent then referred to the judgment of the Supreme Court in *Brij Raj Krishna v. S. K. Shaw and Brothers*, AIR 1951 SC 115. That case arose under section 11 of the Bihar Buildings (Lease, Rent and Eviction Control) Act (3 of 1947) providing for eviction of a tenant on account of non-payment of rent. The question that arose for decision was whether the order for eviction passed by the Rent Controller under the aforesaid Bihar Act could be called in question in a Civil Court or whether the jurisdiction of the civil court under Section 9 of the Code was deemed to have been barred by the Bihar Act? The High Court had held that the civil Court had jurisdiction to reopen the matter. Fazl Ali, J. who wrote the judgment of the Supreme Court, held that since section 11 of the Bihar Act began with the word "notwithstanding anything contained in any agreement or law to the contrary", any attempt to import provisions relating to the law of transfer of property in the interpretation of this section would seem to be out of place. Their Lordships of the Supreme Court further held that section 11 of the Bihar Act was a self-contained section and it was, therefore, wholly unnecessary to go outside the said Act for determining whether a tenant was liable to be evicted or not and under what conditions he could be evicted. I think the reference to the Supreme Court judgment is misconceived. The ratio of the judgment was that no other statute could be looked at for coming to a decision on any point for which provision has been made in the said Act. What was held to be beyond the jurisdiction of the civil Court was the question whether the tenant was liable to be evicted or not and the further question about the conditions on which eviction could be ordered. Those things had been specifically provided for in the Bihar Act and the application of any provision which came into conflict with the said special Act was specifically excluded by the non obstante clause contained in section 11 of that Act. In the present case, the tenant has not raised any question, the answer to which is contained in the Act. There is no provision in the Act abrogating the necessity of a notice required by section 106 of the Transfer of Property Act. The observations in the case of *Brij Raj Krishna*, AIR 1951 SC 115 cannot, therefore, help the landlord on the point in issue.

11. The further argument of the landlord in this connection was that the Act being a complete Code in itself, the ratio of the judgment of the Supreme Court in *Punjalal Bhagwanddin v. Bhagwat-prasad*, AIR 1963 SC 120, cannot be invoked by the tenant, as the pronounce-

ment of the Supreme Court in that case was based on the finding that the Bombay Rents Hotel and Lodging House Rates (Control) Act (57 of 1947) was not a complete code. In fact, the ratio of the judgment of the Supreme Court in the Bombay case was that application of the provisions of section 106 of the Transfer of Property Act is not to be deemed to have been excluded because "there is nothing in it (in section 12 of the Bombay Act) which overrides the provisions of the Transfer of Property Act". Same appears to be true of the present case. Moreover, the Supreme Court does not appear to have held anywhere so far, that merely because a Rent Act is a complete code, the necessity of serving a notice under section 106 of the Transfer of Property Act is taken away, even though there is no provision in the relevant Rent Act abrogating the requirement of the service of such a notice.

12. On the other hand, the tenant has relied on the pronouncements of the Supreme Court contained in *Abbasbhai Alimahomed v. Gulamnabi*, AIR 1964 SC 1341; *Mangilal v. Sujan Chand*, AIR 1965 SC 101; and *Manujendra Dutt v. Purnendu Prosad Roy*, AIR 1967 SC 1419, for supporting his argument based on the following observations in the latest out of the abovesaid three authoritative pronouncements of the Supreme Court on the question in issue—

"To summarise the position: The Thika Tenancy Act does not confer any additional rights on a landlord but on the contrary imposes certain restrictions on his right to evict a tenant under the general law or under the contract of lease. The Thika Act like other Rent Acts enacted in various State imposes certain further restrictions on the right of the landlord to evict his tenant and lays down that the status of irremovability of a tenant cannot be got rid of except on specified grounds set out in Section 3. The right of the appellant therefore to have a notice as provided for by the proviso to Clause 7 of the Lease was not in any manner affected by Section 3 of the Thika Act. The effect of the non obstante clause was that even where a landlord has duly terminated the contractual tenancy or is otherwise entitled to evict his tenant he would still be entitled to a decree for eviction provided that his claim for possession falls under any one or more of the grounds in Section 3. Before therefore the respondents could be said to be entitled to a decree for eviction they had first to give six months' notice as required by the proviso to Clause 7 of the lease and such notice not having been admittedly given their suit for eviction could not succeed."

In *Manujendra Dutt's* case, AIR 1967 SC 1419 the Supreme Court held that the construction placed by the High Court on Section 3 of the Calcutta Act was not correct and that the High Court was wrong in holding that the words "notwithstanding anything contained in any other law for the time being in force or in any contract" absolved the landlord from his obligation to give the notice required by Section 106 of the Transfer of Property Act. A perusal of the abovesaid three judgments of the Supreme Court leaves no doubt that it has been finally settled that unless there is an express statutory provision abrogating the requirement of the service of a notice under Section 106 of the Transfer of Property Act, the mere fact that the rights of a landlord for eviction are restricted or a special machinery for enforcing them is provided in a Rent Restriction Act does not absolve a landlord from the obligation of serving the requisite notice and does not take away from the tenant a perfect defence of his not being liable to ejectment without the service of such a notice. I have already held that despite the fact that the statutory provision is not applicable to the State of Punjab its principles requiring the service of at least fifteen days' notice have the force of law.

13. The last argument of the landlord—which did appear somewhat attractive at the first sight—was that the presence of the words 'before or after the termination of the tenancy' in sub-section (1) of Section 13 of the Act amounts to an express provision abrogating Section 106 of the Transfer of Property Act.

Section 13 (1) states—

"13(1) A tenant in possession of a building or rented land shall not be evicted therefrom in execution of a decree passed before or after the commencement of this Act or otherwise and whether before or after the termination of the tenancy, except in accordance with the provisions of this section, or in pursuance of an order made under Section 13 of the Punjab Urban Rent Restriction Act, 1947, as subsequently amended."

The landlord's submission was that if the words "and whether before or" were not there in section 13 (1), it could indeed be argued that the bar to the eviction of a tenant contained in the said provision (subject to the eviction on the grounds mentioned in sub-section (2) of that section) was a hurdle placed in the way of the landlord in addition to the impediment of section 106 of the Transfer of Property Act. As the sub-section stands, argued Janak Raj landlord, it specifically provides for invoking the machinery for eviction contained in sub-section (2) of that section either before or after the

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Rajasthan High Court

AIR 1969 RAJASTHAN 1 (V 56 C 1)
V. P. TYAGI AND KAN SINGH, JJ.

Mohammad Abdul Baqi Khan, Petitioner v. Rajasthan Board of Muslim Wakfs, Jaipur and others, Respondents.

Civil Writ Petn. No. 312 of 1967, D/- 12-3-1968.

(A) Wakf Act (1954), Ss. 6, 27 — S. 27 is comprehensive and is not to be read subject to S. 6. (Para 14)

(B) Wakf Act (1954), Ss. 27, 6(4), 5(2) — Inquiry under S. 27 — List of wakfs published — Lapse of one year without filing of any suit as required by S. 6(1) — Wakf Board is not divested of its jurisdiction to enquire, into disputed wakfs.

If before the actual publication of the list of wakfs under S. 5(2), the Board has already started an inquiry under S. 27 and has not reached a final conclusion one way or the other about the disputed property, then it only means that the matter is yet under examination qua the disputed property as contemplated by S. 5(2) of the Act and before the conclusion of the proceedings one way or the other the list cannot be said to acquire finality as contemplated by sub-sec. (4) of Sec. 6 of the Act. What is final under sub-section (4) of sec. 6 is the 'list of wakfs published under sub-sec. (2) of sec. 5'. If there has been no publication whatsoever one way or the other in respect of any particular wakf, then it cannot be said that qua that property anything has become final. Secondly, the non-inclusion of a particular property in the list for any reason should not be taken to have the effect of changing the character of the wakf property itself merely because a suit was not filed in respect of it within a

year of the publication of the list as required by S. 6(1). The Board is not divested of its jurisdiction under S. 27 which it had when it started the enquiry, upon the publication of the list in the meantime, AIR 1967 Raj 1, Dist. (Paras 16, 17)

Cases Referred: Chronological Paras
(1967) AIR 1967 Raj 1 (V 54)=ILR
(1966) 16 Raj 935, Radha Kishan v. State of Rajasthan 8, 14, 15, 20
(1967) 1967 Raj LW 199=ILR
(1966) 16 Raj 1140, Thakur Devraj Singh v. State of Rajasthan 8
(1962) AIR 1962 SC 1722 (V 49)=
(1963) 1 SCR 20, Mohammed Ismail v. Sabir Ali 8
(1955) ILR (1955) 5 Raj 984=1956 Raj LW 264, Chand Narain v. Chief Secretary to Govt. of Rajasthan 8
(1921) AIR 1921 Mad 340 (V 8)=
ILR 44 Mad 1, Gurusami Pandiyan v. Chinnathambiar 8

P. N. Dutt, for Petitioner; H. M. Parakh, for Respondents.

KAN SINGH .J. :— This is a writ petition under Article 226 of the Constitution by one Mohammad Abdul Baqi Khan and by it he seeks to question the jurisdiction of the Rajasthan Board of Muslim Wakfs to take proceedings against him under S. 27 of the Wakf Act, 1954 (No. 29 of 1954 hereinafter to be referred as the Act). He also questions the appointment of certain members of the Wakf Board, respondents Nos. 2 to 4, as members of the Judicial Committee of the Board and he prays for quashing the various orders passed by the aforesaid Judicial Committee.

2. The relevant facts emerging from the writ petition are briefly these: The petitioner claims to be the ex-Jagirdar of

Jagar in the former Jaipur State. According to him, besides the village Jagar, his ancestors were granted two plots of land contiguous to each other in the city of Jaipur. One plot measured 9 Bighas and 14 Biswas and this was said to be Inam land. The other plot measured 11 Bighas and 17 Biswas and it was said to be a Muafi land. Sometime in the year 1942-43 the former Jaipur State acquired some portions of these plots for the Maharani Gayatri Devi Girls Public School and compensation was paid to the petitioner for the lands acquired. The remaining portion of the land together with buildings attached to it is known as Jagar House. According to the petitioner, this property was a State grant and was in continuous possession of the petitioner's ancestors and the petitioner.

This State grant is said to be subject to the recognition of succession locally known as 'Matmi' on the death of each holder of the jagir. According to the petitioner, 'Matmi' came to be granted in his favour under Council Resolution No. 10 of 23rd June, 1938 vide Ex. 1. The petitioner's jagir was resumed with effect from 1st August, 1954 under the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952. After the resumption of the jagir, the petitioner applied for declaring the Jagar House as his personal property and according to him under S. 23 of the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952, this property was declared to be his personal property (vide order of the Jagir Commissioner Ex. 2).

3. The Act came into force in the State of Rajasthan on 1st February, 1955. The Wakf Commissioner then issued a notice under S. 4 of the Act to the petitioner and after an inquiry the Wakf Commissioner came to the conclusion that the Jagar House was a State grant and being inalienable in nature could not be the subject of a Wakf with the result that it would not be included in the list of Wakfs to be prepared by the Wakf Commissioner. The petitioner's grievance is that in spite of this order of the Wakf Commissioner, the Secretary, Rajasthan Board of Muslims Wakfs served a notice on him on 28th May, 1963, purporting to be one under S. 27 of the Act saying that there was reason to believe that the Jagar House with its appurtenant property namely houses, shops and Bagh, was Wakf property, and it was, therefore, necessary to hold an inquiry.

The petitioner submitted a reply to this notice and in doing so he questioned the jurisdiction of the Board to hold an inquiry. The Chairman of the Board, however, by his order dated 23rd June, 1965, turned down the petitioner's objection regarding want of jurisdiction in the Board. The petitioner then moved a writ

petition in this Court against the order of the Chairman dated 23rd June, 1965, (Ex. 6). This writ petition having been dismissed in default, the petitioner moved another writ petition after he was not successful in having his earlier writ petition restored. This second writ petition was summarily rejected by this Court on 22nd October, 1965.

It appears that by that time the list of Wakfs had not been published but on 2nd December, 1965, a list of all the Wakfs existing in the State of Rajasthan was published. This list did not include the disputed property namely the Jagar House. After the dismissal of the writ petition, the Board commenced the inquiry and the petitioner filed his written statement.

4. The Board then framed four issues which were as follows:—

"(1) Whether the property in question is Wakf and if so, who dedicated it to Wakf, how and when?

(2) Whether the property in question being a State grant was incapable of being dedicated as Wakf?

(3) Whether the property in question has been declared as personal property of the opposite party under the Rajasthan Land Reforms and Resumption of Jagirs Act on 9-5-59 and what is its effect on the present proceedings?

(4) What is the effect of the order, dated 7-10-58, of the Wakf Commissioner on the present proceedings?"

The case was then set down for recording the statement of the petitioner as a witness for the Wakf Board. For one reason or the other, however, the case could not make any headway and in the meantime on 26th April, 1967, the Wakf Board constituted a Judicial Committee consisting of respondents Nos. 2 to 4. The petitioner was informed about the Judicial Committee being constituted on 6th June, 1967.

As the petitioner wanted to examine the validity of the constitution of the Committee, he applied for inspection of the resolution under which it came to be appointed but no such inspection was allowed to the petitioner. The so-called Judicial Committee then took up the matter and called upon the petitioner to produce his evidence as the Committee thought that the issues framed by the chairman on 9-11-66 should be deleted.

5. It will be clear from what I am going to say that it is not necessary to deal with the question of the validity of the appointment of respondents Nos. 2 to 4 as members of the so-called Judicial Committee. The main contention of the petitioner is that the Wakf Board respondent No. 1 has now no jurisdiction to continue the proceedings initiated by it under S. 27 of the Act because of the

publication of the list of the existing Wakfs in Rajasthan on 2-12-65 as such a list, according to the petitioner, is final and conclusive under S. 4 of the Act.

6. The writ petition has been opposed on behalf of the Wakf Board. Learned counsel for the respondent, however, stated at the bar at the time of arguments that he did not resist the contention of the petitioner about the constituting of the so-called Judicial Committee or regarding the appointment of respondents Nos. 2 to 4 as members thereof. He inter alia submitted that the tenure of the so-called Judicial Committee had come to an end. He further submitted that he would not oppose the quashing of the proceedings taken by the so-called Judicial Committee in the matter.

7. As regards the main contention of the petitioner regarding the jurisdiction of the Wakf Board to continue the proceedings under S. 27 of the Act, learned counsel for the respondent submitted that the mere fact that the list of existing Wakf properties in the State of Rajasthan came to be published in the Gazette on 2nd December, 1965, that is during the pendency of the proceedings, will not preclude the Board from concluding the proceedings.

8. We have heard learned counsel for the parties. Learned counsel for the petitioner made a two-fold submission. In the first instance, he submitted that the Wakf Board had no jurisdiction to continue the proceedings after the list of Wakf properties had been published on 2-12-1965 and specially when the Board failed to file any suit to question the correctness of such a list within a year. In the second place, it was submitted that the Jagat House being a State grant which was subject to Matmi, the same could not be the subject-matter of a Wakf. On this basis it was argued that the proceedings were, in the circumstances, futile. Learned counsel in elaboration of his arguments submitted that for the creation of a valid Wakf, according to Muslim Law, there has to be a permanent dedication of the property and necessarily the property must belong to the Wakf, that is, the person creating the wakf. In support of his submission, learned counsel placed reliance on Amir Ali's Tagore Law Lectures Volume One, page 34, Fatwa Alam Giri page 946 and Radha Kishan v. State of Rajasthan, AIR 1967 Raj 1. He also argued that a private property cannot be blended with a State grant and he invited our attention to Thakur Devraj Singh v. State of Rajasthan, 1967 Raj LW 199, Mohammad Ismail v. Sabir Ali AIR 1962 SC 1722, Chand Narain v. Chief Secretary to Government of Rajasthan, (1955) 1 LA (1955) 1, May 1984, Gurga-

sami Pandiyan v. Chinnathambiar, AIR 1921 Mad 340. Learned counsel also referred to the Revenue Standing Order No. 12 of the former Jaipur State for showing that according to the usages prevalent in the former Jaipur State a State grant could not be transferred. Learned counsel also maintained that according to Sec. 197 of the Rajasthan Land Revenue Act, 1956, pre-existing customs and usages relating to succession to estates were preserved in spite of the repeal of the Land Revenue Act of the former Jaipur State.

9. Shri H. M. Parakh on the other hand took the stand that the question regarding the validity or otherwise of the alleged Wakf has yet to be gone into by the Wakfs Board, and, therefore, it will be premature to deal with the matter at this stage. He next contended that the previous order on the writ petition filed by the petitioner should be taken to bar the second writ petition on the principle of res judicata.

10. Before I address myself to the questions argued before us, I may briefly refer to the relevant provisions of the Act.

11. The Act was enacted by the Parliament to provide for the better administration and supervision of the Wakfs. It was to come into force in a State to which it was extended by a Notification in the official Gazette and, as I have already observed, it came into effect in Rajasthan some time in 1955.

12. Section 3 defines certain terms and the term "Mutawalli" and the term "person interested in a Wakf" have been defined as follows:

"(f) 'Mutawalli' means any person appointed either verbally or under any deed or instrument by which a wakf has been created or by a competent authority to be the mutawalli of a wakf and includes any naib-mutawalli, Khadim, mujawar, sajjadanishin, amin or other person appointed by a mutawalli to perform the duties of a mutawalli and save as otherwise provided in this Act, any person or Committee for the time being managing or administering any wakf property as such."

"(h) 'person interested in a wakf' means any person who is entitled to receive any pecuniary or other benefits from the wakf and includes,—

(i) any person who has a right to worship or to perform any religious rite in a mosque, idgah, imambara, dargah, Khan-gah, Maqbara, graveyard or any other religious institution connected with the wakf or to participate in any religious or charitable institution under the wakf.

(ii) the wakif and any descendant of the wakif and the mutawalli."

The Act is divided in several chapters. Chapter II is headed as "Survey of

Wakfs". Section 4 empowers the State Government to appoint for the State by a notification a Commissioner of Wakfs for the purpose of making the survey of wakf properties existing at the time of the commencement of this Act. Sub-section (3) enjoins the Commissioner to submit his report to the State Government after making such inquiry as he may consider necessary and the report is to contain the following particulars namely (a) the number of the wakfs in the State showing the Shia wakfs and Sunni wakfs separately, (b) the nature and objects of each wakf; (c) the gross income of the property comprised in each wakf; (d) the amount of land revenue, cesses, rates and taxes payable in respect of such property; (e) the expenses incurred in the realisation of the income and the pay or other remuneration of the mutawalli of each wakf and (f) such other particulars relating to each wakf as may be prescribed.

The Commissioner has been given powers of a Civil Court for certain limited purposes such as summoning and examining of witnesses, requiring the discovery and production of any document etc. Section 5 provides for publication of list of wakfs and is as follows:—

"5(1) On receipt of a report under sub-section (3) of section 4, the State Government shall forward a copy of the same to the Board.

(2) The Board shall examine the report forwarded to it under sub-section (1) and publish in the Official Gazette, a list of wakfs, existing in the State containing such particulars as may be prescribed."

Section 6 is about disputes regarding wakfs and I may read that section as well:

"6(1). If any question arises whether a particular property is wakf property or not or whether a wakf is a Shia wakf or Sunni Wakf the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a civil court of competent jurisdiction for the decision of the question and the decision of the Civil Court in respect of such matter shall be final:

Provided that no such suit shall be entertained by the Civil Court after the expiry of one year from the date of the publication of the list of wakfs under sub-section (2) of section 5.

(2) Notwithstanding anything contained in sub-section (1), no proceeding under this Act in respect of any wakf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit,

(3) The Commissioner shall not be made a party to any suit under sub-section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pur-

suance of this Act or of any rules made thereunder,

(4) The list of wakfs published under sub-section (2) of Section 5 shall, unless it is modified in pursuance of a decision of the Civil Court under sub-section (1), be final and conclusive.

13. Chapter IIA is about Central Wakf Council. Chapter III provides for establishment of Boards and their functions. This chapter also provides for certain incidental matters. Then there is Chapter IV which provides for registration of Wakfs. Section 25 lays down that every wakf whether created before or after the commencement of this Act shall be registered at the office of the Board. Sub-section (2) provides for making of application by mutawalli and other persons and lays down as follows:

"(2) Application for registration shall be made by the mutawalli:

Provided that such applications may be made by the wakf or his descendants or a beneficiary of the wakf or any Muslim belonging to the sect to which the wakf belongs."

Section 25 further provides that the application for registration has to be signed and verified like pleadings according to the Code of Civil Procedure. The registering authority for wakfs under the section is the Board and under sub-section (7) it is empowered to make certain enquiries regarding the genuineness and the validity of the application and the correctness of any particulars in the application. The Board is to maintain a register of wakfs according to Sec. 26. Under section 27, the Board has been empowered to decide whether a property is wakf property and I may read this section:

"27. (1) The Board may itself collect information regarding any property which it has reason to believe to be wakf property and if any question arises whether a particular property is wakf property or not or whether a wakf is a Sunni wakf or a Shia wakf, it may, after making such inquiry as it may deem fit, decide the question.

(2) The decision of the Board on any question under sub-section (1) shall, unless revoked or modified by a Civil Court of competent jurisdiction, be final."

Section 28 empowers the Board to direct a mutawalli to apply for the registration of a wakf or to supply any information regarding a wakf, and the Board may itself cause the wakf to be registered or may at any time amend the register of wakfs. This section runs as follows:—

"28. The Board may direct a mutawalli to apply for the registration of wakf or to supply any information regarding a wakf or may itself cause the wakf to be registered or may at any time amend the register of wakfs."

Chapter V relates to mutawallis and Wakf accounts. This chapter provides in detail as to how mutawalli shall submit budget and the accounts and in what manner the Board will be exercising its control over the wakf properties. Section 36A relates to transfer of immovable property of wakfs and it runs as follows:

"36A. Notwithstanding anything contained in the wakf deed, no transfer of any immovable property of a wakf by way of —

- (i) sale, gift, mortgage or exchange, or
 - (ii) lease for a period exceeding three years in the case of agricultural land, or for a period exceeding one year in the case of non-agricultural land or building,
- shall be valid without the previous sanction of the Board."

According to this section, no transfer of the wakf property is valid without the previous sanction of the Board. Section 36B empowers the Board to recover certain wakf properties transferred without the previous sanction of the Board by sending a requisition to the Collector.

14. To start with, the Board issued a notice to the petitioner under S. 27 of the Act saying that there was reason to believe that the jagar House and the buildings appurtenant thereto were wakf properties, and, therefore, it was necessary to hold an inquiry under S. 27 of the Act. The petitioner was, therefore, called upon to appear before the Board and to submit his reply together with documentary proof if any. Against this notice, the petitioner filed detailed objections. It was urged that as the Wakf Commissioner had already decided that the property was not a wakf and as the Wakf Board has not instituted any suit under S. 6 of the Act, the Board could not arrogate to itself the power to reopen the case by holding an inquiry by its order dated 23rd June, 1965. The Board rejected the objections. The Chairman of the Board held that before issuing notice under Sec. 27 of the Wakf Act, the Board collected sufficient material to form a prima facie opinion that the property was wakf property and the petitioner was a mutawalli. The relevant observations of the Chairman were as follows:—

"Before issuing notice under Sec. 27 of the Wakf Act to Shri Nawab Abdul Baqi Khan the Board collected sufficient material to form a prima facie view that the property in question is a wakf property. Shri Abdul Baqi Khan filed two Civil Suits of eviction dated 29-5-52 and 3-7-53 respectively, wherein the property was shown as wakf property, and he himself was mentioned as the Mutawalli of this wakf property. The copies of the plaint are attached with the file. Thus the Board issued notice

u/s. 27 of the Act after complying with the provisions of this section."

This order of the Chairman was challenged by the petitioner by a writ petition which was D. B. Civil Writ No. 553 of 1965. It was summarily dismissed by a Division Bench of which my learned brother was one of the members. The learned Judges observed as follows:—

"We have heard learned counsel for the petitioner at some length and are not satisfied that the Wakf Board had or has no jurisdiction to make an enquiry in the present case. The language of S. 27 of the Wakf Act No. 29 of 1954 is very comprehensive and it is not possible for us to read it as subject to Sec. 6 of the Act, for, if that was the intention of the legislature, then there was nothing to prevent it from wording S. 27 in a different manner from how it stands at present. Once we come to that conclusion we do not think that we would be justified in stopping the Board from making an enquiry which it has set out to make in the present case. Apart from that, any decision which the Board arrives at in a case like the present can be tested by the party aggrieved in a Civil Court. That is yet another reason which disinclines us to interfere at this stage."

There is thus no doubt that the Board had started the proceedings with jurisdiction. From the extract of the Chairman's order dated 23-6-1965, it is evident that the petitioner himself had filed certain suits in relation to the disputed property, describing it to be wakf property and giving himself out as a mutawalli thereof. This was, therefore, enough to furnish a basis for the Board to hold an inquiry under S. 27. It has been held by this Court in its order dated 22-10-1965 that the language of Section 27 of the Act is very comprehensive and the same could not be read to be subject to section 6 of the Act. The petitioner is, in my view bound by this order of the Court as he did not file any appeal against it to the Supreme Court. I have, therefore, to deal with the matter on the basis of this order. The burden of his argument now is that under Sec. 6 of the Act, since the list had been published on 2-12-1965 and as no suit had been filed by the Wakf Board, the list has become final and conclusive. Learned counsel placed strong reliance on AIR 1967 Raj 1 (Supra) in support of this submission that it was for the Wakf Board to have filed a suit once the Commissioner came to the conclusion that the property was not a wakf and in the absence of that the Board cannot resort to proceedings under S. 27 of the Act. I was a party to this case, and, therefore, I propose to examine it closely.

15. The point that arose for decision in Radhakishan's case, AIR 1967 Raj 1 (Supra) was:

"All that we have to consider in this writ application is, whether the Wakfs Commissioner had the jurisdiction to adjudicate and decide against the petitioners whether the property in dispute was a wakf property, whether the list of Wakfs published by the Board of Wakfs under sub-section (2) of Section 5 would be final and conclusive against the petitioners under section 6(4) in case the petitioners do not file a suit within one year from the publication of the list, and whether the petitioners can be dispossessed or their possession can be threatened by the Board of Wakfs by proceeding under S. 36B without filing a suit in a Civil Court."

In that case, the writ petitioners who were non-Muslims contended that under Sec. 6 of the Act, the Wakfs Board was not entitled to include their property in the list of Wakfs or to make any inquiry. The question that, in the circumstances, arose for consideration of the court was as to who were the parties who could be taken to be concerned in a proceeding under S. 6 of the Act and whether a list under that section would bind a person who was neither a mutawalli nor a person interested in the Wakf. In this context, the scope of S. 6 was examined and it was observed as follows:

"The purpose of sec. 6 is to confine the dispute between the Wakf Board, the mutawalli and a person interested in the wakf. In other words, if there is a dispute whether a particular property is a wakf property or not, or whether a wakf is a Shia wakf or a Sunni wakf, then the Board or the mutawalli of the wakf or a person interested in the wakf as defined in Sec. 3 may institute suit in a civil Court of competent jurisdiction for the decision of the question. They can file such a suit within one year of the date of publication of the list of wakfs and such suit is filed, the list would be final and conclusive between them.

The very object of the Wakf Act is to provide for better administration and supervision of wakfs and the Board has been given powers of superintendence over all wakfs which vest in the Board. This provision seems to have been made in order to avoid prolongation of triangular disputes between the Wakf Board, the mutawalli and a person interested in the wakf who would be a person of the same community. It could never have been the intention of the right, title or interest of persons who are not Muslims. That is, if a person who is a non-Muslim whether he be a Christian, a Hindu, a Sikh, a Parsi or of any other religious denomination and if he is in possession of a certain property his right, title and interest cannot be put in jeopardy simply because that property is included in the

list published under sub-sec. (2) of Sec. 5.

The Legislature could not have meant that he should be driven to file a suit in a Civil Court for declaration of his title simply because the property in his possession is included in the list. Similarly the legislature could not have meant to curtail the period of limitation available to him under the Limitation Act and to provide that he must file a suit, within a year or the list would be final and conclusive against him. In our opinion, sub-section (4) makes the list final and conclusive only between the Wakf Board, the mutawalli and the person interested in the wakf as defined in Section 3 and to no other person."

Section 27 of the Act also came to be incidentally dealt with and it was observed as follows:—

"It has already been pointed out that section 27 appears in Chapter IV, which deals with registration of wakfs. It has also already been pointed out that according to section 25, every wakf created before or after the commencement of the Act must be registered at the office of the Board and that an application for registration must be made by the mutawalli giving particulars noted in the section. Section 26 enjoins upon the Board a duty to maintain a register of wakfs and to enter the particulars mentioned in that section. Section 27 has to be read in that context and, so read, it would only mean that if the mutawalli fails to get any wakf registered, then the Board may suo motu collect information if it has reason to believe that a particular property is a wakf property.

If it finds that the property in the hands of a mutawalli is a wakf property and he is wrongly denying it to be a wakf property, it may be registered as such. Similarly, if there is a dispute as to whether a wakf is a Sunni wakf or a Shia wakf, it may decide that matter and register the wakf as a Sunni wakf or a Shia wakf as it considers proper. The decision of the Board under sub-section (2) would be final only between the Board and the mutawalli or a person interested in the wakf, if it is not revoked or modified by a Civil Court of competent jurisdiction.

S. 27 does not seem to suggest that it empowers the Board to decide the question whether a particular property is wakf property or not, if that challenge comes from a stranger who is neither mutawalli nor a person interested in the wakf, but who belongs to another religious denomination and who claims a valid title and lawful possession over that property. To accept the respondents' argument would mean that the Board would be given the powers of the Civil Court to decide such disputes between

itself and strangers and thus to make the Board's decision final unless it is changed by a Civil Court of competent jurisdiction. If a dispute is raised by a non-Muslim, the Board cannot by simply entering the property in the register of wakfs drive him to take recourse to a Civil Court."

After examining the matter pro and con, the learned Chief Justice who delivered the judgment summarised the position as follows:

"To sum up the position, the Wakf Commissioner, though he is invested with the powers of a Civil Court in respect of certain matters, is not a Civil Court empowered to decide a disputed question whether a particular property is a wakf property or not. He has only to make a survey of wakf property existing in the State at the date of the commencement of the Act and to make a report of survey to the State Government. When the State Government forwards the report to the Board of Wakfs, it becomes the duty of the Board to examine it.

"Thereafter the Board should publish, in the official Gazette, a list of wakfs existing in the State. The law does not require the Commissioner to make a survey of wakf properties which have already become extinct as such. If he mentions in his report that certain properties were once wakf properties and can still be recovered as such, then the proper course, in our opinion, for the Board is to file a suit, get them declared as wakf properties and to recover their possession. If a dispute about the existence of a wakf is raised by a person who is stranger to the wakf, then it is neither fair nor proper for the Board to include such properties in the list published in the official gazette. Section 6, in our opinion, refers only to those triangular disputes which exist between the Board of Wakfs, the mutawalli and a person interested in the wakf.

"If there is a dispute between these three on a question whether a particular property is a wakf property or whether a wakf is a Shia wakf or a Sunni wakf, it is open to any one of them to institute a suit in a Civil Court of competent jurisdiction. If a suit is instituted the decision of the Civil Court will be final. If no such suit is filed by any one of them within a year from the date of the publication of the list of wakfs the Court would not entertain the suit thereafter and the list of the wakfs shall be final and conclusive between them. The object of section 6 is to narrow down the dispute between the Board of Wakfs, the Mutawalli and the person interested in the wakf as defined in section 3.

In our view, it does not concern a dispute if it is raised by a person who is an utter stranger to the wakf. The list

cannot be final and conclusive as against a non-Muslim who is not covered by Section 6(1) of the Act. Again, if a dispute whether a particular property is a wakf property or not, is raised by a non-Muslim and a stranger to the wakf, the Board of Wakfs has no jurisdiction to decide the matter in its own favour under section 27 and enter it in the register. The Board's decision under section 27 would not be binding against such persons. For the same reason, the Board would not be able to recover possession of the property from such persons under section 36B of the Act."

The upshot of the observations in Radhakishen's case was (1) that the Commissioner is not empowered to adjudicate on a question whether a particular property is a wakf property or not; (2) the purpose of Sec. 6 is to confine the dispute between the wakf Board, the mutawalli and a person interested in the wakf, and if a person who is a non-Muslim and is in possession of a certain property, his right, title and interest therein cannot be put in jeopardy simply because the property is included in the list. Such a person is not required to file a civil suit for a declaration of his title. In other words, the so-called list has no finality against a person who is a stranger; and (3) in the event of a challenge from the stranger, the Wakf Board cannot decide the question, whether a particular property is wakf property or not in exercise of its powers under S. 27 of the Act and by merely entering the property in the register of wakfs, the Wakfs Board cannot drive such a person to a Civil Court.

16. The pointed question before us in the present matter is whether in a case where the Wakfs Board had embarked on an inquiry with jurisdiction under S. 27 of the Act the Board will at once be divested of its jurisdiction once the list of Wakfs comes to be published in the meantime and one year has elapsed thereafter. This was not the question that fell to be considered in Radhakishan v. State (supra). In my view, the matter can be looked at in two ways.

17. First, if before the actual publication of the list, the Board has already started an inquiry and has not reached a final conclusion one way or the other about the disputed property, then it only means that the matter is yet under examination qua the disputed property as contemplated by S. 5(2) of the Act and before the conclusion of the proceedings one way or the other the list cannot be said to acquire finality as contemplated by sub-section (4) of Sec. 6 of the Act.

18. What is final under sub-section (4) of Sec. 6 is the 'list of wakfs published under sub-section (2) of Sec. 5'. If there has been no publication whatsoever one

way or the other in respect of any particular wakf, then it cannot be said that qua that property anything has become final.

19. Another aspect of the matter is to ask oneself whether the non-inclusion of a particular property in the list for any reason should be taken to have the effect of changing the character of the wakf property itself merely because a suit was not filed within a year. One cannot lose sight of the fact that the Act was designed to provide for better administration and supervision of wakfs. In this context if the mere fact of non-inclusion of a certain wakf property, if it is really wakf property, is to result in the position that it cannot be taken to be an existing wakf, then in my view, it would go against the basic scheme of the Act and we will be faced with an anomalous position where the Act instead of providing for better administration and supervision of wakfs, by preserving them is taken to result in extinction of some wakfs. Such an irrational result has to be avoided.

20. In the present case, it has already been held by the Division Bench to which my learned brother was a party that Section 27 of the Wakf Act cannot be read subject to Sec. 6 of the Act. If the petitioner is ultimately found to be a stranger, that it is a person who is neither the mutwalli nor a person interested in the wakf within the meaning of the Act, then on the basis of the view taken in AIR 1967 Raj 1 (supra), the petitioner may not be held bound by the ultimate decision of the Board. But that is another matter.

21. At the moment, it is on the basis of the material collected by the Board and especially on the basis of the suits filed by no less a person than the petitioner himself that the Board had reason to believe that the property in dispute is wakf and the petitioner is the mutwalli thereof. I am unable to accept the position that merely because the list of wakf properties in the State of Rajasthan came to be published on 2-12-65 during the pendency of the inquiry under S. 27 that the Board stands divested of its jurisdiction to conclude the inquiry.

22. I am not persuaded to examine the other contentions of the petitioner that the Jagar House being a State-grant could not be a subject matter of the wakf. It will be for the Wakfs Board to deal with them. It is, therefore, unnecessary to refer to the several cases cited by learned counsel for the petitioner including the passage from Tagore Law Lectures by Amir Ali and Fatwa Alam Giri. It is true that a State-grant as such is inalienable but on the material before me I am unable to hold that the house properties of Jagirdars though standing on

lands originally granted by the State, were liable to resumption by the State according to the usages prevalent in the ex-Jaipur State.

23. A perusal of the order passed by the Jagir Commissioner on 9th May, 1959, shows that Jagar House consisted of residential accommodation of the Jagirdar along with an open space of land in the form of a chowk, a part of which on one side being rented to business concerns. The whole property was bounded and no part of it was found to be agricultural land. The serious question that will arise for consideration of the Wakfs Board will be whether such a property was to be resumed by the State on the death of a jagirdar and also whether such a property would be transferable by the jagirdar. For the determination of this question, evidence may have to be recorded. I am, therefore, unable to hold that the inquiry before the Wakf Board is futile as contended for by learned counsel for the petitioner. It will be for the petitioner to urge before the Wakfs Board all these points about the property being not a wakf for the several reasons he wanted to urge before us and I do not wish to express any opinion regarding the merits of the claim. I am satisfied that the proceedings which were commenced with jurisdiction should be allowed to be completed by the Wakf Board according to law.

24. As regards the so-called Judicial Committee, learned counsel for the respondents has submitted that respondents Nos. 2 to 4 are no longer in office as their term has expired. It is, therefore, not necessary to restrain these respondents Nos. 2 to 4 from functioning as members of the Judicial Committee, the matter against them having become infructuous.

25. As regards the proceedings taken by respondents Nos. 2 to 4 as members of the Judicial Committee, learned counsel for the respondents has already conceded that all such proceedings should be quashed.

26. In the result I allow the writ petition in part and hereby quash the proceedings taken by respondents Nos. 2 to 4 in the case after 7-6-67. The Wakf Board respondent No. 1 is, however, left free to conclude the proceedings according to law. It shall take up the matter from the stage it was before it came to be entrusted to the so-called Judicial Committee comprising of respondents Nos. 2 to 4. I will leave the parties to bear their own costs.

27. V. P. TYAGI J. :— I agree in the result with my brother Kan Singh J.
BDB/D.V.C. Petition allowed.

AIR 1969 RAJASTHAN 9 (V 56 C 2)

C. M. LODHA, J.

Lajjaram, Petitioner v. Khubiram, Respondent.

Civil Revn. No. 224 of 1967, D/- 12-3-1968, against judgment and decree of Sr. Civil J., Dholpur, D/- 14-3-1967.

(A) Civil P. C. (1908), O. 18, R. 2 (4) (Rajasthan) — Statement of witness recorded before that of plaintiff — Presumption of permission of court to do so — When arises.

The statement of a witness was recorded before that of the plaintiff. The evidence of both was recorded on the same day and no time elapsed between the recording of the two statements. No objection was raised by the defendant.

Held, that it must be presumed that the Court impliedly granted permission to the plaintiff to appear after the witness had been examined. (Para 5)

A bare perusal of sub-rule (4) would show that under certain circumstances a party may appear in his evidence after another witness on his behalf has been examined. All that is required is that there should be an application to seek such a permission and the court may grant permission. It is not necessary that there should be an application in writing. (Para 5)

(B) Civil P. C. (1908) S. 115 (c) — Lower Court exercising jurisdiction illegally and with material irregularity — Statement of plaintiff excluded from evidence on ground that it was recorded after the record of evidence of witness — Exclusion wrong and thus committing error of procedure — Case held fell within ambit of sub-clause (c) and the judgment of lower court was liable to be interfered with. Case law. Ref. (Para 5)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 439 (V 53) =

(1966) 1 SCJ 212, Ratilal Balabhai v. Ranchhodhai

(1964) AIR 1964 SC 1676 (V 51) =

(1964) 8 SCR 1, R. P. Mehta v. I. A. Sheth

(1964) AIR 1964 Raj 243 (V 51) =

ILR (1964) 14 Raj 777, Mst. Tulsi Bai v. Chunilal

(1953) AIR 1953 SC 23 (V 40) =

1953 SCR 136, Keshardeo v. Radha Kishan

J. S. Saluja, for Petitioner; R. P. Goyal, for Respondent.

ORDER: This revision application has been filed by the plaintiff Lajjaram whose suit for recovery of a sum of Rs. 572/- was decreed by the learned Munsiff, Dholpur, but on appeal by the defendant was dismissed by the learned Senior Civil Judge, Dholpur.

2. The plaintiff-petitioner filed the suit for recovery of Rs. 400/- as principal and Rs. 172/- as interest on the basis of a bond dated 13th October, 1961. The defendant denied the execution of the bond and also taking of any loan from the plaintiff on its basis. After framing issues the trial court recorded the evidence of the parties and decreed the plaintiff's suit. On appeal filed by the defendant, the learned Senior Civil Judge, Dholpur came to the conclusion that the statement of the plaintiff Lajjaram (P. W. 2) could not be taken into consideration as it had been recorded in contravention of the provisions of Order 18, R. 2(4) of the Civil Procedure Code. Thus having excluded the statement of the plaintiff Lajjaram from consideration, on the rest of the evidence the learned Judge found that the plaintiff had failed to prove his case. It may be observed that only two witnesses were examined by the plaintiff in support of his case, P. W. 1 Jyoti Prasad and P. W. 2 Lajjaram (plaintiff).

3. Learned counsel for the petitioner has urged that the learned Senior Civil Judge, Dholpur acted illegally and with material irregularity in exercise of his jurisdiction in holding that the statement of the plaintiff was inadmissible. It may be observed that the issues were framed on 17-9-1965. After some adjournments the case was fixed for recording the plaintiff's evidence on 16-3-1966 on which date two witnesses viz. Jyoti Prasad (P. W. 1) and Lajja Ram (P. W. 2) were examined on behalf of the plaintiff. It appears from the order sheet of the trial court of 16th March, 1966 that the statement of Jyoti Prasad was marked as P. W. 1 and that of Lajjaram was marked as P. W. 2. A contention was raised before the first appellate court on behalf of the defendant that under Order 18, rule 2 (4), Civil Procedure Code, the plaintiff should have appeared as a witness before any other witness on his behalf was examined. It was argued that in the present case the plaintiff's witness Jyoti Prasad was examined first and thereafter the plaintiff appeared as a witness. It was further contended that this could be done only with the permission of the Court but no such permission was obtained. This submission found favour with the learned Senior Civil Judge, Dholpur who held that since the plaintiff had not made any application to be examined after his witness Jyoti Prasad was examined, his statement recorded in contravention of the provisions of Order 18, Rule 2 (4), C. P. C. was inadmissible. Thus he refused to take into consideration the statement of the plaintiff Lajjaram and further found that the plaintiff's case was not proved merely by the statement of P. W. 1 Jyoti Prasad.

4. The first question therefore that arises for determination in this revision is whether the lower appellate court was correct in excluding the statement of the plaintiff Lajjaram as inadmissible in evidence. In this connection it is noteworthy that no objection was taken at the time when the statement of Jyoti Prasad and Lajjaram were recorded by the trial court on 16-3-66. It is crystal clear that the plaintiff was present in the court on 16-3-1966 and his statement was actually recorded on that very day. Even as regards, the order in which Jyoti Prasad and Lajjaram were examined there is nothing on the record except that Jyoti Prasad's statement has been marked as P. W. 1 and that of Lajjaram as P. W. 2. It is correct that there is no written application on the record on behalf of the plaintiff seeking permission to examine the plaintiff Lajjaram after his witness Jyoti Prasad was examined and there was of course no occasion for the court to pass any order permitting the plaintiff to do so. From the material on the record it is difficult to come to this conclusion firmly that Jyoti Prasad was examined first and Lajjaram was examined later. Learned counsel for the non-petitioner has submitted that it was never contended on behalf of the petitioner that Lajjaram had been examined prior to Jyoti Prasad and therefore in view of the fact that the statement of Jyoti Prasad was marked as P. W. 1, it must be accepted that Lajjaram came in evidence after Jyoti Prasad. Even, assuming so, the question is: can his statement be altogether excluded from consideration? Sub-rule (4) to R. 2, Order 18, Civil Procedure Code inserted in Rajasthan may be reproduced below:

"(4) Where a party himself wishes to appear as a witness he shall so appear before any other witness on his behalf has been examined; provided that the Court may on an application made in this behalf and for reasons to be recorded, permit him to appear as his own witness at a later stage."

5. A bare perusal of this sub-rule would show that under certain circumstances a party may appear in his evidence after another witness on his behalf has been examined. All that is required is that there should be an application to seek such a permission and the Court may grant permission. It is not necessary that there should be an application in writing. In the present case since no objection was raised on behalf of the defendant and the Court actually recorded the statement of Lajjaram, it may very well be presumed that the Court impliedly granted permission to Lajjaram to appear after Jyoti Prasad had been examined. It also cannot be forgotten that Lajjaram has been examined just after Jyoti Prasad on the same

day and no time elapsed between the recording of the two statements. In these circumstances the lower court was, in my opinion, in error in excluding the statement of Lajjaram from the plaintiff's evidence. Learned counsel for the non-petitioner has, however, submitted that the lower appellate court had jurisdiction to decide that the provisions of Order 18, R. 2(4), C. P. C. are mandatory and this court would not be justified in interfering with the judgment of the lower court in exercise of its revisional jurisdiction.

In support of this contention the learned counsel has invited my attention to *Rattilal Balabhai v. Ranchhodhbhai*, AIR 1966 SC 439, *Mst. Tulsi Bai v. Chunilal*, AIR 1964 Raj 243 and *R. P. Mehta v. I. A. Sheth*, AIR 1964 SC 1676. In my opinion none of these authorities is to the point. The present is a case where the learned Senior Civil Judge has acted illegally and with material irregularity in exercise of his jurisdiction in excluding the statement of Lajjaram. He has clearly committed an error of procedure whereby the statement of Lajjaram which was admissible in evidence has been wrongly excluded. In this connection I may refer to the observations made by their Lordships of the Supreme Court in *Keshardeo v. Radha Kishan*, AIR 1953 SC 23 wherein it was observed that the words "illegally" and "material irregularity" do not refer to the decision arrived at but to the manner in which it is reached. Their Lordships were further pleased to observe that the errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with. Here is a case in which the lower court has dismissed the plaintiff's suit without considering the plaintiff's statement and in disregard of it. In my opinion, therefore, this case falls within the ambit of sub-clause (c) of Section 115 Civil Procedure Code, and the judgment of the lower court is liable to be interfered with in exercise of the revisional powers of this Court.

6. I, therefore, allow this revision application, set aside the judgment and decree of the learned Senior Civil Judge, Dholpur, dated 14th March, 1967 and send the case back to him for deciding the appeal afresh according to law. In the circumstances of the case I leave the parties to bear their own costs of this revision petition.

MVJ/D.V.C.

Revision allowed.

AIR 1969 RAJASTHAN 11 (V 56 C 3)

P. N. SHINGHAL, J.

Gulzarilal and others, Appellants v. Bhagwati Prasad and others, Respondents.

Second Appeal No. 81 of 1960, D/- 24-11-1968, against judgment and decree of Dist. J., Jhunjhunu, D/- 23-12-1959.

(A) Civil P. C. (1908), Ss. 100 and 101 — New plea — New plea purely of fact cannot be allowed to be raised for the first time in second appeal — Question whether a document was executed by the executants thereto — Genuineness not challenged in trial court as well as first appellate Court — Question cannot be allowed to be raised for the first time in second appeal. AIR 1925 All 1 (FB) & AIR 1927 All 231 & AIR 1930 All 885 & AIR 1946 Nag 135 & AIR 1921 Lah 228 & AIR 1955 Raj 59 & ILR (1959) 9 Raj 938, Rel. on; AIR 1938 All 396 (FB) & AIR 1965 SC 1325 & AIR 1932 PC 118 & AIR 1953 Bom 50, Dist. (Paras 7 and 8)

(B) Evidence Act (1872), S. 90 — Ministerial act of physically signing the document left to other persons — Question of Presumption is to be decided on facts.

The question whether the presumption of due execution provided for in section 90 of the Evidence Act should be raised in a case where the ministerial act of physically signing the document has been left to another person, should really be decided on a consideration of all the facts and circumstances. Thus, where there exist signatures of all executants though under the pens of others and at behest of each one of the executants and there is also attestation by witnesses, though at the behest of executants, presumption can be raised that every other part of document purported to be in the handwriting of those persons who wrote it and signed it. AIR 1915 All 393 (2), Rel. on; AIR 1956 SC 305 & AIR 1932 Oudh 227 & AIR 1936 Oudh 170 & AIR 1924 Cal 82 & AIR 1964 Pat 241, Dist.

(Paras 10 and 16)

Cases Referred: Chronological Paras

- (1965) AIR 1965 SC 1325 (V 52)=
 (1966) 2 SCR 480, Chittoori Subbanna v. Kudappa Subbanna 7
 (1964) AIR 1964 Pat 241 (V 51)=
 1963 BLJR 472, Kalika Prasad v. Mt. Jhenjbo Kuer 11, 14
 (1959) ILR (1959) 9 Raj 938=1960 Raj LW 29, Roop Kishore Agarwal v. Kesari Mal 8
 (1959) 1959 Raj LW 183, Ratan Lal v. Shri Mandir Sweetamba Jain 18
 (1958) AIR 1958 Raj 206 (V 45)=
 1957 Raj LW 441, Madanlal v. Durga Dutt 19
 (1956) AIR 1956 SC 305 (V 43)=
 1956 SCR 1, Harihar Prasad Singh v. Deonarain Prasad 11, 14

(1955) AIR 1955 Raj 59 (V 42)=
 ILR (1954) 4 Raj 905, Satya Narain v. Balchand 6

(1953) AIR 1953 Bom 50 (V 40)=
 ILR (1953) Bom 339, Ramlaxmi Ranchhodlal v. Bank of Baroda Ltd. 7

(1946) AIR 1946 Nag 135 (V 33)=
 ILR (1946) Nag 353, Birdhi Chand v. Mt. Kachri Bai 6

(1938) AIR 1938 All 396 (V 25)=
 ILR (1938) All 563 (FB), Dular Pandey v. Nanda Budhai 7

(1936) AIR 1936 Oudh 170 (V 23)=
 1936 Oudh WN 298, Mohammad Azim v. Special Manager, Court of Wards, Balrampur 11, 14

(1934) AIR 1934 All 529 (V 21)=
 148 Ind Cas 1172, Bhairon Prasad v. Ablak Singh 15

(1932) AIR 1932 PC 118 (V 19)=
 ILR 10 Rang 242, M. E. Moola Sons Ltd. v. Perin R. Burjorjee 7

(1932) AIR 1932 Oudh 227 (V 19)=
 ILR 8 Luck 18, Ram Naresh v. Chirkut 11, 14

(1930) AIR 1930 All 885 (V 17)=
 126 Ind Cas 18, Maheshwre Tewari v. Jarbandhan Misir 6

(1927) AIR 1927 All 231 (V 14)=
 ILR 49 All 55, Balkaran Singh v. Mt. Dulari Bai 6

(1925) AIR 1925 All 1 (V 12)=
 ILR 47 All 31 (FB), Haji Sheikh Bodha v. Babu Sukhram Singh 6, 14, 15

(1924) AIR 1924 Cal 82 (V 11)=
 ILR 50 Cal 526, Ramani Kanta v. Bhimanandan 11, 14

(1921) AIR 1921 Lah 228 (V 8)=
 3 Lah LJ 165, Jiwan Shah v. Mt. Fateh Bibi 6

(1915) AIR 1915 All 393 (2) (V 2)=
 13 All LJ 921, Sheo Nandan Ahir v. Ram Lagan Singh 14

H. M. Parekh, for Appellants; R. K. Rastogi, for Respondents.

JUDGMENT :— This second appeal of the defendants arises from the appellate judgment and decree of the District Judge of Jhunjhunu dated December 23, 1959, in these circumstances.

2. There is a piece of land situated in village Gudhagorji in Jhunjhunu District, which has been shown in site-plan Ex. 1. The plaintiffs claimed that the land belonged to the "panadars" of the "pana" of Kishore Singh, that the "panadars" sold it to them under sale-deed Ex. 24 dated Chaitra bad 9, S. 1956, and that the plaintiffs and their ancestors remained in continuous possession of that land. It was further pleaded that the land was expressly purchased for the construction of a house, and that the father of the plaintiffs constructed a masonry compound wall on the southern side and enclosed the remaining three sides by mud walls. The plaintiffs had, however, to live out-

side in connection with their business and the compound walls deteriorated by lapse of time. The financial position of the plaintiffs did not enable them to build a house. The plaintiffs claimed, however, that the foundations of the masonry compound wall were still there. The defendants held out threats to them regarding the land, so the plaintiffs initiated proceedings against them under section 107 of the Code of Criminal Procedure in the court of the Sub Divisional Magistrate of Udaipur (Shekhawati). January 22, 1954 was fixed for the hearing of those proceedings but, according to the plaintiffs, the defendants forcibly dispossessed them on January 15, 1954 and enclosed the land with a fresh thorn fencing. The plaintiffs therefore instituted the present suit on Jan. 23, 1954, for possession and they impleaded Sujan Singh and Hanuman Singh as defendants because the defendants claimed that they had purchased the land from them.

3. Defendants Gulzari Lal, Sheo Prasad and Mohan Lal denied the plaintiffs' ownership or possession of the disputed land and pleaded that it never belonged to the "pana" of Kishore Singh. According to them, the land belonged to the "pana" of Ghadika of which Sujan Singh and Hanuman Singh were the descendants. Further, the defendants pleaded that the suit land was known as "Bera Bhadwalla" and that it was purchased by them from the said Sujan Singh and Hanuman Singh by means of sale-deeds Exs. A-1 and A-2 dated Mangsir Sud 15, S. 2005 and that they were, in fact, in possession of the land even earlier. Defendants Sujan Singh and Hanuman Singh claimed to be the descendants of the "panadars" of Ghadika and to be the rightful owners of the suit land. They supported the defendants' version regarding its sale. Certain other pleas were taken in the written statements of the two sets of defendants, but nothing turns on them and I am therefore leaving them out of consideration.

4. The trial court framed issues on the questions whether the suit land belonged to the plaintiffs and was in their possession up to January 15, 1954, and whether the first three defendants forcibly took possession of it on that date. Both these points were decided in favour of the plaintiffs by the Civil Judge of Jhunjhunu and their suit was decreed, except for the direction that the plaintiffs shall not construct any building within 5 feet of their western boundary because of the existence of "todas" and "jharokas" etc. of the adjoining houses of Kalu Ram and Maoji Ram. The defendants preferred an appeal and the plaintiffs a cross-objection. The learned District Judge dismissed the appeal but allowed the cross-objection, so that the plaintiffs succeeded not only in

obtaining a confirmation of the trial court's decree regarding the land but also in getting rid of the direction prohibiting them from making any construction within 5 feet of the boundary of their land towards the west. It is against that judgment and decree of the lower appellate court that the present appeal has been filed by all the five defendants. It may be mentioned that defendant Mohan Lal died during the pendency of the appeal and it is not disputed that his legal representatives have duly been brought on the record.

5. It would thus appear that the main point in controversy was whether the suit land belonged to the plaintiffs by virtue of sale-deed Ex. 24 dated Chaitra bad 9, S. 1956. The two courts below have given their reasons for deciding the point in favour of the plaintiffs. The finding rests mainly on Ex. 24 which has been held to be the title deed of the plaintiffs. Mr. Parakh, learned counsel for the defendants-appellants, has tried to assail the sale-deed on two grounds. Firstly, he has argued that the courts below erred in raising a presumption under section 90 of the Evidence Act regarding the execution of document Ex. 24 because it does not purport to bear the signatures of the executants. It contains the signatures of some other persons and it has been urged that the plaintiffs have not proved that those who actually signed the document had the authority if the so-called vendors to execute it. Secondly, the learned counsel has argued that Ex. 24 is not a sale-deed at all.

6. So far as the first point is concerned, it appears that when the trial court decided to apply section 90 of the Evidence Act to document Ex. 24, no objection was taken that the signatures on it were not those of the executants, or that the document could not be taken into consideration in the absence of proof that the signatories had the authority of the vendors to execute it. In fact the defendants did not even think it worth their while to cross-examine the witnesses of the plaintiffs on these lines, and the point was not urged by way of an argument before the trial court. A perusal of the memorandum of the first appeal shows that no such ground was taken in that court to assail the finding of the trial court in favour of the plaintiffs, although it rested mainly on document Ex. 24 in respect of which the trial court had invoked the provisions of section 90 of Evidence Act.

Such a point was not even urged at the hearing of the first appeal, for the impugned judgment of the learned District Judge shows that the learned counsel for the appellants raised only two arguments in connection with the application of section 90 to the document. Firstly, it was

urged that the document was not an "out and out sale" because the sum of Rs. 30 on account of the "mohrana" was not proved to have been paid to the vendors, and, secondly, that the document did not specify the land. Both these points were considered by the learned District Judge and were rejected for the reasons given by him.

It is apparent from a perusal of his judgment that the arguments before him proceeded on the assumption that Ex. 24 had duly been executed in favour of the plaintiffs; and the appellants cannot be allowed to raise a new point, for the first time in this second appeal, that Ex. 24 did not bear the signatures of the executors, or that those who signed for them did not have the authority to do so. A careful reading of the memorandum of the second appeal shows that no such grounds have been taken for an appeal to this court also and the learned counsel for the appellants has not cared to ask for leave to raise any new point for consideration. It may be that he has abstained from doing so because of the fact that the appeal was filed almost eight years ago and the limitation had expired long ago. At any rate the learned counsel has not shown any reason, what to say of a good reason, for the failure to raise the point in the courts below. There is therefore considerable force in the argument of Mr. Rastogi, learned counsel for the plaintiffs-respondents, that such a new point should not be allowed to be raised for the first time in this court because it is essentially a question of fact.

Reference may in this connection be made to the decision in *Haji Sheikh Bodha v. Babu Sukhram Singh*, AIR 1925 All 1 (FB) where Sulaiman, J. expressed the view that such a new question could not be allowed to be raised at the final hearing. This view has been followed in *Mt. Balkaran Singh v. Mt. Dulari Bai*, AIR 1927 All 231, *Maheshrey Tewari v. Jarbandhan Misir*, AIR 1930 All 885 is also a decision to the same effect. The same view has been taken in *Birdhichand v. Mt. Kachri Bai*, AIR 1946 Nag 135 and *Jiwan Shah v. Mt. Fateh Bibi*, AIR 1921 Lah 228 cited by Mr. Rastogi. This court has also taken the view that an appellant should not be allowed to raise a new point in this court for the first time in such circumstance, and it will be sufficient to refer to the decisions in *Satya Narain v. Balchand*, ILR (1954) 4 Raj 905 = (AIR 1955 Raj 59) and *Roop Kishore Agarwal v. Kesari Mal*, ILR (1959) 9 Raj 938.

7. Mr. Parakh has however argued that the point raised by him is purely a point of law as it relates to the construction of document Ex. 24 and that it should be allowed to be raised in this court for the first time. He has tried to support his

argument by reference to *Dular Pandey v. Nanda Budhai*, AIR 1938 All 396 (FB); *Chittoori Subbanna v. Kudappa Subbanna*, AIR 1965 SC 1325, *M. E. Moola Sons, Ltd. v. Perin R. Burjorjee*, AIR 1932 PC 118 and *Ramlaxmi Ranchhodlal v. Bank of Baroda, Ltd.*, AIR 1953 Bom 50. I have gone through the decisions cited by the learned counsel but they are based on facts which were quite different. In *Dular Pandey's* case, AIR 1938 All 396 (FB) the point of law which was entertained for the first time in second appeal was based on facts which were held to be proved by the lower appellate court. In *Chittoori Subbanna's* case, AIR 1965 SC 1325 the question sought to be raised was a pure question of law and was not dependant on the determination of any question of fact, while in AIR 1932 PC 118 the question related to the construction of a document or upon the facts either admitted or proved beyond controversy. In the remaining case of *Ramlaxmi Ranchhodlal*, AIR 1953 Bom 50 the new plea followed as a matter of legal consequence from proved facts. Thus all the cases cited by Mr. Parakh were quite different, inasmuch as the new points which were raised were either based on proved facts or arose out of the construction of the document in question. In the instant case, however, it is a question of fact whether the Panadar-vendors executed and signed document Ex. 24, and as there was no dispute in any of the two courts below that they had signed the document, there was no occasion for the plaintiffs to prove the genuineness of the signatures, or the so-called authority of those who affixed them on their behalf, and a contrary submission cannot be allowed to be raised now at this distance of time. In fact any other view will be prejudicial to the plaintiffs for, if any such dispute had been raised in the trial court, they would have the opportunity of leading other evidence to prove the due execution of the document.

8. For the reasons mentioned above, I am not inclined to allow the defendants-appellants to raise the aforesaid argument for the first time in this court. I have, however, examined the argument on the merits and, as I shall presently show, it is without any substance.

9. A reading of Ex. 24 shows, inter alia, that (i) it purports to have been executed by all the four "panadars" of the "pana" of Kishore Singh, (ii) by it they gave the suit land to the transferees for building a house, (iii) the document describes the location and the area of the land, as well as the consideration for the transfer, (iv) it contains a recital that the document had been written to evidence the conveyance of the land to the transferees, (v) the document has been signed at the behest or command of the "panadars",

and (vi) it bears the attestation of Hardeva Sah and Ganga Ram Sah, again at the behest of the Sardars of all the four "panas". Dhalji has signed the document at the behest of Rajshri Ugar Singh, Balji has signed at the behest of Rajshri Harjan Singh, Ganga Singh has signed it at the behest of Rajshri Jesaji and so on. To take a typical example, the signature of Ugar Singh is as follows,—

"कहे राज श्री उगर सिंह जी के। दः दालजी का"

This is the pattern of the signatures, but the signature of one of the executants reads as follows, —

"दः राय सिंह जी का बकलम घोकल का"

10. It has not been disputed that the document is more than thirty years old having been executed on Chaitra bad 9, S. 1956, and that it has been produced from the proper custody of the plaintiffs. A perusal of the document shows that it bears the signatures of the executants, although this has been done under the pens of others, at the behest of each one of the executants. Then there is the further fact that it has been attested by two witnesses, again at the behest of the executants who have been named to be all the four "panadars". In these facts and circumstances, it was quite reasonable for the two courts below to raise the presumption that the signatures and every other part of the document which purported to be in the handwriting of the persons who wrote and signed it, were in the handwriting of those persons and, further, that it had been duly executed and attested by the persons by whom it purported to be executed and attested, within the meaning of Section 90 of the Evidence Act.

11. All the same, it has been argued by Mr. Parakh that no such presumption should be raised because the document has not been signed by the executants themselves and there is no evidence to prove that those who signed it were the authorised agents of the executants. In other words, the learned counsel has argued that there could be no presumption under section 90 of the Indian Evidence Act regarding the agents' authority to sign a document in such circumstances and that, in the absence of such evidence, the document could not be relied upon as the title deed of the plaintiffs. The learned counsel has made a reference to Harihar Prasad Singh v. Deonarain Prasad, AIR 1956 SC 305, Ram Naresh v. Chirkut, AIR 1932 Oudh 227, Mohammad Azim v. Special Manager, Court of Wards, Balrampur, AIR 1936 Oudh 170, Ramani Kanta v. Bhimanandan Singh, AIR 1924 Cal 82 and Kalika Prasad Ojha v. Mt. Jhehbo Kuer, AIR 1964 Pat 241 in support of his argument. There is, however, no substance in this argument.

12. As has been stated, a perusal of document Ex. 24 shows that it is a deed of transfer of land which has been executed on behalf of all the four "panadars" of the "pana" of Kishore Singh, in favour of the transferees. The only thing is that instead of signing the document himself, each one of the executants asked a named person to sign it for him. Thus, Dhalji signed it at the behest of Ugar Singh, Balji signed it at the behest of Harjan Singh, Gangsingh signed it at the behest of Jesa etc.

One Dhonkal affixed the signature of Ram Singh under his own pen. Such is the nature of the signatures. But the fact nonetheless remains that the document clearly shows that each of the persons who physically signed it, did so at the express behest of one or the other of the executants named by him. It is also apparent that while affixing their signatures on behalf of the executants, those who signed the documents made it quite clear that they did so at the behest of the particular executants named by them. The pattern of the signatures, such as it is, goes to show clearly that it was only the ministerial act of physically signing the document which was discharged by others, and that too under the direct supervision of the executants and at their express behest or command. In fact and substance, therefore, the document must be held to have been signed by the executants, and there is no reason why a presumption under section 90 of the Evidence Act should not be raised in respect to it. This conclusion becomes all the more irresistible when it is remembered that the document bears the attestation of the two persons mentioned above, namely, Hardeva Sah and Ganga Ram Sah, and that attestation again purports to have been made at the behest of the Panadar-executants themselves.

13. The argument that the performance of even the ministerial act of signing the document smacks of authorization similar to that in the case of an agent or the holder of a power of attorney, is quite futile, because the execution of a document by an agent or power of attorney-holder stands on quite a different footing and is of course not covered by the presumption provided for in section 90.

14. I have gone through the cases cited by Mr. Parakh but they have no bearing on the precise point which arises for consideration in this case, and were based on different facts. In Harihar Prasad Singh's case, AIR 1956 SC 305 the documents were signed by Chulai Mahto, an agent, and there was no proof that he was an agent. Their Lordships of the Supreme Court therefore held that section 90 of the Evidence Act did not authorize the raising of a presumption as to the exist-

ence of authority on the part of the agent to represent the mortgagors. In Ram Naresh Singh's case, AIR 1932 Oudh 227 the deeds in question did not purport to have been signed or even marked by the executants and it was not known in whose handwritings there were some Hindi writings thereon. That case was therefore vastly different and the decision was based on its peculiar facts. Mohammad Azim's case, AIR 1936 Oudh 170 was based on the decision in Sheo Nandan Ahir v. Ram Lagan Singh, 13 All LJ 921=(AIR 1915 All 393 (2)) which was overruled in the Full Bench decision in AIR 1925 All 1 (FB) to which I shall refer a little later. In AIR 1924 Cal 82 the signature was of an "am-mukhtar" and this is why it was held that his authority as such had to be proved and could not be presumed under section 90 of the Evidence Act. The decision in Kalika Prasad Ojha's case, AIR 1964 Pat 241 does not refer to the contrary view which had been taken in a number of cases and, with all respect to the learned Judges who decided it, I find it difficult to follow it.

15. The view which I have taken above finds support from the Full Bench decision in AIR 1925 All 1 (FB). In that case the question was whether the presumption permitted by section 90 of the Evidence Act in the case of a document purporting to be thirty years old, that it was duly executed by the party by whom it purported to be executed, included the presumption that when the signature of the executant purported to have been made by the pen of the scribe, the latter was duly authorized to sign for him. The question was referred to a Full Bench and was answered in the affirmative. It was a case in which the signature of an executant had been affixed by the hand of scribe, but it was held that the document purported to have been executed by the executant by the pen of the scribe so as to attract a presumption under section 90. With all respect to the learned Judges who decided that case, it appears to me that this is the correct view of the law, and it has been followed in Bhairon Prosad v. Ablak Singh, AIR 1934 All 529.

16. The question whether the presumption of due execution provided for in section 90 of the Evidence Act should be raised in a case where the ministerial act of physically signing the document has been left to another person, should really be decided on a consideration of all the facts and circumstances. As I have stated, in the present case document Ex. 24 purports to be a deed of transfer executed by all the four "panadars" of the "pana" of Kishore Singh, in favour of the transferees. The land so transferred and its boundaries have been described in the document, and so also the con-

sideration for the transfer. The document clearly states that it was written and executed to evidence the conveyance of the land mentioned in it, to the transferees. But instead of signing the document themselves, each one of the executants asked another person to sign it for him and the persons who signed it expressly stated that they did so at the behest or command of the individual executant mentioned by each one of them.

To this effect the document bears the attestation of the two witnesses who categorically noted in the document that they had attested it at the behest of the "panadars" of all the four "panas". All these facts and circumstances fully justify the raising of a presumption under section 90 of the Evidence Act in respect of the document. Then there is satisfactory evidence to show that the transferees paid "nalkandi" and the receipts in that connection are Exs. 20 to 22, and 26 to 30 for the period S. 1976 to S. 2009. Besides, the courts below were satisfied that a compound wall had been erected and that the plaintiffs had raised a dispute to protect the land when there was an encroachment on it as evidenced by Ex. 12 of S. 1936. I have therefore no hesitation in overruling the argument of Mr. Parakh, for two courts below were quite justified in applying section 90 of the Evidence Act to document Ex. 24.

17. As has been mentioned, Mr. Parakh has raised another argument that Ex. 24 is not a sale-deed at all. But as Mr. Rastogi has rightly pointed out, no such point was raised in the lower appellate court for, as has been mentioned earlier, only two points were made in that court regarding Ex. 24 and none of them related to the question that it was not a sale-deed. What was urged in the lower appellate court was that it was not an out and out sale because the amount of the "Mohrana" was not proved to have been paid to the vendors, and the "patta" did not specify the land in question. There is therefore no justification for raising a new point in second appeal. The point cannot in fact be raised even on the ground that it relates to the construction of the document (Ex. 24), for it clearly contains the recital that the transferors had given the land specified in the document, to the transferees, for the construction of a house, on the payment of "mohrana" as well as "jhunpri" and "lag".

The document, in fact and substance, is therefore a sale-deed in favour of the vendees. It is common knowledge that in the area where the land in question is situated, the "jagirdars" or "bhomins" were not allowed to make an out and out sale of the land for ever, and they used to disguise the alienations by taking

resort to the type of language used in Ex. 24. As a matter of fact defendant Gulzaril Lal has claimed the ownership of the suit land by calling Ex. A-1 as a sale-deed and that document is quite similar to Ex. 24. I have no doubt that the submission of Mr. Parakh that Ex. 24 is not a sale-deed in favour of the plaintiffs, is quite unjustified.

18. Mr. Parakh has raised the further argument that the suit land did not belong to the "pana" of Kishore Singh and that it could not at all have been sold by the "panadars" of that "pana" under document Ex. 24. The learned counsel has, in this connection, tried to argue that the parol evidence on this point has been misread by the learned District Judge. The appellants did not, however, take an express plea in the grounds of their appeal that the evidence had been misread on any particular point or points and, as has been held by this court in *Ratan Lal v. Shri Mandir Sweetambar Jain*, (1959) 1959 Raj LW 183, the point cannot be allowed to be raised for the first time in second appeal. The two courts below have considered the evidence at length, and it has, in fact, not been shown that there has been any misreading thereof. What Mr. Parakh has submitted is that plaintiff, Bhagwati Prashad P. W. 10 went to the extent of denying the existence of "bera Bhadwala" when at one place he had admitted the existence of such a "bera".

The argument is not really correct because it appears that while the witness admitted the existence of "bera" Bhadwala, he denied the existence of "bera" Bhadwala, and there was no contradiction in his statement. So also, there is no contradiction in the evidence of the witness regarding the construction of a boundary wall, for the alleged contradiction relates only to the eastern wall, close to the house of Maoji Ram. The only other witness whose evidence is alleged to have been misread, is Geegla P. W. 5. Mr. Parakh has tried to show that the witness had admitted that the suit land belonged to Hanuman Singh and Sujan Singh from whom the defendants had purchased it under Exs. A-1 and A-2. This attempt is also futile because the trial court has given reasons for rejecting this part of the statement of Geegla and, after reading his evidence as a whole, I am not inclined to read any portion of it in favour of the defendants-appellants.

19. The only other point urged by Mr. Parakh is that based on the view taken in *Madanlal v. Durgadutt*, 1957 Raj LW 441=(AIR 1958 Raj 206) that where a plaintiff sues for possession of property which is in the occupation of another and bases his suit on title and also alleges dis-

possession or discontinuance of possession, the plaintiff will not be entitled to succeed merely by proving title and he must, in addition, prove that he has been in possession of the property within 12 years of the suit. These observations were made with reference to the scope of Art. 142 of the first schedule of the Indian Limitation Act and they are of no avail to the appellants because the two courts below have given adequate reasons for taking the view that the plaintiffs were in possession of the suit property and were dispossessed on the date mentioned by them.

20. No other point remains for consideration and the appeal is dismissed with costs.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 RAJASTHAN 16 (V. 56 C 4).

B. P. BERI, J.

Municipal Council, Jaipur, Appellant v. Laxmi Narain and others, Respondents.

Criminal Appeals Nos. 91, 417 and 107 of 1965, D/- 20-2-1968, against judgments of the Municipal Magistrates Nos. 2, Jaipur, D/- 12-9-1965, 3-3-1964 and 13-5-1963, respectively.

(A) Municipalities — Rajasthan Municipalities Act (38 of 1959), Ss. 67(d), 78 — Prevention of Food Adulteration Act (1954), S. 20 — Powers of Municipal Chairmap under S. 67(d) — Includes power to institute complaint for prosecution of accused under S. 20 of Food Adulteration Act — Specific delegation under S. 78 is not necessary — Appeal by Municipal Council on acquittal of accused is valid.

Institution of complaint by Chairman of a Municipal Council for prosecution of accused under S. 20 of Food Adulteration Act is one of the functions to be discharged by him on behalf of Municipal Council under the powers conferred by the Municipalities Act (1959). Therefore, the Municipal Council is entitled to file an appeal as a complainant against the order of acquittal of the person prosecuted under Food Adulteration Act (1954). A chairman of Municipal Council under the Act can perform the executive functions as may be performed by or on behalf of the Board over which he presides, whether or not there has been an express delegation under Section 78 of the Act. Even if there is resolution of the Municipal Council expressly delegating the power under S. 78 to its chairman to institute complaint, the resolution merely repeats the power which already resides in the chairman to perform executive functions and therefore, the resolution has

not the effect of detracting from the power which by virtue of S. 67(d) already exists in the chairman. Case law discussed. (Paras 10 & 11)

The fact that in the printed form of the complaint that has been lodged, the name of the chairman is written first and the Municipal Council thereafter, does not alter the nature of the complaint and it cannot be said that the chairman was not acting on behalf of the Municipal Council and not discharging its functions and duties conferred on him by the provisions of S. 67(d) but was acting in his personal capacity. It is more precise to say that Municipal Council was the complainant through its chairman, but mere lack of precision in the matter of drafting would not alter the substance of the matter. (Para 11)

(B) Prevention of Food Adulteration Act (1954), Ss. 16, 7 — Person contravening S. 16 need not necessarily be a licensed vendor. (Para 19)

(C) Prevention of Food Adulteration Act (1954), Ss. 10, 11, 16 — Negligence of Food Inspector to note what is written on milk container — Prosecution of accused on strength of his oral statement — Non-compliance with S. 11 — Conviction under S. 16 is illegal.

Prosecution of accused by the Food Inspector on the strength of his oral statement that the container contains cow's milk, instead of confirming the same from what is written on the container, vitiates the prosecution. Taking of sample for the purpose of analysis and consequent possible prosecution are serious statutory steps. (Para 22)

(D) Prevention of Food Adulteration Act (1954), S. 16 — Conviction under — Sale of adulterated food article must be proved. (Para 25)

Cases Referred: Chronological Paras
(1967) Criminal Appeal No. 271 of 1966, D/- 13-2-1967 (Raj), Municipal Council, Jaipur v. Prabhu Narain 6, 8, 9, 13
(1964) AIR 1964 Cal 64 (V 51)= 1964 (1) Cri LJ 186, Nanilal Samanta v. Rabin Gosh 7, 14
(1964) AIR 1964 Raj 123 (V 51)= 1963 Raj LW 634=1964 (1) Cri LJ 702, Ratanlal v. State 10
(1958) AIR 1958 Pat 10 (V 45)= 1958 Cri LJ 70, Har Narain Singh v. Nawab Chand Lal 7, 14
(1956) AIR 1956 Tra-Co. 189 (V 43)= 1956 Cri LJ 1018, Kannan Devan Hills Produce Co. Ltd. v. Madhavan Pillai 8, 14
(1940) AIR 1940 Sind 134 (V 27)= 41 Cri LJ 788 (FB), Muhammad Hashim v. Emperor 7, 14
(1914) AIR 1914 Mad 387 (1) (V 1)= 15 Cri LJ 299, Paramananda Nadar v. Karunakara Doss 7, 8, 14

(1899) ILR 22 All 123 (FB), M. J.

Powell v. Municipal Board of Mussoorie

8, 9

P. C. Bhandari, S. M. Mehta, for the Municipal Council, Jaipur; C. K. Garg as an Intervener; M. M. Tewari for Laxmi Narain; V. S. Dave for Hardev and K. N. Tikku, for Mohanlal.

JUDGMENT :— The aforesaid three criminal appeals instituted by the Municipal Council, Jaipur, in cases relating to the Prevention of Food Adulteration Act, raise an identical point and are, therefore, being disposed of by this common judgment.

2. In Criminal Appeals Nos. 91 of 1965 and 107 of 1965 Shri Shyam Beharilal Saxena, President, Municipal Council, Jaipur, had made a complaint before the Municipal Magistrate No. 2, First Class, Jaipur. In Criminal Appeal No. 417 of 1965 the complaint was made before the Municipal Magistrate No. 2, Jaipur by Shri Jagat T. Bhatia, President, Municipal Council, Jaipur. In all these three cases the accused were acquitted and the Municipal Council, Jaipur, after obtaining leave under Sec. 417(3) of the Code of Criminal Procedure presented appeals against the acquittal.

3. Learned counsel appearing for the respondents raised a preliminary objection as to the maintainability of these appeals. They urged that an appeal against an acquittal is only competent by a complainant. Shri Shyambehari Lal and Shri Jagat T. Bhatia were the complainants in these cases and they alone could have preferred appeals. The present appeals by the Municipal Council, Jaipur, are incompetent as they have not been filed by the complainant in each case.

4. Learned counsel for the Municipal Council, Jaipur urged that the appeals have been properly presented by competent persons because both Shri Shyambehari Lal and Shri Jagat T. Bhatia presented the complaints on behalf of the Municipal Council.

5. The first point which arises for consideration is: Whether these appeals have been presented by persons competent to do so.

6. Arguments were addressed on behalf of the respondents by Mr. Tikku and Mr. V. S. Dave. They contended that the powers in these three cases having been conferred by resolution of the Municipal Council, presumably under Section 78 of the Rajasthan Municipality Act, it was the President who presented the complaints could alone present these appeals. In this connection, they relied upon the depositions of Shri Shyambehari Lal. They further contended that the complaints did not indicate that they were presented for and on behalf of the Municipal Council, Jaipur. Therefore, it cannot be construed

that the complaints were not instituted by the President, Municipal Council, Jaipur. They relied upon the Municipal Council, Jaipur v. Prabhu Narain, an unreported decision of this court by D. M. Bhandari and P. N. Shinghal, JJ. being D. B. Criminal Appeal No. 271 of 1966 dated 13th February, 1967 (Raj).

7. Mr. C. K. Garg, appeared as an intervener, being interested in this controversy. His contention was that a bare reading of Sections 200, 247, 248 and 250 Criminal Procedure Code would show that the functions of a complainant are understood in a particular sense, which functions a Municipal Council as such could not fulfil. His further contention was that under section 87 of the Rajasthan Municipalities Act, it is only a suit which can be instituted by a Municipal Council and not a complaint. He invited my attention to Section 265 of the Rajasthan Municipalities Act. He placed reliance on Paramananda Nadar v. Karunakara Doss, AIR 1914 Mad 387(1), Muhammad Hashim v. Emperor, AIR 1940 Sind 134 (FB), Nanilal Samanta v. Rabin Gosh, AIR 1964 Cal 64 and Har Narain Singh v. Nawab Chand Lal, AIR 1958 Pat 10.

8. Mr. Sagar Mal Mehta argued that a corporate body can only make a complaint through some person and the person in the present case was the President, Municipal Council. The case of Cri. Appeal No. 271 of 1966, D/- 13-2-1967 (Raj), he urged, was distinguishable because there the complaint was filed by the Food Inspector, who had nothing to do with the Municipal Council. On the other hand, a president is required by the Rajasthan Municipalities Act to perform the executive functions pursuant to the powers conferred on him by section 67(d). He relied on M. J. Powell v. The Municipal Board of Mussoorie, (1899) ILR 22 All 123 (FB). In regard to section 200 of the Cr. P. C. his argument was that under sub-clause (aa), a public servant's presence can always be excused under Sec. 247, Cr. P. C. He submitted that the proviso to the said section will come into operation in regard to S. 248 of the Criminal Procedure Code, his submission was that Paramananda Nadar's case, AIR 1914 Mad 387 (1), does not lay down the correct law. He placed reliance on Kannan Devan Hills Produce Co. Ltd. v. Madhavan Pillai, AIR 1956 Trav. Co. 189.

9. Section 20 of the Prevention of Food Adulteration Act inter alia enables a local authority to institute a prosecution for an offence under that Act. A corporate body such as a local authority can act only through the agency of a human being. This aspect of the matter came up for consideration in M. J. Powell's case, (1899) ILR 22 All 123 (FB) and the observations of Strachey, C. J. are well

worth recalling. The learned Chief Justice observed:—

"A complaint of the Municipal Board in itself implies the Board authorising somebody to make the complaint because, as I have said, the Board being a corporate body cannot make a complaint at all without authorising some one to make it. Again, if the Board does authorise some person in the words of the second part to make a complaint, that complaint is, strictly speaking, the complaint of the Board itself."

In the case of the Cri. Appeal No. 271 of 1966, D/- 13-2-1967 (Raj), Shinghal J. observed: "It does not therefore require much argument to hold that if a local authority decides to institute the prosecution, it shall itself be the complainant in the case, even though, being a body corporate, it may authorise some particular person to make the complaint on its behalf." Bhandari, J. further observed in his separate judgment in the aforesaid case: "Now, a Corporation cannot act except through a duly constituted agent. Such an agent will sign the complaint and it is such an agent who will be examined by the Magistrate under section 200 of the Code. For the purposes of examining and signing of the statements recorded by the Magistrate such duly constituted agent will be treated as a complainant in spite of the fact that the complaint purports to be by the Corporation." Under the Rajasthan Municipalities Act, 1959 (hereinafter called 'the Act') there are two provisions to which my attention was rightly invited by the learned counsel appearing before me. The first is section 67, the relevant portion whereof reads as follows:

"S. 67: Functions of Chairman. — It shall be the duty of the Chairman of a Board,—

(c) to perform all the duties and exercise all the powers specifically imposed, or conferred upon him by or delegated to him under and in accordance with this Act;

(d) subject to the provision of section 78 and of the rules for the time being in force, to perform such other executive functions as may be performed by or on behalf of the board over which he presides;

And the other is section 78, the relevant portion whereof reads as under, —

"S. 78. Powers, duties and functions which may be delegated: (1) Any powers, duties or executive functions which may be exercised or performed by or on behalf of the board may be delegated by the board to the Chairman or to the Vice-Chairman or to the Executive Officer or to the Secretary or the Chairman of any Committee or to one or more stipendiary or honorary officers, without prejudice to

any powers that may have been conferred on any committee by or under Section 73; and each person, who exercises any power or performs any duty or function so delegated shall be paid all expenses necessarily incurred by him therein.

10. The contention of Mr. Tikku is that in the face of the resolution having been passed under section 78 of the Act the powers were specifically conferred on the President of the Municipal Council, Jaipur to institute a complaint. Mr. Sagar-mal on the other hand contended that a complaint could be instituted by a President exercising his functions entrusted to him by Section 67 (d) and the resolution by which the President was authorised to institute a complaint under the Prevention of Food Adulteration Act is either a superfluity or an action by way of abundant caution. A similar argument was raised before this Court in *Ratanlal v. State*, 1963 Raj LW 634 at pp. 637-638 = (AIR 1964 Raj 123 at p. 126), to which I was a party, and it was observed —

"The Chairman is of course to perform any of the duties and functions which may be delegated to him. Even in the absence of any specific delegation so far as the executive functions are concerned, he has been given the power to perform them under section 67(d). Section 78 does not in any way affect the power conferred upon the Chairman under Section 67. . . . In our opinion, the words 'subject to the provision of section 78 and of the rules for the time being in force', occurring in sec. 67 (d) only mean 'unless there is anything to the contrary in Section 78' or in the rules. They do not mean that 'unless there is express delegation under Section 78' the Chairman cannot perform any executive act."

In view of this Division Bench decision a Chairman of Municipal Council under the Act can perform the executive functions as may be performed by or on behalf of the board over which he presides, whether or not there has been an express delegation under Section 78 of the Act. In the cases before me there is an express delegation under section 78 by the Municipal Council, Jaipur to its Chairman to institute complaints under the Prevention of Food Adulteration Act. Even if it was not there he could in exercise of his executive function, in my opinion, act on behalf of the Board by instituting prosecutions under the Prevention of Food Adulteration Act. Therefore, the resolution merely repeats the power which already resided in the President of the Municipal Council to perform the executive functions including the function of instituting a complaint under the Prevention of Food Adulteration Act. The resolution has not therefore the effect

of detracting from the power which by virtue of Section 67(d) already existed in the President.

11. The Chairman, therefore, discharged his functions under the powers conferred by the Act and was acting on behalf of the Municipal Council, Jaipur when he instituted the complaint. Therefore, in substance the complaint was by the Municipal Council through its Chairman. Stress was laid before me that in the title of the complaints in all these three cases the name of the president is mentioned first and the Municipal Council, Jaipur city has been added thereafter. I cannot overlook the fact that the complaint has been lodged in a printed form. The writer of the complaint has mentioned the name of the President first and the Municipal Council thereafter. I am prepared to recognise that it may have been more precise to say that the Municipal Council, Jaipur was the complainant through its president but a mere lack of precision in the matter of drafting would not alter the substance of the matter. Neither Mr. Shyam Behari Lal Saxena nor Mr. Bhatia were acting in their personal capacities. They were acting as Presidents of the Municipal Council and to all intents and purposes on behalf of the Municipal Council. From the mere verbal frame of the complaint I am unable to reach the conclusion that these Presidents were not acting on behalf of the Municipal Council, Jaipur and not discharging their functions and duties conferred on them by the provisions of Section 67(d) of the Act.

12. Before I proceed to the next point I might deal with another argument emphasised by Mr. Garg with reference to Section 265 of the Act. Section 265 of the Act provides that the Board may direct any prosecution for any public nuisance whatever and may order proceedings to be taken for the recovery of any penalties. This section speaks of prosecutions in respect of public nuisances and for the recovery of penalties and for the punishment of any persons offending against the provisions of the Rajasthan Municipalities Act, 1959. This section does not exhaust the powers of the Municipal Councils or excludes Board's power to take action under the Prevention of Food Adulteration Act and does not help in resolving a controversy in respect of complaints under that Act.

13. The cases before me are clearly distinguishable from Prabhu Narain's case, Cri. Appeal No. 271 of 1966, D/-13-2-1967 (Raj) and I am, therefore, of the opinion that the complainant in substance in all these three cases was the Municipal Council, Jaipur, which was acting through its President, and therefore, under Section 417(3), Cr. P. C. the

Municipal Council being the complainant could and did prefer appeals against the acquittals in these cases.

14. I might briefly notice some of the cases cited before coming to the merits of individual cases. S. Paramananda Nadar's case, AIR 1914 Mad 387(1) was a case where a person on the authority of the Municipal Secretary had instituted a complaint. It was held that it was not competent for Municipal Council to withdraw the complaint when the complainant did not withdraw it. In my opinion this case does not assist me to resolve the controversy which is before me. In Nani-lal Samanta, AIR 1964 Cal 64 a case before their Lordships of the Calcutta High Court arose where a person having obtained a special leave under section 417(3) of the Code of Criminal Procedure for instituting an appeal against an order of acquittal passed by a Magistrate had died. The learned Judge was called upon to decide whether the substitution of the widow as an appellant was permissible or not and in the course of that decision the learned Judge observed as to who the complainant was and those observations in my opinion are mere obiter dicta and do not help to decide the point in these appeals. Muhammad Hashim's case, AIR 1940 Sind 134 was in regard to the payment of compensation under Section 250 and is unhelpful for the decision of the dispute engaging my attention. Har Narain Singh's case, AIR 1958 Pat 10 was a case that was started on a police report and not on a complaint and, therefore, no application under section 417(3) Cr. P. C. for special leave could lie. This case is equally unhelpful. In Kannan Devan Hills Produce Co.'s case, AIR 1956 Trav-Co. 189 the learned Judges held that the substitution of a duly constituted attorney who instituted a complaint was possible but since no such application was made by M in place of W the learned Magistrate was right in refusing the substitution sought. This case, therefore, is of no assistance in deciding the point in these appeals.

15. I, therefore, overrule the preliminary objection as to the maintainability of these appeals. In my opinion these appeals have been properly presented by the Municipal Council, Jaipur as the original complaints were also by the Municipal Council, Jaipur through its President.

16. Now I shall deal with each one of these cases on their merits.

Cri. Appeal No. 91/65:

17. The circumstances in which this appeal arises are that at 8.50 A. M. on 19th August, 1961 Satya Narain Sharma, Food Inspector, Municipal Council, Jaipur in his official capacity reached the shop of Laxmi Narain s/o Ladhu Ram Brahmin and found milk in a jug (chari)

without bearing the description of the animal whose milk it was. Finding that the accused was a licensed vendor of the Municipal Council he bought 24 ozs. of milk for 0.47 P., made out three samples and handed over one sample with a form to the accused. Another was preserved with Municipal Council and the third was sent to the Central Laboratory. The Public Analyst found that there was no cane sugar and starch in the milk and the percentage of other components was also below standard. The accused denied the accusation and added that he has no shop in which he sells milk and examined defence. The learned Magistrate found that there were contradictions in the statements of the two independent witnesses inasmuch as while Sewa Ram said that the sample bottles had already been filled in when he came, Jhumarmal says that they were filled in his presence. Sewa Ram further said that whether the accused is the owner of the shop or his father he did not know. While the Food Inspector on the other hand says that all these proceedings were done in the presence of the two independent witnesses. In the complaint it was said that the accused was himself the Municipal Council's licensed vendor but the Food Inspector in his statement admitted that the receipt of the license is in the name of the father of the accused, and the learned Magistrate, therefore, came to the conclusion that because the accused was not challenged for selling milk without a licence the taking of the sample and the checking all stand disproved. He also decided that it was not proved that the sample was taken from his shop or that the price was paid for the sample. For decision on this point the learned Magistrate has not given any reasons. The third point whether the milk was adulterated or not the learned Magistrate chose not to decide it because according to him this does not make any difference to the result of the case.

18. I have examined the evidence on record. The statement of the Food Inspector is clear and convincing and all the details of purchasing of the milk and making the samples stand established from the evidence of the Food Inspector Satya Narain Sharma read with Ex. P/2. I might notice here that the date on which purchase of milk was made is 19th August, 1961 and not 29th August, 1961 as mentioned by the Magistrate and repeated by the learned counsel in his application for leave to appeal. The report of the Analyst clearly indicates that the milk was adulterated by reason of its containing 13 per cent of added water and abstraction of 7 per cent of original fat. Both the independent witnesses at least support the prosecution to this extent that the Food Inspector had gone to a shop in which accused was sitting and

had taken samples. The only difference is in regard to the time of the arrival of independent witnesses, and in the circumstances of the case I am not prepared to attach much importance to this variation.

19. The other question which arises for consideration is that if the father of the accused was a licensed vendor why was the accused not prosecuted for running a shop without a license. I deal with this argument because the learned Magistrate has attached great importance to it. Whoever be the licensed vendor it was the accused who was sitting at the shop out to sell milk, the sample whereof was taken. Whether the accused was the licensed vendor or his father was a licensed vendor, it makes little difference because under the Act any person who keeps an article adulterated for sale contravenes the provisions of Section 16 of the Act. Section 7 employs the words "No person shall himself or by any person on his behalf." In this view of the matter the judgment of the learned Magistrate is clearly erroneous when he says that the shop occupied by the accused was not at all checked and the samples from his shop were not taken. The learned Magistrate has disbelieved the story of taking of the samples in an arbitrary and perfunctory manner.

20. I accordingly convict the accused under Section 7 read with section 16 of the Prevention of Food Adulteration Act. Having regard, however, to the fact that the incident relates to the year 1961, I think that the ends of justice will be adequately met if the accused is sentenced to pay a fine of Rs. 250 instead of awarding him the sentence of imprisonment. I accordingly sentence him to a fine of Rs. 250, failing which he will undergo one month's rigorous imprisonment.

Cr. Appeal No. 417 of 1965:

21. Food Inspector A. P. Goyal suspected the milk of the accused to be adulterated and, therefore, purchased on 5th August, 1961, 24 ozs. on payment of 0.47p. It was divided into three samples and one sample whereof was sent to the Chief Public Analyst and he found the milk to be adulterated by reason of its containing 3 per cent of added water and abstraction of 11 per cent original fat. The accused denied the sale of the milk to the Food Inspector and pleaded that he was taking goat's milk for his brother, who was under treatment in hospital, and the Food Inspector forcibly took the milk. The accused was convicted and he preferred a revision and the learned Additional Sessions Judge, Jaipur city accepted the revision and remanded the case with a direction that the case be tried as a warrant case as it was the second offence committed by the accused oppo-

site party. The learned Magistrate who tried the case as a warrant case came to the conclusion that while there was contradiction in the prosecution evidence the contention of the accused was reliable and he acquitted the accused. The Municipal Council has now come up in appeal.

22. According to the prosecution witnesses the accused at the time when the Food Inspector purchased the milk from him had two drums (Dhol) and one 'chari'. Abhinandan Prasad Goyal, Food Inspector, says that he had only one 'chari' with him. In his statement Ex. C/2 portion A to B, A. P. Goyal admitted that something was written on the container of the milk but he does not remember what was written there. He merely accepted the word of the accused that it was cow's milk. This part of the story has been contradicted by Gopi, an independent witness. I am unable to appreciate how a Food Inspector neglects to note what was written on the container of the milk and prefers to proceed on the statement of the accused for the purposes of this prosecution. Taking of sample for the purposes of analysis and a consequent possible prosecution are serious statutory steps and I am left unimpressed by the evidence of the Food Inspector when he says that he did not care to even read what was written on the container of the milk. In this view of the matter, when the learned Magistrate has accepted the story of the accused that it was goat's milk which he was taking for his brother, which story stands substantiated by his defence evidence, I do not see any reason to interfere in the case of acquittal in those circumstances.

23. This appeal accordingly fails and is dismissed.

Cr. Appeal No. 107 of 1965:

24. The facts which give rise to this appeal are that Food Inspector A. P. Goyal on 9-9-1962 at 7.30 A. M. went to the shop of the accused which is situated in Khura Ladliji and found him selling the milk. He purchased milk by way of sample and sent one of the samples to the Chief Public Analyst who in his report Ex. P/5 found the fat contained to be 4.5 per cent, solid non-fat 8.06 per cent and 10 per cent of added water and, therefore, adulterated.

25. The defence of the accused was that the milk from which the sample was taken, was not for the purposes of sale but for cleaning 'Khand' as a catalytic agent. The accused adhered to his statement under section 342 Cr. P. C. and further added that he had no measure even in his possession to sell the milk. Out of the two motbirs examined in the case, P. W. 1 was declared hostile by the prosecution itself. The learned Magistrate,

therefore, found that taking of the sample was not established in the presence of the accused. The accused entered the witness-box himself and was cross-examined at length and the learned Magistrate has come to the conclusion that despite this protracted cross examination he is not shaken. The accused says that he is a 'Halwai' and not a milk vendor. This circumstance has been believed by the learned Magistrate and in my opinion for good reason. It has not been proved by the prosecution satisfactorily that the accused was selling milk to any one. It was merely suggested that he was selling milk to children. That is no satisfactory evidence and it is quite possible that as a Halwai he might have taken some milk as a catalytic agent and I am prepared to give him that benefit of doubt.

26. This appeal fails and is, therefore, dismissed.
BNP/D.V.C.

Order accordingly.

AIR 1969 RAJASTHAN 22 (V 56 C 5)

C. M. LODHA, J.

Sudesh Kumar, Petitioner v. Mool Chand, Non-petitioner.

Civil Revn. Petn. No. 378 of 1967, D/- 1-3-1968, from order of Civil J., Jodhpur, D/- 16-8-1967.

(A) Rajasthan Stamp Law (Adaptation) Act (7 of 1952), Art. 57 — Stamp Act (1899), S. 2(5)(a) — In order to attract applicability of Art. 57 document itself must be mortgage deed or security bond — Promissory note and receipt though executed and given by way of security for performance of certain conditions, that would not make either of these documents as security bond and could not be stamped as such.

(Paras 4 and 5)

(B) Evidence Act (1872), S. 115 — Interpretation of document is question of law and there can be no estoppel in such matters.

(Para 6)

(C) Stamp Act (1899), Art. 35 — In order to hold that agreement to let may be stamped as lease, it is necessary that such agreement should create actual demise: AIR 1928 Bom 553, Rel. on.

(Para 7)

Cases Referred: Chronological Paras (1928) AIR 1928 Bom 553 (V 15) = 53 Bom 1, In re Maneklal Manilal

R. L. Jangid, for Petitioner; M. L. Chhangani, for Non-petitioner.

ORDER: — This is a revision application directed against the order of the learned Civil Judge, Jodhpur, dated 16-8-1967, in Civil Original Suit No. 2/

DL/EL/B710/68

1966, by which he decided preliminary issues Nos. 4 and 5 against the defendant-petitioner and held that the promissory note and receipt dated 22-12-65 and the agreement to let dated 20th December, 1965 were sufficiently stamped.

2. The non-petitioner-plaintiff Moolchand filed the suit for arrears of rent and for award of future rent also against the defendant-petitioner Sudesh Kumar in respect of a shop situate on the High Court Road, Jodhpur. The plaintiff's case is that he rented out the half portion of the shop in question at a monthly rent of Rs. 150 to the defendant-petitioner on 20th December, 1965, and got a rent note executed by the defendant on the same day. It is further alleged that later on the defendant took the whole shop on rent at a monthly rent of Rs. 300 and agreed to deposit one year's rent in advance and instead of making a cash deposit, the defendant executed a promissory note in his favour for Rs. 3600 (being the rent for one year), on 22-12-65, and also a receipt in respect of this amount of the same date. Since the defendant did not pay the rent to the plaintiff, this suit was instituted in the court of learned Civil Judge on 4-11-66. The defendant in his written statement pleaded inter alia that he had actually taken the shop on rent from 24-12-65 when the possession of the shop was delivered to him. He also raised an objection with respect to the admissibility of the promissory note and receipt and also the rent note dated 20th December, 1965, on the ground that they were insufficiently stamped. Issues Nos. 4 and 5 were framed in respect of this objection and were decided as preliminary issues by the lower court.

3. It is urged by the learned counsel for the petitioner that the promissory note as well as the receipt dated 22nd December, 1965, fall within the ambit of security bond as they were passed on to the plaintiff by the defendant as a security for complying with the condition of the payment of rent of the shop in question regularly. He has, therefore, contended that these two documents should have been stamped as required by Art. 57 of the Stamp Act as security bonds. I am however, unable to accept the contention of the learned counsel for the petitioner for the simple reason that neither the promissory note nor the receipt can be considered as a security bond. Article 57 of the Rajasthan Stamp Law (Adaptation) Act, 1952 on which reliance has been placed by the learned counsel for the petitioner is as under: —

"57. Security Bond or Mortgage-deed, executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof or executed by a surety to

secure the due performance of a contract or the due discharge of a liability."

4. It is no gain-saying the fact that there is nothing either in the promissory note or the receipt dated 22-12-65 to show that these documents were executed by way of security for the due performance of any contract. It is no doubt correct that the promissory note and the receipt were executed and given by way of security for performance of certain conditions agreed to between the plaintiff and the defendant. But that would not make either of these documents a security bond. In order to attract the applicability of Art. 57, it is necessary that the document itself must be a mortgage-deed or a security bond. The learned counsel for the petitioner in this connection has also referred to the definition of the word 'bond' contained in section 2(5) of the Indian Stamp Act, 1899, and has particularly placed reliance on clause (a) of section 2(5), which is as under :—

"Bond" includes —

(a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be."

5. A bare perusal of this definition will go to show that neither the promissory note nor the receipt contain the ingredients described in this sub-clause. There is, thus, no force in the contention of the learned counsel for the petitioner that the promissory note and the receipt should have been stamped as security bonds. They are properly stamped as promissory note and receipt. The finding of the learned Civil Judge on issue No. 4, which pertains to the promissory note and receipt, is, therefore, in order.

6. Coming to issue No. 5, which refers to the alleged rent note dated 20-12-65 the learned counsel for the petitioner submits that the plaintiff himself has described this document in his plaint as rent note and has stated that the relationship of landlord and tenant between the plaintiff and the defendant was created by virtue of this document. He has, therefore, argued that the plaintiff cannot go back on the position which he has already taken in the plaint and the document dated 20-12-65 must be considered to be a rent note for purposes of stamp duty. I am afraid, this contention is devoid of force. It is true that the plaintiff has described it as a rent note in his plaint, but this is only a matter of interpretation of the document, which is purely a question of law and there cannot be estoppel in such matters. To take a simple illustration, if a document is in fact a will, but if it has been wrongly described as a gift by a certain party, it would not be correct to hold it to be a gift merely on the

ground that the party has described it as a gift and the court will have to consider independently of admission of any party the correct nature of the document.

7. I have examined the document dated 20-12-65 and there is no doubt in my mind that it is not a rent note, but is only an agreement to let. I am, however, constrained to observe that the document is very badly drafted. Nevertheless, so far as the nature of the document is concerned, it is clear that it is only an agreement. It is titled as an agreement and even from the language used in the body of the instrument, it appears that the parties intended to bring into existence only an agreement and not a rent note. This would be crystal clear from para No. 18 of this deed, which says that within six months from the date of its execution the tenant shall execute a valid rent note on requisite stamp paper and get it registered, by embodying therein all the terms and conditions incorporated in the agreement. Faced with this position, the learned counsel for the petitioner has argued, in the alternative that even if it is considered as an agreement to let it must be stamped as a lease, as in Article 35 'lease' includes an under-lease or sub-lease and any agreement to let or sub-let. I must state that this alternative position was not taken by the petitioner in the lower court. But since the point envisaged is a pure point of law, I have allowed the learned counsel for the petitioner to rely on it. In order to hold that an agreement to let may be stamped as a lease, it is necessary that such an agreement should create an actual demise. If an authority is needed on this point, I may refer to *In re Maneklal Manilal*, AIR 1928 Bom 553, wherein it was observed. —

"An agreement to lease is included in the word 'lease' under the Stamp Act, but an agreement to lease must amount to an actual demise and not an agreement that in certain contingencies a lease will be granted."

8. The question, therefore, is whether the document dated 20th December, 1965, amounted to actual demise or it was merely an agreement to the effect that in certain contingencies a lease will be granted? I cannot fail to observe that there has been a lot of bungling in drafting this document. However, in the written statement filed by the defendant, it has been pleaded that the possession of the shop in question was handed over to the defendant on 24-12-65 and the defendant became the tenant of the plaintiff only from 24-12-65. There is nothing in this written statement to show that there was actual demise in favour of the tenant on the date when this document was executed. This position was not even

taken in the trial court that even though the document in question was an agreement, yet it amounted to an actual demise in favour of the defendant. Again, there are certain clauses in the document itself which go to show that the parties intended that a regular lease-deed would be got executed after some time on happening of certain contingencies. In this connection, I may refer to paras Nos. 18 and 19 of this document. As already stated above, in para No. 18, it has been mentioned that the defendant would execute a valid rent note on requisite stamp paper within six months. Again in Para No. 19, it is mentioned that the landlord would effect the partition of the shop and the defendant would bear half of the expenses and pay the sum to the plaintiff within six months in easy instalments and if the defendant wanted to take the full shop, he would execute the rent note for the same and pay rent at the rate of Rs. 300 per mensem. In this state of the pleadings of the parties and looking to the contents of the document, I do not feel persuaded to interfere with the order of the lower court in exercise of my revisional jurisdiction.

9. The revision application is, therefore, dismissed. Looking to the circumstances of the case, the parties are left to bear their own costs.

AKJ/D.V.C.

Revision dismissed.

AIR 1969 RAJASTHAN 24 (V 56 C 6)

P. N. SHINGHAL, J.

Ramdayal, Appellant v. Kishorilal Chaudhary and others, Respondents.

Civil Second Appeal No. 316 of 1961. D/- 3-4-1968, against judgment and decree of Dist. and S. J., Bikaner, D/- 9-1-1961.

T. P. Act (1882), S. 105 — Tenancy at will — Lease of premises to Natya Parishad — Reservation of yearly rent — Lease expressed to be at will of lessee only, by providing that it shall continue to stage dramas as long as it liked — Held though tenancy was at the will of lessee it was equally a tenancy at will of the lessor, as it was tenancy at will — Reservation of yearly rent could make no difference.: AIR 1957 Pat 490 and AIR 1941 Pat 228 and AIR 1961 Raj 203, Rel. on. Case law Ref. (Paras 10, 20)

Cases Referred: Chronological Paras

(1961) AIR 1961 Raj 203 (V 48)=1960

Raj LW 555, Ram Niwas v. Nihal Singh

(1957) AIR 1957 Pat 490 (V 44)=

1957 BLJR 291, Babu Lal Seth v. Gopilal Seth

HL/IL/D348/68

- (1941) AIR 1941 Pat 228 (V 28)=
ILR 20 Pat 115, Ramlal Sahu v. Mt. Bibi Zohra 18, 19
(1939) AIR 1939 Cal 423 (V 26)=
43 Cal WN 794, Mohammad Azizal v. Moulvi Raziuddin Mohammad Idris Khan 21
(1929) AIR 1929 Bom 66 (V 16)=
30 Bom LR 1596, Abdulrahim Funumulla v. Sarafalli Mahamadalli 21
(1927) AIR 1927 PC 116 (V 14)=
53 Mad LJ 509, Smt. Nayan Munjari Dasi v. Khagendra Nath Das 21
(1927) AIR 1927 Cal 179 (V 14)=
31 Cal WN 46, Ashutosh Lahiri v. Chandi Charan Mitra 21
(1926) AIR 1926 Bom 374 (V 13)=
28 Bom LR 552, Bai Sona v. Bai Hiragavri 21
(1913) ILR 36 Mad 557=23 Mad LJ 641, K. R. Manicka Mudaliar v. T. Chinnappa Mudaliar 17, 19
(1903) 1 KB 577=72 LKKB 103, Zimblor v. Abrahams 21
(1880) ILR 4 Bom 424, Vaman Shripad v. Maki 21
(1879-80) 5 C. P. D. 97=49 LJ QB 188, Spencer v. Harrison 13
R. K. Rastogi, for Appellant; M. C. Bhandari, for Respondents.

JUDGMENT :— This second appeal arises from the judgment and decree of the District Judge of Bikaner dated January 9, 1961, in a suit for recovery of arrears of rent and eviction.

2. The facts are quite simple. Plaintiff Ramdayal, and before him his predecessor Ram Ratan Dass, were "mahants" of the Dadoo Panthi "math" at Sardarsahar. They owned a "nohra" and a "Kothri" shown in the site-plan. Ram Ratan Dass let out these premises to the defendants for the residence of defendant Shobhachand and staging of dramas by the Manoranjan Natya Parishad of which defendant Shobhachand was the President, while defendant Himkar was the Secretary. The premises were taken on an annual rent of Rs. 150. The plaintiff pleaded that it was agreed between the parties that the rent would be payable in advance, but that the defendants did not pay the rent after Chaitra Sud 8, S. 2011, and that after calculating the rent for the intercalary month a total sum of Rs. 156/4 was recoverable from the defendants which they failed to pay in spite of repeated demands. The plaintiff asked for the eviction of the defendants on the grounds that they had not paid the rent, did not allow him to carry on worship at the "samadhi" of Ram Ratan Dass (who had died), and did not stage the dramas; and also because he did not any longer want to keep them as his tenants in the suit premises. For that purpose the plaintiff gave two notices to the defendants.

and instituted the suit for recovery of arrears of rent and possession when the notices went unheeded. It may be mentioned that the plaintiff initially filed the suit against Shobhachand and Himkar, and impleaded the Manoranjan Natya Parishad and its members as co-defendants by a subsequent amendment, with the permission of the court.

3. The defendants denied the alleged lease of the "kothri" and pleaded that it had been given free of rent for the residence of Shobhachand. As regards the "nohra", they pleaded that it was given on rent by Ram Ratan Dass in S. 1982 on an annual rent of Rs. 100, on the condition that he would not get it vacated as long as the Natya Parishad continued to remain in existence and staged the dramas. It was pleaded that the annual rent was merely raised to Rs. 150 on March 12, 1946, but otherwise the old conditions remained intact. It was denied that the rent was payable in advance. It was also denied that there was any "samadhi" of Ram Ratan Dass, or that there was any question of worshipping it, and it was further asserted that the earlier terms of the lease were re-affirmed by a document dated October 13, 1955. The receipt of the notices was admitted, but it was pleaded that they were unauthorized. The main defence however was that as the Manoranjan Natya Parishad continued to be in existence, and was staging the dramas, the plaintiff was not entitled to bring a suit for eviction. The defendants filed documents Ex. A-2 dated March, 12, 1946 and Ex. A-1 dated October 13, 1955 in support of their plea.

4. After framing issues on the various points in controversy, the trial court decreed the suit for the recovery of arrears of rent at the rate of Rs. 150 per annum, but rejected the claim for possession. As that judgment of the trial court has been upheld by the impugned judgment of the District Judge of Bikaner dated January 9, 1961, the plaintiff has preferred this second appeal.

5. It may be mentioned that defendant Shobhachand, the President of Manoranjan Natya Parishad, died during the pendency of this appeal on May 26, 1964. The plaintiff-appellant therefore presented an application for the substitution of the names of Kishori Lal Chaudhary and Ram Kumar Jalan in place of the names of Shobhachand and Himkar as it were they who became the President and Secretary of the Natya Parishad. This was allowed. One effect of the amendment was that the plaintiff gave up his prayer for the eviction of the defendants from the suit "kothri" for the reason that, according to the plaintiff, it came in his possession on the death of Shobhachand without the intervention of

the court. There is thus no controversy in regard to the "kothri" and there is also no dispute regarding the plaintiff's claim for arrears of rent. The dispute is now confined to the question whether the plaintiff was not entitled to get the "nohra" vacated as long as the Natya Parishad was in existence and staged dramas in it. This was the subject matter of issue No. 5 and it is not necessary to refer to the other points in controversy for it is conceded that the finding of this court on this issue will govern the fate of the appeal.

6. In order to understand the controversy, it will be better if I state the case of the parties in regard to issue No. 5. As has been stated, the plaintiff gave two notices to the defendants. Notice Ex. 2 was given on February 14, 1956. In it the plaintiff stated that the defendants had misbehaved with him and that there were several other reasons why he did not want to continue their tenancy and terminated it. In the other notice Ex. 3 dated March, 12, 1956 also the plaintiff reiterated that he was not prepared to continue the tenancy under any circumstances, and asked for delivery of possession. As the notices went unheeded, the plaintiff filed the suit and pleaded, inter alia, that as he did not want to continue the tenancy, he was entitled to possession of the premises. The defendants, on the other hand, pleaded that, in terms of the agreement between the parties, the plaintiff was not entitled to evict them as long as the Natya Parishad was in existence and continued to stage dramas. It is on the basis of these pleadings that I have to consider the short question whether there is force in the plea of the defendants that the "nohra" could not be got vacated as long as the Natya Parishad was in existence and staged the dramas, for this was the subject matter of the aforesaid issue No. 5.

7. The trial court examined the dispute and came to the conclusion that the tenancy was for an indefinite period and continued as long as the Natya Parishad staged the dramas in the "nohra". That court in fact went to the extent of holding that the lease was perpetual, even though no such plea had been taken by way of defence. The lower appellate court also held that as the "nohra" was being used for the purpose for which it had been let out by the plaintiff, he could not oust the defendants under the very terms of the lease. That court therefore upheld the dismissal of the suit for eviction, and the question is whether this view is correct?

8. In order to arrive at an answer, it is necessary to examine documents Exs. A-2 and A-1 for their genuineness is beyond any dispute and it is admitted by

the learned counsel for the parties that the fate of the appeal will in fact depend on the interpretation of the terms of these two documents. As this is essentially a question of law, it is not disputed that this court can examine whether any mistake of law has been committed in interpreting the two documents. The learned counsel for the parties also agree that the parol evidence of the parties is of no consequence. In fact Mr. Rastogi, learned counsel for the appellant, has addressed his arguments on the assumption that the Natya Parishad continued to remain in existence and staged the dramas, so that I need not examine the evidence to decide whether this was so, and shall proceed to consider the legal effect of the two documents.

9. Document Ex. A-2 is first in point of time being of March, 12, 1946. It was executed both by Ram Ratan Dass and plaintiff Ramdayal who admitted that the Natya Parishad staged its dramas in the "nohra" on an annual rent of Rs. 150. Clause 4 of the document is important for in it the lessors stated that the Parishad could stage the dramas as long as it liked, but that on the day on which it decided to leave the premises, it would pay the balance of the rent upto that date and would not be entitled to remove its material (tins, chairs etc.), until such payment.

10. Document Ex. A-1 was executed by plaintiff Ramdayal on October 13, 1955, in favour of the "mantri" of the Manoranjan Natya Parishad confirming the terms of Ex. A-2. It would thus appear that while an annual rent was payable for the premises, the lessor (plaintiff) was a consenting party to the condition that the Parishad could stage the dramas in the suit premises as long as it liked. The mere fact that an annual rent was reserved for the tenancy did not, however, make it an yearly tenancy if the real intention of the parties was to create a tenancy at will. In fact it is not even the case of the defendants that their's was an yearly tenancy, and no importance can therefore be attached to the reservation and payment of annual rent. In spite of such a reservation, the tenancy could be a tenancy at will, and the question is whether this was really so, or whether the agreement between the parties constituted a perpetual lease, or a lease for the life time of the Parishad, as has been argued by Mr. Bhandari on behalf of the respondents.

11. Before considering the legal effect of the aforesaid clause of document Ex. A-2, it may be pointed out that it is a matter of much significance that there is no mention either in Ex. A-2 or Ex. A-1 that the lessors or the lessor would

not be entitled to evict the Parishad for any specific period of time, or until it remained in existence and continued to stage the dramas. As I shall presently show, this is an omission of much significance. The fact therefore remains that the agreement between the parties shows that, at the time of the execution of document Ex. A-2, the lease was expressed to be at the will of the tenant only by providing that it shall continue to stage the dramas as long as it liked.

12. What then are the rights of a landlord for the termination of such a lease? Is it a tenancy at his will also? The question has been considered and answered both by courts in England and in India, but as the Indian decisions have turned mainly on the English cases, I shall first refer to an important decision of that country.

13. It is reported in *Spencer v. Harrison*, (1879-80) 5 C. P. D. 97 and was decided as far back as 1879. After considering a case of an interest in land of uncertain duration determinable at the will of a stranger, the court made the following important observation at page 104, —

"On the other hand, an estate of uncertain duration determinable on the will of the grantor or lessor, or of their successors in title, is generally speaking an estate at will, and not a freehold: see *Litt. 68*, and *Co. Litt. 55, a*; *Com. Dig. Estate by Grant (H. 1)*; *Fernie v. Scott*. It is true that *Brudnell, C. J.*, speaking in the early part of the reign of Hen. 8, is reported to have said, "A lease at will must be at the will of both parties; for, if it be at the will of the lessor only, it is a lease for life," see *7 M. & G. 46, n*. But we can find no instance of a lease at the will of the lessor which is not also a lease at the will of the lessee, and therefore a lease at will. And *Lord Coke*, in *Co. Litt. 55, a*, says that a lease cannot be at the will of the lessor only. So, a lease at the will of the lessee is also at the will of the lessor".

14. It appears that this view has all along been followed in England, but instead of referring to the decided cases I think it sufficient to refer to some of the important books which reiterate this view as a correct proposition of the law. In *Halsbury's Laws of England*, third edition, volume 23, paragraph 1150 reads as follows, —

"A tenancy at will is a tenancy under which the tenant is in possession, and which is determinable at the will of either landlord or tenant; and although upon its creation it is expressed to be at the will of the landlord only or at the will of the tenant only, yet the law implies that it shall be at the will of the other party also; for every lease at will must in law be at the will of both parties,

As in other tenancies, a tenancy at will arises by contract binding both landlord and tenant, and the contract may be express or implied.

A tenancy expressed to be at will takes effect according to its tenor, notwithstanding that a rent at an annual rate is reserved."

15. In Foa's "General Law of Landlord and Tenant," eighth edition, it has been stated as follows at page 3, —

"Tenancies at will are tenancies which endure at the will of the parties only, i. e., at the will of both; for if a demise be made to hold at the will of the lessor, the law implies that it is at the will of the lessee also, and vice versa. The conception of tenancy at will with a promise by the landlord that it would not be determined has been disapproved."

16. The nature of such a tenancy has also been considered in Hill and Redman's "Law of Landlord and Tenant," fourteenth edition, at page 24, as follows—

"A tenancy at will is a tenancy under which the tenant is in possession, and which is determinable at the will of either landlord or tenant; and although upon its creation it is expressed to be at the will of the landlord only or at the will of the tenant only, yet the law implies that it shall be at the will of the other party also; for every tenancy at will must in law be at the will of both parties. Like other tenancies, a tenancy at will arises by contract binding both lessor and lessee, and the contract may be express or implied."

It has therefore been taken as a well settled proposition of the law in England that a tenancy which is determinable at the will either of the landlord or of the tenant is a tenancy at will and that even though upon its creation it is expressed to be at will of the landlord only, or the tenant only, the law, all the same, implies that it shall be terminable at the will of the other party also.

17. This rule of law was noticed and followed in India in *K. R. Manicka Mudaliar v. T. Chinnappa Mudaliar*, (1913) ILR 36 Mad 557. In that case their Lordships were concerned with a lease by which the lessees were allowed to hold for such time as they required or wished, and they held as follows, —

"We think the plaintiff is bound by the lease evidenced by Exhibit C. By that document the lessees are to hold for such time as they require or wish, and it is argued that the contract is thus expressed to be a tenancy at the will of the lessee and so by implication of law a tenancy at the will of the lessor also. This contention is supported by reference to "Coke on Littleton" page 55 and is in accordance with the law of England as laid down in 18 Halsbury," page 434."

We agree that the lease is expressed as creating a tenancy at the will of the lessees and we have not been shown sufficient reasons for refusing to adopt the English law on the point. We think therefore that the plaintiff was entitled to terminate the tenancy, and he has done so."

18. A similar point arose for consideration in *Ramlal Sahu v. Mt. Bibi Zohra*, AIR 1941 Pat 228, and after considering Coke on Littleton and Halsbury's Laws of England, their Lordships held that where a tenancy is terminable at the will of the tenant, it must be held to be terminable at the will of the landlord also as it is a tenancy at will. This view, has been approved and followed in *Babu Lal Seth v. Gopi Lal Seth*, AIR 1957 Pat 490. In that case the document stated that the defendants may remain in the house as long as they pleased, and their Lordships held, as a matter of construction that the tenancy was a tenancy at will and could be terminated by either party even though a monthly rent was reserved by it.

19. The point does not appear to have arisen directly for the consideration of this court, but I have been referred to a decision of Chhangani J. in *Ram Niwas v. Nihal Singh*, 1960 Raj LW 555 = (AIR 1961 Raj 203) where the learned Judge had an occasion to refer to (1913) ILR 36 Mad 557 and AIR 1941 Pat 228 and observed that the views expressed therein had his concurrence "on considerations of the principles of mutuality."

20. I am in respectful agreement with the view taken in the above mentioned cases and publications. I have therefore no hesitation in holding that as document Ex. A-2 shows that the tenancy was at the will of the lessees, namely, the defendants, it was equally a tenancy at the will of the lessor, namely, the plaintiff, as it was a tenancy at will.

21. Mr. Bhandari, learned counsel for the respondents, has cited some cases for a contrary submission. The first of these is *Vaman Shripad v. Maki*, (1880) ILR 4 Bom 424. I have gone through the judgment which runs in three sentences and I find nothing to show that their Lordships were at all concerned with the question whether the lease was a tenancy at will. The landlord merely made the argument that the lease terminated on the death of the lessee, and as it was upheld without much controversy, the decision cannot really justify the argument of Mr. Bhandari that their Lordships took the view that a tenancy at the will of the lessee was not a tenancy at the will of the lessor also. In *Bai Sona v. Bai Hiragavri*, AIR 1926 Bom 374 the lessor agreed not to take possession as long as the lessee went on paying the rent, and it was therefore a case in which the will

of the lessor had been expressed to the advantage of the lessee. Moreover, their Lordships merely relied on (1880) ILR 4 Bom 424 and did not really consider the question of mutuality of an option in the case of a tenancy at will. *Smt. Nayan Munjari Dasi v. Khagendra Nath Das*, AIR 1927 PC 116 is also not a case in point because the lessor had curtailed or restricted his power not to settle the land with any other person as long as the tenant agreed to pay proportionate rent for the land. That case does not at any rate, deal with a tenancy at will. So also, *Ashutosh Lahiri v. Chandi Charan Mitra*, AIR 1927 Cal 179 is of no relevance because it was decided on a consideration of the surrounding circumstances which negated the plea of a tenancy at will and the question of mutuality of an option, as in the case of a tenancy at will, was not raised for consideration. Such a question was no doubt raised for consideration in *Abdulrahim Funumulla v. Sarafalli Mahamadalli*, AIR 1929 Bom 66, but that was a case of a lease for 25 years after which the lessee was to remain in possession so long as he paid the rent. It was therefore held that the lease represented a transaction where there was a lease for a particular period after which an option was given to the lessee to continue in possession on payment of rent. Such an option, if expressly given to the lessee, ought in the opinion of their Lordships, to enure for his benefit and "the principle of reciprocity or mutuality cannot be invoked in such a case." *Mohammad Azizal Bari v. Moulvi Raziuddin Mohammad Idris Khan*, AIR 1939 Cal 423 was again, a case in which the question of such a mutuality was not raised for consideration and after taking the surrounding facts into consideration their Lordships held that the intention was to allow the lessee to continue for an indefinite period so long as he paid the rent and performed the other conditions of the lease. I am therefore unable to derive any assistance from that judgment also. The only other case on which reliance has been placed by Mr. Bhandari is *Zimble v. Abrahams*, (1903) 1 KB 577. In that case the lessor's agent had signed a document by which he agreed that he shall not give the lessee a notice to quit, and it was not therefore a case of a tenancy at the will of both the parties.

22. It would thus appear that the cases cited by Mr. Bhandari are of no real assistance for deciding the present controversy and they do not persuade me to take a view different from that taken by courts in England and the two Patna cases referred to above, which, for reasons already stated, bear mightily on the point under consideration. On a construction of documents Exs. A-2 and A-1 I have therefore no doubts that the ten-

ancy in dispute was a tenancy at will and carried all its characteristics as such.

23. Apart, however, from the interpretation of the terms of the two documents just referred, I find that the surrounding circumstances of the case, as far as they are available on the record, also go to establish the plaintiff's contention that it was a tenancy at will. Documents Exs. A-2 and A-1 show that the "nohra" had already been constructed and was used for the staging of dramas. The defendants were allowed to stage the dramas and to use certain ear-marked and demarcated portions for seating the audience, locating the booking office, establishing a water hut and a tea-stall, and demarcating passage for the visitors of both the sexes, and as a stage. It was then agreed between the parties that the Parishad would be entitled to use all these premises as in the past, and to place some more tinsheds. The Parishad was not, however, given the right to make any permanent building, or to carry out any material alteration. It was also clarified that on the termination of the tenancy, the Parishad would simply remove its material i. e. its tinsheds, chairs etc. after payment of the arrears of the rent, if any. There is therefore nothing to suggest or support the contention that it was the intention of the parties to create a permanent lease, or a lease for the lifetime of the Parishad. In fact, as has been stated, the defendants did not take a plea that there was any such tenancy and the plaintiff did not therefore have an opportunity of establishing all those facts and surrounding circumstances which would have enabled him to prove that, apart from the written terms of the agreement incorporated in documents Exs. A-2 and A-1, the parties intended to treat the tenancy as a tenancy at will and acted on that understanding. Whatever material has, all the same, come on the record, and to which I have just made a reference goes, however, to support the view that the tenancy in question was a tenancy at will.

24. I have therefore no hesitation in holding that this is a case of a tenancy at will. According to law, a tenancy at will is determinable by either party or his expressly or impliedly intimating to the other his wish to put an end to it. So, as the plaintiff has given such an intimation to the defendants in his two notices Exs. 2 and 3 referred to above stating clearly that he did not want to continue the lease and had put an end to it, and as he has asked for delivery of possession, there is no reason why he should not be entitled to evict the defendants.

25. The appeal is allowed. The impugned judgment and decree of the

lower appellate court are set aside and the plaintiff's suit decreed for possession of the suit "nohra", with costs throughout on the respondents.

RSK/D.V.C.

Appeal allowed.

AIR 1969 RAJASTHAN 29 (V 56 C 7)

L. S. MEHTA, J.

Jhanwarlal, Petitioner v. State of Rajasthan and another, Non-petitioner.

Criminal Ref. No. 212 of 1967, D/- 10-7-1968, made by S. J., Bikaner, D/- 1-9-1967.

Criminal P. C. (1898), Ss. 489(2) and 488 — Maintenance order in favour of wife — Husband subsequently obtaining decree for restitution of conjugal rights — Right to maintenance not ipso facto extinguished by decree.

The Magistrate, acting under sub-s. (2) to S. 489, Cr. P. C., has a discretion in giving effect to a civil court's decree. On a decree for restitution of conjugal rights in favour of the husband, the Magistrate is not bound to cancel an order passed under S. 488, Cr. P. C. He must consider it along with other circumstances. If the Magistrate is satisfied that the object of the husband in obtaining a decree for restitution of conjugal rights is to get the maintenance order cancelled and not to take his wife back, he may decline to cancel his previous order. Where the husband bona fide wishes to execute the decree for restitution of conjugal rights but the wife unreasonably refuses to obey, the order for maintenance may be cancelled. Thus, where a competent Civil Court has pronounced an order, which runs counter to the order for maintenance it may still remain discretionary with the Magistrate to cancel or vary the order for maintenance under S. 489(2), Cr. P. C. In such a case, the proper remedy for the husband is to apply to the criminal court under S. 489(2). AIR 1944 Bom 11 & AIR 1925 Mad 1218 & AIR 1965 Punj 79 & AIR 1955 Cal 108 & AIR 1945 Pesh. 53, Rel. on. (Para 5)

Cases Referred: Chronological Paras

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| (1965) AIR 1965 Punj 79 (V 52)= | |
| 1965 (1) Cri LJ 203, Smt. Shiela Rani v. Durga Pershad | 3 |
| (1955) AIR 1955 Cal 108 (V 42)= | |
| 1955 Cri LJ 354, Kunti Bala Dassi v. Nabin Chandra Das | 4 |
| (1949) AIR 1949 Cal 87 (V 36)=49 | |
| Cri LJ 757, Tarak Nath Dhar v. Sneharani Dhar | 2, 4 |
| (1945) AIR 1945 Pesh 53 (V 32)= | |
| 47 Cri LJ 229, Khan Bahadur Nawabi v. Mt. Ilahi Noor | 2, 4 |
| (1944) AIR 1944 Bom 11 (V 31)= | |
| 45 Cri LJ 271, Fakruddin Shamsuddin v. Bai Jenab | 3 |

(1925) AIR 1925 Mad 1218 (V 12)=
27 Cri LJ 30, Pavakkal v. Athappa Goundan

3

Babulal, for Petitioner; M. M. Tiwari, for Non-petitioners.

ORDER :— This is a reference submitted by Shri Roshanlal Sharma, Sessions Judge, Bikaner, recommending that the order of Sub-Divisional Magistrate, Bikaner, (City), dated October, 11, 1966, allowing maintenance allowance of Rs. 60 to Smt. Bhanwari, may be set aside.

2. The facts of this case are short and simple. Smt. Bhanwari is admittedly the legally married wife of Jhanwarlal. After the marriage Smt. Bhanwari lived with her husband amicably for some time. It is alleged that some time later Jhanwarlal's father Chhaganlal desired to satisfy his sexual lust with Smt. Bhanwari and for that purpose he made an indecent assault on her. Smt. Bhanwari brought this fact to the notice of both her husband and her mother-in-law, but instead of their coming to her rescue, she was beaten by them and turned out of the house. Consequently she withdrew from the residence of Jhanwarlal and started residing with her father. Later on, she made an application in the court of learned Sub-Divisional Magistrate, Bikaner, under S. 488, Cr. P. C., for grant of alimony. The said Magistrate, after necessary inquiry, made an order, on October 11, 1966, allowing maintenance allowance of Rs. 60 to Smt. Bhanwari. Prior to this Jhanwarlal also filed an application for restitution of conjugal rights in the court of District Judge, Bikaner, on January 18, 1966, under section 9 of the Hindu Marriage Act, 1955. That application was decreed in favour of the petitioner on November 1, 1966, on the ground that Smt. Bhanwari had no reason to withdraw herself from the society of her husband.

On an application filed by Jhanwarlal in revision against the order of Sub-Divisional Magistrate, Bikaner, dated October 11, 1966, learned Sessions Judge, Bikaner, heard the parties and expressed the view that when a decree for restitution of conjugal rights was passed subsequent to the order of awarding maintenance, that decree has to be respected and should be treated as a sufficient cause for not giving effect to the order for maintenance. He relied upon certain authorities, reported in Khan Bahadur Nawabi v. Mt. Ilahi Noor, AIR 1945 Pesh 53, and Tarak Nath Dhar v. Sneharani Dhar, AIR 1949 Cal 87 and submitted a reference to this Court, with the request that the maintenance order passed by Sub-Divisional Magistrate, Bikaner, be quashed.

3. The proposition laid down by learned Sessions Judge is one that is open to considerable doubt. From a reading of

sub-section (2) to S. 489, Cr. P. C. it seems to me to follow that the judgment of a competent Civil Court does not of itself cancel the maintenance order, and that, in considering any such application as the present, the Magistrate is not necessarily bound to follow the order of the Civil Court, but must consider it, along with any other circumstance, if any, which may be brought to his notice. S. 489(1), Cr. P. C. enables a Magistrate on a change in the circumstances of the party receiving an allowance under Sec. 488, Cr. P. C., to modify or vary the order. This sub-section contemplates a change in the circumstances as would lead to a reduction or the increase in the allowance. Cancellation of order is specifically provided for under sub-section (5) to S. 488, and sub-section (2) to Sec. 489, Cr. P. C. Under sub-section (5) to Section 488, maintenance order may be cancelled on proof that wife is living in adultery, or that, without sufficient reasons, she declines to live with her husband, or that they are living separately by mutual consent. The terms of reference are not covered by this provision.

Sub-sec. (2) to Sec. 489 reads as following:—

“Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.”

Under the above sub-section, the Magistrate is empowered to consider whether in consequence of the civil court's finding he has to cancel or modify the order. Where a civil court has made a decree for restitution of conjugal rights, the criminal court has to decide, on the materials before it, whether the wife ought to have returned to the husband and if that is so, and if she is in default in not returning, obviously the order made under S. 488, Cr. P. C., ought to be cancelled. The Magistrate's discretion under that section must, no doubt, be exercised judiciously.

I think the recommendation of the learned Sessions Judge, Bikaner, is going too far in suggesting that the Magistrate, without expressing his own discretion, is bound to cancel the order, simply on the ground that a Civil Court has given a judgment for restitution of conjugal rights. The Magistrate is entitled to satisfy himself that the husband is prepared to implement the order of the Civil Court and that he is willing to take back his wife. The mere fact that the Civil Court has given a particular finding does not justify the Magistrate in surrendering his own discretion. In this connection a reference is made to Fakruddin Sham-

suddin v. Bai Jenab, AIR 1944 Bom 111. In that case, Beaumont C. J. observed that the Magistrate is entitled and is indeed bound to satisfy himself that the husband is bona fide prepared to implement the order of the Civil Court. The learned Judge has further pointed out that the mere fact that a Civil Court has passed a decree does not justify the Magistrate in not exercising his own discretion. In proper case a Magistrate is within his right to decline to revoke the maintenance order under S. 488, Cr. P. C.

A like case came up for consideration before the Madras High Court in Pavakkal v. Athappa Goundan, AIR 1925 Mad 1218. There Phillips, J., observed that it is competent for a Magistrate to cancel or vary an order for maintenance if he thinks that it should be cancelled or varied in consequence of any decision of a competent Civil Court. If a Civil Court had given to the husband a decree for restitution of conjugal rights and the husband bona fide wished to execute that decree and the wife refused, that would be a good ground for cancelling the order for maintenance under Sec. 488, Cr. P. C. But where the husband is not willing to take back his wife and his object in obtaining the decree for restitution of conjugal rights is merely to get the maintenance order cancelled, it will be wrong to cancel the order for maintenance under Sec. 489(2), Cr. P. C. Thus according to the Madras view also the discretion whether the order for maintenance should be revoked or not lies with the Magistrate even though a decree for restitution of conjugal rights has been passed by a competent Civil Court. In a recent decision reported in Smt. Shiela Rani v. Durga Pershad, AIR 1965 Punj 79, it was held by the Punjab High Court that a decree for restitution of conjugal rights obtained by husband subsequent to the order for maintenance does not ipso facto end the right of maintenance.

4. Learned Sessions Judge referred to a decision of the Calcutta High Court reported in AIR 1949 Cal 87, wherein Lodge J., held that a decision in a suit against a wife for restitution of conjugal rights is a binding decision to the effect that the wife had no sufficient ground to refuse to live with the husband and, therefore, the previous order for maintenance must be cancelled. But this authority has been disapproved by the same High Court in a latter case, reported in Kunti Bala Dassi v. Nabin Chandra Das, AIR 1955 Cal 108. In that case Guha J. was of the view that where the husband obtained a decree for restitution of conjugal rights against his wife, in whose favour a prior order for maintenance has been passed, under S. 488, Cr. P. C., a Magistrate is not justified in surrendering

his own discretion of cancelling the order for maintenance simply because the husband was armed with a decree of Civil Court for restitution of conjugal rights. Learned Sessions Judge has also referred to AIR 1945 Pesh 53. A careful examination of the case suggests that it hardly supports the views embodied in the order of reference. In that case it has been clearly laid down that if subsequent to the decree other circumstances have arisen which might provide the wife with a reasonable cause for not returning to her husband, then the Magistrate might in a proper case, in spite of the existence of a decree for restitution of conjugal rights, make an order for maintenance.

5. From what has been discussed above, it is manifest that the Magistrate, acting under sub-sec. (2) to S. 489, Cr. P. C., has a discretion in giving effect to a Civil Court's decree. On a decree for restitution of conjugal rights in favour of the husband, the Magistrate is not bound to cancel an order passed under section 488, Cr. P. C. He must consider it along with other circumstances. If the Magistrate is satisfied that the object of the husband in obtaining a decree for restitution of conjugal rights is to get the maintenance order cancelled and not to take his wife back, he may decline to cancel his previous order. The mere fact that a Civil Court has passed a decree for restitution of conjugal rights will not nullify the order for maintenance passed by the Magistrate. Where the husband bona fide wishes to execute the decree for restitution of conjugal rights but the wife unreasonably refuses to obey, the order for maintenance may be cancelled. Thus, where a competent Civil Court has pronounced an order, which runs counter to the order for maintenance it may still remain discretionary with the Magistrate to cancel or vary the order for maintenance under Sec. 489(2), Cr. P. C. In such a case, the proper remedy for the husband is to apply to the criminal Court under Sec. 489(2), Cr. P. C. In the circumstances of the case, I am of the opinion, that the reference submitted by learned Sessions Judge, Bikaner, hardly merits any consideration.

6. In the result, the reference stands rejected.

CWM/D.V.C. Reference rejected.

AIR 1969 RAJASTHAN 31 (V 56 C 8)

P. N. SHINGHAL, J.

Syed Habib Hussain and others, Appellants v. Kamal Chand, Respondent.

Second Appeal No. 71 of 1961, D/- 24-4-1968, from judgment and decree of Sr. Civil J., Jaipur City, D/- 5-10-1960.

HL/JL/D356/68

(A) Civil P. C. (1908), O. 6, R. 2 — Plea of right of privacy — Use of word "bapardgi" in plaint is sufficient to sustain it — Where well-known custom exists, it is not necessary to set up existence of customary right in any great detail or with particular emphasis. 1954 Raj LW 710, Foll. (Paras 18, 19)

(B) Easements Act (1882), S. 18, Illustration (b), S. 2(b) — Right of privacy — Nature of — Proof — Held customary rights of privacy existed in Jaipur. AIR 1929 All 676, Dissent from. AIR 1963 All 340 Held obiter and Dissent from.

While it is true that custom gives rise to a customary right as well as a customary easement, there is a vital difference between the two as Sec. 2(b) of the Easements Act makes it quite clear that the Act does not deal with a customary right. The reason is that customary rights are rights arising by custom, but not appurtenant to a dominant tenement, while a customary easement can exist only for the beneficial enjoyment of other land and it is appurtenant to the dominant heritage and cannot exist in gross. All the same, where a customary easement is claimed by virtue of S. 18, the essential characteristics of a custom bearing on it have to be established. The courts, however, recognized the customary right of privacy even before the commencement of the Easements Act, in States or localities where it was found to exist, and it was only later that it was recognised as an easement under Sec. 18 of the Easements Act.

(Para 20)

A case of right of privacy falls under illustration (b) of S. 18, but even so the right is different from a prescriptive easement which comes into existence by user over the prescribed length of time. There is no such requirement in the case of a customary easement because nobody really knows when it first came into existence. The right is not, however, personal to any individual or society, and is attached to land for its beneficial enjoyment. Case law ref. (Para 21)

By its very nature, the origin of a custom is lost in antiquity, but the evidence has, nonetheless, to be such as to prove that the custom was consciously followed or recognized as governing the locality for which it is claimed, and one of the modes of proof is to establish the particular instances, referred to in S. 13(b) of the Evidence Act, in which it was claimed, recognised or exercised. In that context, judgments not inter partes will also be relevant if they relate to the custom, even though they may not be conclusive proof thereof. In the case of a customary easement, the court can take judicial notice of a well established custom, and this can be done by virtue of S. 57 of the Evidence Act which is not

exhaustive.: AIR 1926 Oudh 352 & (1887) ILR 10 All 358, Rel. on. (Para 22)

Held (after taking judicial notice of judgments in (1887) ILR 10 All 358, 1954 Raj LW 710, JLR 1924 Vol 1, Pt. V, p. 3, JLR 1925, Vol. I, Pt. IX, p. 11, JLR 1940 Vol. XIII p. 86) in the absence of any evidence to the contrary, a customary right of privacy existed in Jaipur for such a length of time as to suggest that it became the customary law of the locality so as to become a customary easement within the meaning of Section 18 of the Jaipur Easements Act, 1943 (Act No. 6 of 1943), or Section 18 of the Indian Easements Act of 1882. A custom will, however, not have the sanction of S. 18 if it is not reasonable, but wherever this claim has been found to be reasonable, it has been upheld by courts. Case Law ref. AIR 1929 All 676, Dissent. from. AIR 1963 All 340 held obiter and Dissent. from. (Paras 22, 24)

(C) Constitution of India, Art. 19(1)(f), (5) — Easements Act (1882), S. 18, Illustration (b) — Constitutional validity.

The fundamental right to hold one's property guaranteed by the Constitution is a right to enjoy all the benefits attached to the ownership of the property, and if such an enjoyment is restricted, the restriction would undoubtedly affect the right adversely. But human life is very complex, and an unfettered fundamental right of even such a nature may, in a given state of circumstances, adversely affect a similar right of another person. And it is for the purpose of harmonizing the exercise of the right to property of every member of the society that the Constitution has made it clear in clause (5) that the right mentioned in sub-clause (f) of clause (1) shall be subject to the reasonable restrictions imposed by the law in the interest of the general public. (Para 28)

As the right to privacy is based on custom which has to fulfil the requirement of reasonableness before it can claim its recognition in a court of law, the question of the reasonableness is the sine qua non of the claim. It is therefore for the court to decide whether this requirement has been fulfilled, and to uphold only that claim which is reasonable and substantial. If therefore it is found that the intrusion on one's privacy is of a substantial nature or, in other words, as has been stated in illustration (b) of S. 18 of the Easements Act, if the offending new window of B's house invades the privacy of those portions of A's house which are ordinarily excluded from observation should succeed in his claim for their closure. (Para 30)

What is substantial invasion on the neighbour's privacy, is a matter to be examined with reference to a number of factors like the climatic condition, the

habits of the people, and the conditions of domestic life in the locality. In a changing society these factors undergo changes from time to time, and notions about invasion on one's right of privacy also undergo a consequential change. The pace of the change depends largely on the state of social work and literacy in the area but, by its very nature, the process is quite tardy. So it remains for the courts to decide what really amounts to a substantial invasion on the neighbour's right of privacy, and this duty has to be discharged with a greater sense of responsibility wherever changed circumstances of social life are shown to exist. (Para 31)

Cases Referred: Chronological Paras

- (1965) AIR 1965 Raj 217 (V 52)=
ILR (1965) 15 Raj 948, Ramchandra Singh v. Pratap Singh 20, 21
(1963) AIR 1963 All 340 (V 50), Basai v. Hasan Raza Khan 24
(1961) AIR 1961 Orissa 154 (V 48)=
ILR (1961) Cut 258, Keshab Sahu v. Dasarath Sahu 23
(1960) AIR 1960 SC 430 (V 47)=
(1960) 2 SCR 375, Narendra Kumar v. Union of India 29
(1960) AIR 1960 SC 923 (V 47)=
(1959) Supp (2) SCR 836, Hathisingh Manufacturing Co. Ltd. Ahmedabad v. Union of India 29
(1960) AIR 1960 Andh Pra 603 (V 47)=
(1960) 1 Andh WR 113, K. Ramchandran v. Commr., Hyderabad Municipal Corporation 25
(1960) AIR 1960 Madh Pra 263 (V 47)=
1960 Jab LJ 419, Gulabchand Gappalal Sarawgi v. Manikchand Gulabchand Sarawgi 23
(1959) 1959 Raj LW 273, Laduram v. Sheodev 21, 23
(1957) AIR 1957 All 48 (V 44), Mt. Daroupdi Debi v. S. K. Dutt 21, 23
(1954) 1954 Raj LW 710, Gokalchand v. Brijnarain 18, 22, 23
(1953) AIR 1953 Sau 67 (V 40), Kanbi Devakarsan v. Kanbi Bava Punja 24
(1952) AIR 1952 Cal 273 (V 39)=
55 Cal WN 719 (FB), Ishwari Prosad v. N. R. Sen 25
(1952) AIR 1952 Kutch 22 (V 39)=
Jivraj Virjee v. Keshavji Lakhamshi 24
(1952) AIR 1952 SC 196 (V 39)=1952
SCR 597, State of Madras v. V. G. Raw 29
(1951) AIR 1951 SC 118 (V 38)=
1950 SCR 759, Chintamanrao v. State of Madhya Pradesh 29
(1949) AIR 1949 All 308 (V 36)=
1948 Oudh WN 388, Jarao v. Sri Nath Byas 23
(1945) AIR 1945 All 335 (V 32)=
ILR (1945) All 607, Bhulan Lal v. Altaf Husain 23
(1940) 1940-13 JLR 86, Kanhaiya v. Sedhu 22

THE All India Reporter

1969

Tripura J. C.'s Court

AIR 1969 TRIPURA 1 (V 56 C 1)

C. JAGANNADHACHARYULU, J. C.

Union Territory of Tripura and another, Appellants v. Madhusudan Guha, Respondent.

A. S. No. 3 of 1961, D/- 22-1-1968, against judgment and decree of Sub. J., Tripura, D/- 24-1-1961.

Limitation Act (1908), Arts. 49 and 120 — Wrongful seizure of goods — Suit against Government for compensation — Art. 49 and not Art. 120 applies.

Where there is wrongful seizure of goods, a suit against Government for compensation for wrongful seizure would be governed by Art. 49 and not Art. 120 of the Limitation Act. The period of limitation would start when the property was wrongfully taken or injured or when the detainer's possession became unlawful. Hence where goods were seized wrongfully on 1-1-1952, the suit should have been filed on or before 1-1-1955 i.e., within 3 years from date of seizure or within 3 years from date of sale of the goods i.e., before 3-3-1958. A suit filed on 8-4-1958 was held to be barred by limitation. AIR 1955 Ori 57 and AIR 1957 Ker 151 and AIR 1958 Pat 512, Distinguished. (Para 13)

Cases Referred: Chronological Paras

(1968) AIR 1968. Tri 63 (V 55)=

First Appeal No. 16 of 1962, Hiralal Jain v. Union of India

13, 17

(1965) AIR 1965 SC 1039 (V 52)=

1965 (2) Cri LJ 144, Kasturi Lal Ralia Ram v. State of U. P.

17

(1958) AIR 1958 Pat 512 (V 45), Chetandas Gulabchand v. State of Bihar

14

(1957) AIR 1957 Ker 151 (V 44)=
1957 Ker LT 459, State of Trav-Co v. Janardan Pai

14

(1955) AIR 1955 Orissa 57 (V 42)=
ILR (1954) Cut 717, Panchanan

Das v. Province of Orissa

14

H. C. Nath, Govt. Advocate, for Appellants; A. K. Shyam Choudhury, for Respondent.

JUDGMENT:— This is an appeal filed by the defendants in Money Suit No. 10 of 1958 on the file of the Sub-Judge, Tripura, against the judgment and decree for a sum of Rs. 11,126/6/- with proportionate costs towards the price of and subsidy for 418 bags of salt.

2. The case of the respondent is that salt was one of the essential commodities, required to be imported to the Tripura by air from Calcutta. The respondent carried on business as a dealer in salt. The first appellant represented by the Civil Supply Department, Tripura, issued a permit No. 9160-65/S/28-1, dated 6-2-1951, under the Tripura Essential Commodities Air Movement Order of 1950 in favour of the respondent for importing 2000 bags of salt from Calcutta to Kailasahar, Tripura for the purpose of sale of the same to the consumers and members of the public in Kailasahar. The second appellant was the Divisional Officer in Kailasahar in charge of Civil Supplies Department and was also the Sub-Divisional Magistrate, Kailasahar at that time. The first appellant had to fix the price of the salt. The respondent booked 2000 bags of salt with M/S. Tripura Air Ways for air-lifting the same from Calcutta to Kailasahar. The respondent produced the consignment notes before the Divisional Officer, Kailasahar. Thereafter the price of salt both for retail and for wholesale was fixed by the first appellant by an order dated 9-3-

1951. The first appellant also by the same order agreed to pay and fix the rate of subsidy payable to the respondent in respect of the said air-lifted goods. Out of the said 2000 bags of salt, the respondent obtained part delivery of 450 bags which were sold in due course. He received the subsidy and price for the same.

3. It is also the case of the respondent that on or about 1-1-1952 he obtained delivery of another consignment of 504 bags of salt from M/S. Tripura Air Ways. But, they were illegally and wrongfully seized by the police on account of some alleged dispute between M/S. Tripura Air Ways and its principal M/S. Bharat Air Ways which filed a criminal case against Captain Das Gupta, the agent of M/S. Tripura Air Ways. The respondent had nothing to do with the criminal case. The respondent was to sell the said 504 bags of salt in Kailasahar. But, the appellant refused to release the goods in favour of the respondent. Instead, the second appellant passed an order directing that the goods should be sold by public auction and that the sale proceeds should be deposited in the Government Treasury. On or about 3-1-1955 the criminal case was dismissed. An order was passed that the sale proceeds should be paid to the person from whose custody the goods were seized. On or about 11-2-1955 the respondent received payment of Rs. 4000/- being the said sale proceeds. As a result of wrongful seizure and detention the respondent sustained loss of Rs. 3560/- towards the price of the salt and Rs. 10,678/8- towards subsidy. So, he filed the suit for recovery of Rs. 14,238-8.

4. Both the appellants filed joint written statement alleging inter alia that permit No. 9160-65/S/28-1, dated 6-2-1951, was issued by the Director of Civil Supplies to the respondent for air-lifting 2000 bags of salt from Calcutta to Kailasahar for sale to the authorised retailers at Kailasahar on production of coupons granted to them by the Civil Supplies Department at the rate fixed by it for which he would be entitled to get subsidy at the rate fixed by the Government. However, the conditions, on fulfilment of which the respondent permit-holder was entitled to get the subsidy according to sub-paras (a) to (d) in para 26 were not complied with. They were, firstly, on arrival of the goods, he should take delivery of the same and keep them in his godown. He should make an entry of the arrival of the goods in the stock register maintained by him. He should then submit the arrival report with the relevant consignment note of the Air Company to the office of the Divisional Officer concerned. Secondly, on receiving the aforesaid report, the

office of the Divisional Officer concerned would send an officer for verification of the said report. After physical verification he would certify to that effect on the stock register. Thirdly, the respondent permit-holder would then sell the goods at the rate fixed by the Director of Civil Supplies to the authorised retailers on production of coupons issued to them by the Civil Supplies Department. Fourthly, the respondent permit-holder should then submit the bill for payment of subsidy to the office of the Divisional Officer concerned. The Divisional Officer would then certify on the body of the bill to the effect that the terms and conditions above had been fulfilled and then forward the bill to the office of the Director of Civil Supplies for payment.

The appellants further alleged in their written statement that the respondent booked 600 bags of salt from Calcutta with Tripura Air Ways, an agent of M/S. Bharat Air Ways, on 20-2-1951 for air-lifting the same to Kailasahar, but that the respondent did not take delivery of the same, that on 1-1-1952 the officer-in-charge of Bharat Air Ways Ltd., Kailasahar sent information in writing to the officer-in-charge of the Kailasahar Police Station to the effect that one Captain Das Gupta, proprietor of Tripura Air Ways took away 504 bags of salt by force in that morning from his possession without paying air freight in his absence and requested the officer-in-charge of the Police Station to take necessary legal action, that the police seized 504 bags of salt, that the police, however, submitted a final report dropping the investigation, but that the complainant filed a "Naraji" petition in the Sub-Divisional Magistrate's Court, who took it on file in Criminal Case 96 Chh of 1952, that the 504 bags of salt were seized by the police in pursuance of the orders of the Sub-Divisional Magistrate and kept in the custody of one Prafulla Sarker after taking proper security from him, that the trying Magistrate ordered the salt to be sold in auction in accordance with the directions of this Court in Criminal Revision No. 8 of 1952, dated 6-9-1952, that the respondent filed a petition on 17-9-1952 for delivery of salt to him after taking proper security from him, that his petition was allowed, but that eventually he failed to furnish security and take the salt. The appellants further state in their written statement that according to the order of Sub-Divisional Magistrate the salt was sold in auction for Rs. 4000/-, that on 3-1-1955 the Sub-Divisional Magistrate discharged the accused, that the respondent withdrew the auction amount of Rs. 4000/-, that thus it is clear that the salt was not brought to Kailasahar and sold there according to the terms

and conditions, which would entitle the respondent to claim the price and subsidy, that the suit was barred by limitation and that, therefore, his suit was liable to be dismissed.

5. On the above pleadings the learned Sub-Judge framed the necessary issues and held that the police seized 86 bags of salt from the godown of the respondent and the remaining 418 bags of salt from the air-strip at Kailasahar when they were in the possession of the respondent, that though the Sub-Divisional Magistrate directed the respondent to furnish cash security of Rs. 3000 and take delivery of 86 bags of salt, he did not do so, that thus the procedure laid down in sub-paras (a) to (d) of para 26 of the written statement filed by the appellants (mentioned above) was not followed by the respondent and that, therefore, he was not entitled to get either the price or subsidy for 86 bags of salt. With regard to the remaining 418 bags of salt he held that though the Sub-Divisional Magistrate directed the respondent to take delivery of the same also after furnishing personal security bond for Rs. 9000 they were not released by the appellants in spite of the orders of the "Higher Court" and that, therefore, the appellants are liable to pay the respondent the price of and subsidy for the said 418 bags of salt at the rate claimed in the plaint. He negatived the contention of the appellants that the suit was barred by limitation and held that it was covered by Article 120 of Schedule 1 of the Limitation Act (Act IX of 1908). So, he decreed the suit in part for Rs. 11,126/6/- towards the price of and subsidy for 418 bags of salt. Hence the appeal by the defendants.

6. The points which were argued and which arise for determination are:

(i) Whether the respondent is not entitled to the price of and subsidy for 418 bags of salt decreed by the Lower Court?

(ii) Whether the suit is barred by Limitation?

(iii) Whether the suit is not maintainable against the appellants under Article 300 (1) of the Constitution of India?

(iv) To what relief is the respondent entitled?

7. POINT (i):—

The respondent P. W. 1 was a dealer in salt. He was issued a permit as per Ext. D-7, dated 6-2-1951, to airlift 2000 bags of salt from Calcutta to Kailasahar for sale in Kailasahar under the direction of the Divisional Officer, Kailasahar under the Tripura Essential Commodities Air Movement Order of 1950. The price was fixed as can be seen from Exts. P-1 and D-6 dated 9-3-1951. It is common ground that P. W. 1 airlifted 450 bags of salt in the first instance out of the

2000 bags of salt, that the same were sold in Kailasahar and that P. W. 1 received payment of the price and subsidy for the same. On the next occasion he consigned 504 bags of salt to be airlifted from Calcutta to Kailasahar, as can be seen from Ext. P-3 consignment note through Tripura Air Ways. Tripura Air Ways was formerly an agent of Bharat Air Ways. The consignment was airlifted actually by Bharat Air Ways. After the consignment was unloaded and 86 bags of salt were removed by P. W. 1 to his godown, the officer-in-charge of Bharat Air Ways lodged a complaint with the police station alleging that one Captain Das Gupta of Tripura Air Ways illegally removed all the salt bags and some more consignments from the possession of the Bharat Air Ways without paying freight of Rs. 16,180/14/6 pies and that the police should take action against him. Vide his report No. KIS/MISC-4/392 dated 1-1-1952.

Accordingly the police registered a case under Section 380, Indian Penal Code and seized 86 bags of salt from the godown of P. W. 1 as can be seen from Ext. P-4 and 418 bags of salt from his possession when they were on the air-strip in front of the Tripura Air Ways room in Kailasahar as can be seen from Ext. P-5, dated 1-1-1952. (The dates mentioned therein viz., 1-1-1951 are mistakes for 1-1-1952). But, after investigation the police submitted a final report dropping the investigation. The officer-in-charge of Bharat Air Ways, however, filed a petition on 30-4-1952 before the second appellant Sub-Divisional Magistrate challenging the final report. The second appellant, who was then the Sub-Divisional Magistrate and also in-charge of the Civil Supply Department in Kailasahar, took the case on file in Criminal Case No. 96 Chh of 1952 and directed seizure of the 504 bags of salt again. They were accordingly seized and kept in the custody of one Prafulla Sar-ker.

8. On a petition filed by P. W. 1 on 17-9-1952 for delivery of the 504 bags of salt to him the second appellant, Sub-Divisional Magistrate, passed an order that P. W. 1 should furnish cash security of Rs. 3000 for the 86 bags of salt and personal security of Rs. 9000 for the remaining 418 bags of salt. But, P. W. 1 did not do so. In the meanwhile the criminal case was transferred by the District Magistrate to his own file. The complainant filed a revision petition before the District and Sessions Judge to set aside the order of transfer of the case. The District and Sessions Judge submitted references to this Court in Criminal motions 48 and 49 of 1952 to quash the order of the District Magistrate. This Court passed orders as per

Exts. D-1 and D-2 dated 6-9-1952 cancelling the order of the District Magistrate transferring the case to his file and directed the second appellant to pass appropriate orders as he deemed fit regarding the seized property without any unreasonable delay.

9. But, the first respondent did not furnish either cash security for the 86 bags of salt or personal security of Rs. 9000 for the remaining bags of salt. P. W. 1 moved the Sessions Court in Criminal Motion 136 of 1952 to set aside the said order of the second appellant. The Sessions Judge made reference to this Court to set aside the second appellant's order regarding the 418 bags of salt. But, this Court rejected the reference. Vide Exts. P-7 to P-9 and certified copy of this Court's order dated 13-12-1952 in Criminal Reference 29 of 1952. The salt was sold away in an open auction for Rs. 4000 and the amount was deposited in the Sub-Treasury which was withdrawn by P. W. 1.

10. The learned Sub-Judge held with regard to the 86 bags of salt that P. W. 1 did not furnish cash security of Rs. 3000 and obtained delivery of 86 bags of salt, though he was given an opportunity to take delivery of the same, that he did not follow the procedure mentioned in sub-paras (a) to (d) of para 26 of the written statement and that, therefore, he was not entitled to get the price of and subsidy for the same. His finding that all the 504 bags of salt were seized when they were in the possession of P. W. 1 is correct. For, Exts. P-4 and P-5 bear out the same. The allegation of the appellants that all of them were seized when they were in the possession of Tripura Air Ways is not correct. His further finding that the procedure laid down in sub-paras (a) to (d) of para 26 of written statement had to be followed before P. W. 1 could claim the price of and subsidy for the salt is also correct. For, though D. W. 1 the solitary witness examined by the appellants spoke to the above procedure to be followed, in the cross-examination, he admitted that he was not personally aware of the terms and conditions under which P. W. 1 airlifted the salt from Calcutta to Kailasahar. So, his evidence is of no avail. The appellants should have examined the second appellant or somebody else who had personal knowledge of the terms and conditions of the contract between the appellants and P. W. 1. But, however, P. W. 1 admitted in his cross-examination that after taking delivery of the first consignment of 450 bags of salt, he reported to the Sub-Divisional Officer that he obtained delivery of the same, that after he made the delivery report, he made entries of the same in the khatas of his shop and pre-

pared consignment report, that then verification of the same was made by the office of the Sub-Divisional Officer, that he submitted a bill after all the salt was sold away and that he got the price, and subsidy for the same. So, the procedure pleaded in sub-paras (a) to (d) of para 26 of the written statement of the appellants had to be followed, before P. W. 1 was entitled to draw the price of and subsidy for the 504 bags of salt.

11. The learned Sub-Judge held that as P. W. 1 did not take delivery of the salt after furnishing security and follow the procedure of entering in the register, getting it checked and the other procedure indicated in sub-paras (a) to (d) of para 26 of the written statement, he was not entitled to recover the value of and subsidy for 86 bags of salt. It has to be noted that P. W. 1 did not file any cross-objections in this appeal regarding the same. He accepted the judgment and decree of the Sub-Judge regarding the 86 bags of salt. No doubt, his learned Counsel stated that P. W. 1 was financially in bad circumstances and that, therefore, he did not file any cross-objections. Disregarding the conduct of P. W. 1 in not filing cross-objections regarding his claim for 86 bags of salt which was disallowed by Sub-Judge, it has to be noted that the same reasoning of the learned Sub-Judge would apply to the remaining 418 bags of salt also. For, the second appellant directed P. W. 1 to furnish personal security for Rs. 9000 for the same and take delivery of the same. But, he failed to do so just as he failed to furnish cash security of Rs. 3000 and take delivery of 86 bags of salt.

The learned Sub-Judge distinguished the claim of P. W. 1 for 418 bags of salt on the ground that Exts. D-1 and D-2, private copies of the orders of this Court in Criminal Reference 5 of 1952 and Criminal Revision 8 of 1952, were not admissible in evidence, that the said 418 bags of salt were seized illegally, that they were not released by the appellants in spite of the orders by the "Higher Court" and that therefore, the appellants were liable to pay the price of and subsidy for the said 418 bags of salt to P. W. 1. The learned Sub-Judge made some incorrect observations in his judgment. He held that the order of seizure of the 418 bags of salt passed by the second appellant was illegal, and that, though a reference was made by the Sessions Judge to this Court to set aside the order of the second appellant regarding the 418 bags of salt, there was nothing on record to show that this Court rejected the reference. Again, he observed in para 25 of his judgment that their release was ordered by the "Higher Court" and that still the 418 bags of salt

were not released. All these observations are incorrect. In para 23 of his judgment, he stated that both the parties marked the documents as Exhibits waiving formal proof. He exhibited the documents filed by P. W. 1 as Exts. P-1 to P-15 on his behalf, and the documents filed by the appellants as Exts. D-1 to D-9 on behalf of the appellants. They include Exts. D-1 and D-2 uncertified copies of orders of this Court passed in Criminal Reference 5 of 1952 and in Criminal Revision 8 of 1952 dated 6-9-1952. He should not have exhibited them, if he felt that they were not admissible in evidence as they were only uncertified copies. The appellants filed certified copies of Exts. D-1 and D-2 and a comparison of the exhibits shows that Exts. D-1 and D-2 are correct copies.

This Court stated in Criminal Reference 5 of 1952 dated 6-9-1952 as can be seen from Ext. D-1, (of which certified copy was also produced) regarding the transfer of the Criminal Case to the Court of the District Magistrate that the Sub-Divisional Magistrate did not commit any error in his orders, that he was not bound to accept the final report of the police, that he was correct in entertaining the "naraji" petition filed by the complainant in the case after he had learnt about the final report submitted by the police and that the orders of the second appellant regarding the property did not show that he committed any error which would warrant any apprehension in the mind of the accused that the case would not be heard impartially and that the District Magistrate was not justified in transferring the case to his own file. This Court cancelled the order of the District Magistrate transferring the case and directed the second appellant to dispose of the case according to law. Certified copy of the order of this Court dated 13-12-1952 in Criminal Reference 29 of 1952 shows that this Court disposed of the Criminal Motion No. 136 of 1952 on the file of the District and Sessions Judge Agartala on 10-12-1952.

The Sessions Judge stated in the reference, as can be seen from the certified copy of his reference in Ext. P-8 relating to Criminal Motion No. 136 of 1952, that the order of the second appellant directing P. W. 1 to furnish security for Rs. 9000/- for release of 418 bags of salt was improper and unjust, that it should be set aside and that the same should be released in his favour without any security. The Sessions Judge further stated in his reference that the order of the second appellant demanding security to the extent of Rs. 3000/- in respect of the remaining 86 bags of salt would stand. Ext. P-7 is a certified copy of the letter forwarding the records to this Court in Criminal Motion 136 of 1952. Ext. P-9

is a certified copy of the explanation of the second appellant. The certified copy of the order of this Court No. 2 dated 13-12-1952 produced by the appellants shows that this Court rejected the reference and held that it was left to the discretion of the Trial Court to pass an appropriate order as it deemed just with regard to the property which was perishable and that it was not a matter with which this Court should interfere in revision. It is in accordance with the order of this Court, as per Ext. D-2 dated 6-9-1952 of which certified copy was filed. A certified copy of this order dated 13-12-1952 was not produced in the Lower Court. But, it can be looked into by this Court in this appeal as it is an order of this Court which is the final appellate and revisional authority of Tripura. As such, Exts. P-7 to P-9 and order No. 2 of this Court dated 13-12-1952 go to show that the reference was rejected and that the order of the Sub-Divisional Magistrate calling upon P. W. 1 to take delivery of 418 bags of salt was allowed to stand.

This is also further borne out by Ext. D-2 filed in the Lower Court, which is an uncertified copy dated 6-9-1952, which was marked by consent. No doubt the case ended in the discharge of the accused finally. But the orders which were passed in the Criminal Case go to show that P. W. 1 was directed to furnish personal security for Rs. 9000/- and take delivery of 418 bags of salt, but that he did not take delivery of the same. So, the case of P. W. 1 with regard to the remaining 418 bags of salt stands on the same footing as his case relating to the remaining 86 bags of salt. The claim to the price of and subsidy for the same was negatived by the Lower Court. There is no difference between the two items of 86 bags of salt on one hand and 418 bags of salt on the other which were separately seized by the police as can be seen from Exts. P-4 and P-5 dated 1-1-1952. As such, the reasoning and judgment with regard to 86 bags of salt equally hold good with regard to the remaining 418 bags of salt and the Sub-Judge should have negatived the claim of P. W. 1 for the price of and subsidy for the latter also.

12. For the above reasons I find point (i) against the respondent.

13. Point (ii):—

The judgment of the learned Sub-Judge shows that the appellants argued before him that Article 56 of Schedule 1 of the Limitation Act (Act IX of 1908) would apply. He held that Article 120 of the Limitation Act applies and that Article 56 would not apply. I had an occasion to refer to the question of limi-

tation in a similar case between Hiralal Jain v. Union of India, New Delhi, First Appeal No. 16 of 1962=(AIR 1968 Tri 63) where also the plaintiff alleged that his goods were wrongfully seized and sold by the Customs Authorities. I held that Article 49 of Schedule 1 of the Indian Limitation Act (Act IX of 1908) would apply. Article 49 runs as follows:—

“49. For other spe-Three When the pro-
specific moveable property years party is wrong-
or for compensation fully taken or
for wrongfully taking injured or when
or injuring or wrong- the detainer's
fully detaining the possession be-
same. comes unlawful”

So, the period of limitation would start when the property was wrongfully taken or injured or when the detainer's possession became unlawful. P. W. 1 alleged in paragraph 8 of his plaint that the appellants wrongfully refused to release the goods in his favour. Also it follows from the fact that ultimately Captain Das Gupta was discharged in the Criminal Case, the seizure was wrongful. So, P. W. 1 should have filed the suit within 3 years from 1-1-1952 the date of the seizure (evidenced by Exts. P-4 and P-5) or within 3 years from the date of the sale of the goods. The suit was filed on 8-4-1958. So, it is barred by limitation, if the period of limitation of 3 years is counted from 1-1-1952. Even if the said period is counted from the date of the sale of the goods, then also the suit is barred by limitation. For, the Criminal Case was dismissed on 3-1-1955 and the payment of the sale proceeds was ordered to be made to P. W. 1 by the Sub-Divisional Magistrate on 31-1-1955. As such, the goods must have been sold prior to 3-1-1955. The period of 2 months' notice issued by P. W. 1 to the appellants under Section 80 Civil Procedure Code has to be excluded. Even then the suit should have been filed at least on 3-3-1958. But, it was filed on 8-4-1958. So, in any view of the matter the suit is barred by limitation.

14. The contention of the learned Counsel for the respondent is two-fold. Firstly, he urged that Article 120 of Schedule I of the Limitation Act would apply and relied on three rulings, which are all distinguishable from the facts of this case. In Panchanan Das v. Province of Orissa, AIR 1955 Orissa 57 the Government failed completely to discharge the duty imposed upon it by Rule 75A(5) of Defence of India Rules of 1939 in not determining the amount of compensation and not paying it to the owner of the property from whom it was requisitioned. It was held that the ordinary remedy of recovery of compensation was available to the owner, but that the period of

limitation for his suit was governed by Article 120 of the Limitation Act, because the suit was not for damages for any wrongful act of the government servant. In State of Travancore-Cochin v. Janardan Pai, AIR 1957 Ker 151 the State realised a sum of money from the plaintiff who was the treasurer of a District Treasury on the ground that he had paid the amount to a wrong person. It was held that the cause of action for the plaintiff's suit for refund of the amount arose when he made the payment pursuant to Government orders and that the subsequent attempts to make the Government re-consider their order could not have the effect of stopping or arresting the time which had begun to run for purposes of limitation even if Article 120 of the Limitation Act applied. In Chetandas Gulabchand v. State of Bihar, AIR 1958 Pat 512 the Additional District Magistrate ordered the sale of certain goods. It was held that as his order could not be held to be a wrongful act, Article 49 of the Limitation Act would not have been attracted and that the suit filed by the owner of the goods for payment of compensation against the Government would be governed by the residuary Article 120. Thus, in none of the above cases was there any wrongful seizure. But, as I have already stated that the seizure of the salt in this case was wrongful and as the plaint proceeded on the same basis, Article 49 of the Limitation Act would certainly apply to this case.

15. The second contention of the learned Counsel for the respondent is that in para 19 of the plaint the respondent mentioned that the cause of action arose on 11-2-1955 the date on which he withdrew the auction money of Rs. 4000/- and the subsequent dates, but that the appellants did not deny the correctness of the said allegation and that therefore the suit was in time. He further argued that if P. W. 1 filed the plaint earlier he might have been non-suited on the ground that the suit was premature and that he should have waited for the payment of the money by the Government. But these contentions are not correct. For, the subsequent attempts of P. W. 1 to make the appellants re-consider their orders or the fact that P. W. 1 waited to him would not have the effect of stopping or arresting the time which had already begun to run for the purpose of limitation under Article 49 of the Limitation Act. So, in any event the suit is barred by limitation.

16. For the above reasons, I find point (ii) in the affirmative.

17. Point (iii):—

The learned Counsel for the appellants contended that under Article 300(1),

of the Constitution of India the first appellant is not liable for any tortious act done by its officers in discharge of their duties, that even if the case of P. W. 1 is true, his suit is one for damages for the tortious act of unlawful seizure of the bags of salt by the police officers in discharge of their official statutory duties under the Criminal Procedure Code and that the suit is not maintainable. He relied on *Kasturi Lal Ralia Ram v. State of Uttar Pradesh*, AIR 1965 SC 1039. This aspect of the case arose for decision in a similar matter in First Appeal No. 16 of 1962=(AIR 1968 Tri 63) disposed of by me on 20-11-1967. Therein I fully discussed the question of law and the rulings relating to it in paragraphs 23 to 27 of my judgment and held that the Government is not liable for the tortious acts of its servants done in exercise of their sovereign powers in the course of their employment by the State. There is, however, one point of distinction between the present case and the cases in AIR 1965 SC 1039 and First Appeal No. 16 of 1962=(AIR 1968 Tri 63) on the file of this Court. That point is that the goods were seized from the plaintiffs in those two cases against whom proceedings were taken under the Sea Customs Act (Act VIII of 1878) and other connected Acts. In the present case P. W. 1 was not involved in the Criminal Case. Only Captain Das Gupta, the proprietor of Tripura Air Ways, who was the agent of Bharat Air Ways, was prosecuted. The contention of the Learned Counsel for the appellants is that the principle underlying AIR 1965 SC 1039 would apply to this case also, even though P. W. 1 was not involved in any criminal case. I refrain from discussing this aspect of the case further, because the decision on points (i) and (ii) would not entitle P. W. 1 to claim any amount either towards the price of or subsidy for 418 bags of salt, lest this case in which no prosecution was launched against the plaintiff should be a precedent. No finding is given on point (iii).

18. Point (iv):—

In the result, the appeal is allowed and the judgment and decree of the Lower Court are set aside. The suit is dismissed. But, I direct the parties to bear their respective costs in both the Courts as the appellants did not properly conduct the case in the Lower Court and did not file certified copies of all the necessary documents, on which they relied.

BNP/D.V.C.

Appeal allowed.

AIR 1969 TRIPURA 7 (V 56 C 2)

C. JAGANNADHACHARYULU, J. C.

Sudhir Chandra Deb Nath and another, Appellants v. State-Union Territory of Tripura, Respondent.

First Appeal No. 9 of 1960, D/- 23-8-1967, against judgment and decree of Addl. Dist. J., Tripura, D/- 30-4-1960.

(A) West Bengal Land Development and Planning Act (21 of 1948), S. 8(1) (b) — The Constitution (Fourth Amendment) Act (1955) — Decision in AIR 1954 SC 170 that date of 31-12-46 fixed by S. 8 (1) (b) for determining market value of land acquired for public purpose is no longer law in view of Constitution (Fourth Amendment) Act (1955) and the provision is constitutional. AIR 1962 Tripura 13, Foll. (Para. 8)

(B) West Bengal Land Development and Planning Act (21 of 1948), S. 8 (as amended by Act 23 of 1955) — Amendment is not made applicable retrospectively in Tripura. (Para. 8)

(C) West Bengal Land Development and Planning Act (21 of 1948), S. 8 — Market value of land as on 31-12-46 — Burden of proving correct value of land is on claimants. (Para. 9)

(D) West Bengal Land Development and Planning Act (21 of 1948), S. 8(1)(b) — Acquisition of land for construction of Industrial Training Centre — Fixation of market value of land for compensation — Evidence of sale transaction in respect of nal land produced — Held, lands acquired was 'table tilla' land and was as valuable as nal land, if not more and better fitted for building purposes — Fixation of compensation at half the rate at which 'nal land' was sold was, therefore, not proper and same should be fixed at the same rate at which 'nal land' was sold. (Para. 10)

Cases Referred: Chronological Paras
(1962) AIR 1962 Tri 13 (V 49),
Kiranmay Sen Gupta v. Chief
Commr. and Administrator for
Union-Territory of Tripura 8
(1954) AIR 1954 SC 170 (V 41)=
1954 SCR 558, State of West Ben-
gal v. Mrs. Bela Banerjee 8

A. K. Shyam Choudhury, for Appel-
lants; H. C. Nath, Govt. Advocate, for
Respondent.

JUDGMENT:— This is an appeal filed by Sudhir Chandra Deb Nath and Ananta Chandra Dev Nath against the judgment and decree, dated 30-4-1960, in Land Acquisition Case No. 41 of 1956, on the file of the Additional District Judge, Tripura, to set aside the same and to grant them compensation at the rate of Rs. 1600/- per "kani".

2. On 29-6-1956 the Land Acquisition Officer of Agartala (District Magistrate and Collector) passed an order for issuing a notification under Section 4 of the West Bengal Land Development and Planning Act of 1948 (West Bengal Act XXI of 1948), as extended to Tripura, by Notification No. 86-J, dated 1-8-1950, by the Government of India, Ministry of States, for acquisition of land measuring 3.80 acres in mouja New Model Village for the construction of Industrial Training Centre. The notification was published in the extraordinary issue of the Tripura Gazette, dated 11-7-1956. The Land Acquisition Officer passed an order on 28-7-1956 for publishing declaration in the Gazette under Section 6 of the said Act. Notices under Section 9 of the Land Acquisition Act (Act I of 1894) were also published calling upon the interested parties to appear before the Land Acquisition Officer and to make their claims. On 16-10-1956, he passed an award awarding compensation to the claimants at the market value of Rs. 200/- per "kani" of land, as on 31-12-1946, under Section 8 (1) (b) of the West Bengal Land Development and Planning Act and allowed the statutory compensation of 15 per cent and interest at 6 per cent per annum from 15-5-1953, the date of taking possession up to 15-12-1956.

3. The appellants herein were not satisfied with the amount awarded to them and got a reference made under Section 18 of the Land Acquisition Act (Act I of 1894) for fixing the correct amount of compensation. The learned Additional District Judge recorded evidence, oral and documentary, and upheld the award passed by the Land Acquisition Officer and the market value of the land as on 31-12-1946. Hence the appeal by both the claimants.

4. The land of the first appellant which was acquired by the Land Acquisition Officer is 20 "decimals" ($\frac{1}{2}$ of kani) covered by jote No. 197 in mouja New Model Village. The land of the second appellant was also of the same extent covered by the same jote No. 197 in mouja New Model Village.

5. The first question that falls for determination is regarding the fixation of the date, on which the market value of the lands in question prevailed for being taken into consideration in fixing the compensation. Section 8 of the West Bengal Land Development and Planning Act, 1948 (Act XXI of 1948), under which the lands were acquired runs as follows, after its amendment by West Bengal Land Development and Planning (Amendment) Act 1955 (West Bengal Act XXIII of 1955).

"8 (1). After making a declaration under Section 6, the State Government may acquire the land and thereupon the

provisions of the Land Acquisition Act, 1894 (hereinafter in this section referred to as the said Act), shall, so far as may be, apply:

Provided that—

(a) if in any case the State Government so directs; the Collector may, at any time after a declaration is made under Section 6, take possession, in accordance with the rules, of any beel, baor, tank or other watery area, or any waste or arable land in respect of which the declaration is made and thereupon such land shall vest absolutely in the Government free from all encumbrances;"

* * * * *

Section 8 (1) (b) of the said Act prior to its amendment by West Bengal Land Development and Planning (Amendment) Act, 1955 (West Bengal Act XXIII of 1955) ran as follows:—

"(b) in determining the amount of compensation to be awarded for land acquired in pursuance of this Act the market value referred to in clause first of sub-section (1) of Section 23 of the said Act shall be deemed to be the market value of the land on the date of publication of the notification under sub-section (1) of Section 4 for the notified area in which the land is included subject to the following condition, that is to say,—

if such market value exceeds by any amount the market value of the land on the 31st day of December, 1946, on the assumption that the land had been at that date in the state in which it in fact was on the date of publication of the said notification, the amount of such excess shall not be taken into consideration."

6. Section 8 (1) (b) was amended by the West Bengal Land Development and Planning Amendment Act, 1955 (West Bengal Act XXIII of 1955) and after the amendment the relevant portion of the said second paragraph in Section 8 (1)(b) runs thus:

"if such market value in relation to land acquired for the public purpose specified in sub-clause (i) of clause (d) of Section 2 exceeds by any amount the market value of the land on the 31st day of December, 1946, on the assumption that the land had been at that date in the state in which it in fact was on the date of publication of the said notification, the amount of such excess shall not be taken into consideration."

7. The amendment made by the West Bengal Land Development and Planning Amendment Act of 1955 was brought into force in Tripura from 7-3-1960, as published in the Tripura Gazette Extraordinary, dated 21-3-1960. So the legal position in Tripura prior to 7-3-1960 was that the market value with regard to any land acquired for any public purpose as

defined by Section 2 (d) of the West Bengal Land Development and Planning Act of 1948 was to be determined as on 31-12-1946 and the excess market value as on the date mentioned in the first clause of sub-section (1) of Section 23 of the Land Acquisition Act (Act I of 1894) should not be taken into consideration. But, after the amendment was introduced in Tripura i.e., after 7-3-1960, the said date of 31-12-1946 was to be taken into account only in the case of market value of land acquired for settlement of immigrants, who have migrated into the State of West Bengal (here - Tripura) on account of circumstances beyond their control. Both the Land Acquisition Officer and the Additional District Judge took the date of 31-12-1946 as the date for fixing the market value of the lands in question, since they were acquired for a general public purpose prior to the introduction of the amendment in Tripura.

8. The contention of the learned Counsel for the appellants regarding the said date is three-fold. His first contention is that the provision in Section 8 (1) (b) of the West Bengal Land Development and Planning Act that the market value as on 31-12-1946 should be considered is repugnant to the provisions in Section 23 of the Central Act namely, the Land Acquisition Act (Act I of 1894) and that it is illegal and cannot be followed. This was also what was held by the Supreme Court in the State of West Bengal v. Mrs. Bela Banerjee, AIR 1954 SC 170. But, after the Supreme Court rendered the above decision, the Constitution of India was amended by the Constitution of India (4th Amendment Act of 1955), by which Arts. 31, 31A, 305 and the 9th Schedule mentioned in the Article 31B of the Constitution were amended. In the 9th Schedule the West Bengal Land Development and Planning Act of 1948 as amended by the subsequent Acts was added making the said Act valid notwithstanding the decision of the Supreme Court. So, the 4th Amendment of the Constitution of India validated the said Act and Section 8 of the West Bengal Land Development and Planning Act. The same point came up for decision previously in this Court and this Court held likewise: Vide Kiranmay Sen Gupta v. Chief Commr. and Administrator, for Union Territory of Tripura, AIR 1962 Tri 13. So, there is no force in the contention that the date of 31-12-1946 fixed by Section 8 (1) (b) is unconstitutional.

The second contention of the learned Counsel for the appellants is that the Additional District Judge disposed of the matter on 30-4-1960 after the amendment was brought into force in Tripura on 7-3-1960 and that, therefore, the Additional District Judge should have held that the date of 31-12-1946 should be

considered in a case covered by Section 2 sub-clause (i) of clause (d) of the West Bengal Land Development and Planning Act i.e., to a case of acquisition of land for settlement of immigrants, but that in the present case the lands were acquired for constructing the Industrial Training Centre and that the market value should have been fixed as on the date mentioned in the first clause of sub-section (1) of Section 23 of the Indian Land Acquisition Act (Act I of 1894). But, the amendment made by the West Bengal Government by the West Bengal Amending Act XXIII of 1955 was not made applicable retrospectively in Tripura. Unless it was made specifically retrospective, it could not apply to the present case, wherein the lands were acquired in 1956 before the Amending Act came into force in Tripura. The date of disposal of a case makes no difference. So, this contention also fails. The third contention of the learned Counsel for the appellants is that they took the lands from the Government under settlement in 1948 by paying Rs. 250/- per kani as premium and undertaking to pay Rs. 5/- towards annual rent and -/5/- annas towards cess for each year per kani and that if the market value is to be fixed as on the date of 31-12-1946, it would work out injustice and hardship to the appellants. The learned Government Advocate argued that the appellants purchased the lands in open auction, that the prices of lands gradually increased from 1946 and that, therefore, they paid heavy premium. But, it is not at all necessary to decide whether the lands were granted on settlement or sold in auction, inasmuch as the Court is bound to grant compensation according to law with reference to the market value prevailing on the date of 31-12-1946 fixed by Section 8 (1) (b) of the West Bengal Land Development and Planning Act, 1948.

9. The next contention of the learned Counsel for the appellants is that even if the market value prevalent on 31-12-1946 is to be taken into consideration, both the Land Acquisition Officer and the Additional District Judge erred in fixing a low value at Rs. 200/- per kani. The judgment of the Additional District Judge on this point is very laconic. The burden of proving what the correct value of the land was on 31-12-1946 lies on the appellants. No reliance can be placed upon the oral testimony of witnesses, examined on behalf of the appellants, regarding the price of the land. But, they filed Exts. P-1 to P-4 registered sale deeds to prove the market value of the land. Ext. P-1 is dated 20-3-1359 T. E. i.e., 1949 A. D. which shows that 18 gandas, 1 kara and 1 krant of land in Abhoynagar with two huts were sold for Rs. 2,200/-. This sale deed cannot be

taken into account inasmuch as it relates to 1949 A. D. Ext. P-2 is a registered sale deed dated 29-4-1952 A. D. under which the first appellant sold away 10 "decimals" of land at Rs. 400/-. This is also of no avail, since it does not show the market value on 31-12-1946. Under Ext. P-3 dated 28-8-1357 T.E. (1947 A.D.) about 18 "decimals" of land were sold for Rs. 700/-. This can be taken into account, as the date of sale is near about 31-12-1946 A. D. But, it is not clear what other properties were sold with the land. The price of each "decimal" works out at Rs. 38.8 paise. Ext. P-4 registered sale deed is dated 11th Magh, 1357 T. E. corresponding to 1948 A. D. under which 80 "decimals" of land with pond in mouja Indranagar were sold for Rs. 2,499/-. Each "decimal" of land was sold for Rs. 31-23 paise. It also cannot be taken into account as the sale deed was executed in 1948 A. D.

10. As against the above documents, the respondent filed Exts. D-1 to D-3 registered sale deeds. Under Ext. D-1, 1½ kanis of nal land were sold for Rs. 600/- on 18-9-56 T. E. The Land Acquisition Officer relied on this sale deed, as it was executed in 1947 A. D., the date being near 31-12-1946. He, however, fixed the market value of lands in question at Rs. 200/- per kani, being half of the market value covered by Ext. D-1, on the ground that the land covered by Ext. D-1 was more costly being nal land than the lands in question, which are "table tilla". But, the lands were acquired for the purpose of construction of Industrial Training Centre. A "table tilla" land is as valuable as nal land, if not more and better fitted for building purposes. Besides, the lands in question are near Agartala town. So, the Land Acquisition Officer should have fixed the value at Rs. 400/- per kani as mentioned in Ext. D-1. Ext. D-2 is another registered sale deed dated 7th Magh, 1356 T. E. corresponding to 1947 A. D. under which 100 "decimals" of land in extent in Jagatpur mouja were sold for Rs. 1000/-. So, each "decimal" was sold for Rs. 10/-. Ext. D-3 is another registered sale deed dated 18th Falgun, 1356 T. E. corresponding to 1947 A. D. under which about 115 "decimals" of land in mouja Jagatpur were sold for Rs. 300/-. This would work out at Rs. 3/- per "decimal". As Ext. D-1 relied on by the Land Acquisition Officer relates to land near the lands in question, I too would act upon it and fix the rate at Rs. 400/- per kani as mentioned in Ext. D-1. This was also the market value of the land covered by Ext. D-2.

11. The learned Counsel for the appellants stated that there were fruit bearing trees on the lands and that no compensation was paid to them in respect of those trees. But, in the petitions

for reference filed by the appellants no reference was made to the trees.

12. In the result, the appeals are allowed and the market value of the lands in question as on 31-12-1946 is fixed at Rs. 400/- per kani. The appellants are entitled to compensation at this rate together with the statutory compensation and interest according to law. They are also entitled to proportionate costs in the appeal.

AKJ/D.V.C.

Appeal allowed.

AIR 1969 TRIPURA 10 (V 56 C 3)

C. JAGANNADHACHARYULU, J. C.
Shri Pran Gopal Saha, Petitioner v.
District Magistrate and Collector (Tribal Welfare Section) Agartala and another, Respondents.

Writ Petn. No. 10 of 1962, D/- 8-11-1967.

(A) Constitution of India, Art. 311 (1), (2) — Order must be by way of punishment, to bring case under either clause. AIR 1958 SC 36, Rel. on. Case law referred. (Para 4)

(B) Central Civil Services (Temporary Service) Rules 1949, Rule 5 — Notice terminating service — Office file showing orders passed by appointing authority — Copy of the order served on the government servant signed by another and not mentioning that it was on behalf of the Appointing Authority — Held, Appointing Authority signing the original order on office file is enough compliance with R. 5 (a). AIR 1961 All 284 and AIR 1962 All 471, Disting. AIR 1963 Tri 38, Applied. (Para 5)

Cases Referred: Chronological Paras
(1963) AIR 1963 Tri 38 (V 50),
Prafulla Chandra Bhowmik v.
Union Territory of Tripura 4, 6
(1962) AIR 1962 All 471 (V 49),
Varma, J. S. v. State of U. P. 4, 6
(1961) AIR 1961 All 284 (V 48) =
(1961) 2 Lab LJ 191, Bhagwat
Saran Srivastava v. Collector and
Dist. Magistrate Jaunpur 4, 6
(1959) AIR 1959 All 795 (V 46),
Moinuddin v. Divisional Mechanical
Engineer, N. R. Rly. 8
(1958) AIR 1958 SC 36 (V 45) =
1958 SCR 828, Parshotam Lal
Dhingra v. Union of India 4

B. C. Dev Barma, for Petitioner; H. C. Nath, Govt. Advocate, for Respondents.

JUDGMENT:— This is a Writ Petition filed by Shri Pran Gopal Saha, an Ex-Amin in the Tribal Welfare Department, Tripura, under Article 226 read with Article 311 (2) of the Constitution of India for a Writ of Certiorari or any,

other appropriate Writ for quashing the notice, dated 17-2-1961, of Shri L. B. Thanga, the then District Magistrate and Collector, Tripura, terminating his services under Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949 (hereinafter referred to as the Rules) with effect from the date of expiry of one calendar month from the date of service of the order on him and the subsequent order dated 29-3-1961 of actual termination of his service in pursuance of the notice.

2. The petitioner was appointed temporarily by an order, dated 17-2-1956, of Shri M. Ramunny, the then District Magistrate and Collector, Tripura, for a short period upto 29-2-1956 on the scale of Rs. 55-3-118-4-130/- together with the usual allowances as admissible in Tripura on the condition that his service was liable to be terminated at any time without any notice or assigning any reasons. His order of appointment was also made subject to his being found fit on medical examination and verification of his character and antecedents. Vide Ext. A(1). He continued to be in service. After a lapse of 5 years he was served with a notice, dated 17-2-1961, signed by Shri L. B. Thanga, the then Additional District Magistrate and Collector, Tripura, under Rule 5 of the Rules, that his service would be terminated with effect from the date of expiry of one calendar month from the date of service of the notice on him. Vide Ext. A(4). In pursuance of the said notice the Sub-Divisional Officer, Dharmanagar, under whom the petitioner was then working as Amin, Tribal Welfare Section, Dharmanagar, released him from duty with effect from the afternoon of 29-3-1961. Vide Ext. A(5). The petitioner filed an appeal before the second respondent Chief Commissioner against the order of termination of his service, without any success, Vide Exts. A(6), A(8) and A(9). The petitioner thereupon issued a registered notice of demand to the Chief Secretary, Tripura Administration and also the first respondent District Magistrate and Collector threatening to file a Writ Petition, if he was not reinstated. Vide Ext. A(7). But, as he was not reinstated, he filed the present Writ Petition.

3. The Central Government framed the Central Civil Services (Temporary Service) Rules of 1949 (under Section 241 (7) of the Govt. of India Act of 1935). The petitioner, who was appointed temporarily and whose services were liable to be terminated without any notice or any reasons, did not acquire the status of a quasi permanent Government servant within the meaning of R. 3 of the aforesaid Rules, though he was in continuous Government service for more than 3 years. A Government servant would be deemed

to be in quasi-permanent service under the said rule, provided, firstly, he is in continuous Government service for more than 3 years and secondly, if the appointing authority, being satisfied as to his suitability in respect of age, qualification, work and character for employment in a quasi-permanent capacity, has issued a declaration to that effect in accordance with such instructions as the President may issue from time to time. But, in the case of the petitioner no such declaration was issued. So he remained to be purely a temporary Government servant.

4. In the Writ Petition three grounds were taken by the petitioner impugning the orders of termination of his service. The first ground is that he was appointed by Shri M. Ramunny, the then District Magistrate and Collector, but that his service was terminated by the Additional District Magistrate and Collector, an authority subordinate to the Appointing Authority and that, therefore the order is in violation of Art. 311 (1) of the Constitution of India. The second ground mentioned in the Writ Petition is that no notice was given to him and no enquiry was made as required by Article 311 (2) of the Constitution of India and that, therefore, the order of termination of his service is illegal. But, when the matter came up for arguments the petitioner's learned Counsel did not rely (rightly) on the above two provisions of Article 311 of the Constitution of India. For, the petitioner was neither "dismissed" nor "removed from service" nor "reduced in rank" by way of punishment. Clause (1) of Article 311 of the Constitution of India comes into play only when there is "dismissal" or "removal" of a Government servant from service, while clause (2) of Article 311 comes into play when there is "dismissal" or "removal" or "reduction in rank" of a Government servant and both the clauses will apply only when such an order is passed by way of punishment. This position of law is also clear from a number of rulings. Vide the well-known Dhingra's case in *Parshotam Lal Dhingra v. Union of India*, AIR 1958 SC 36, *Bhagwat Saran Srivastava v. Collector and District Magistrate, Jaunpur*, AIR 1961 All 284, *J. S. Varma v. State of U. P.*, AIR 1962 All 471 and a decision of this Court in *Pratulla Chandra Bhowmik v. Union Territory of Tripura*, AIR 1963 Tri 38.

5. The only point (which was the third ground in the Writ Petition) that was urged by the petitioner's Counsel and which arises for determination is whether the notice of termination of service (vide Ext. A(4) dated 17-2-1961) signed by Shri L. B. Thanga, Additional District Magistrate and Collector, Tripura is

a valid notice under Rule 5 of the Rules which could validly terminate the temporary service of the petitioner. Rule 5, which is relevant for the purpose of the present case, runs as follows:—

"5. (a) The service of a temporary Government servant, who is not in quasi-permanent service, shall be liable to termination at any time by notice in writing given either by the Government servant to the Appointing Authority, or by the Appointing Authority to the Government servant,

(b) The period of such notice shall be one month unless otherwise agreed to by the Government and by the Government servant,

Provided that the service of any such Government servant may be terminated forthwith by payment to him of a sum equivalent to the amount of his pay plus allowances for the period of the notice or, as the case may be, for the period by which such notice falls short of one month or any agreed longer period.

Provided further that the Compensation (City) and House Rent allowances, where admissible, shall be payable on the expiry of the notice period and after it is certified by the competent authority that the Government servant continued to reside during the period of notice at the station where he was last employed, notwithstanding the fact that he was not expected to return to duty at that station."

Sub-rule (a), thus, contemplates that the notice in writing, which has to be given to the Government servant, should be given by the Appointing Authority. In the present case, the first respondent District Magistrate was the appointing authority. So, evidently, the original of Ext. A (4) notice by itself is not a valid one, because it was not given by the District Magistrate. But, it was given by the Additional District Magistrate. However, the office note file Ext. B(2) shows that the order of termination of service of the petitioner was passed by the then District Magistrate Shri H. S. Butalia. Ext. B(2) is a continuous note-sheet. An office note was put up on 15-2-1961 that the petitioner entered service on 22-2-1956, that he was still temporary and that if desired, Rule 5 might be applied in his case. There is another office note dated 16-2-1961 that the "Additional District Magistrate" might kindly see the office note mentioned above. Then, there is a short order of Shri H. S. Butalia, District Magistrate and Collector dated 16-2-1961 "apply". The notice of termination of service was drafted on 17-2-1961 and the signature of the Additional District Magistrate was obtained in the office copy. So, in fact, the

notice of termination of service was issued and signed by Shri H. S. Butalia, the then District Magistrate, while copy of the order served on the petitioner was signed by the Additional District Magistrate. The contention of the petitioner's Counsel that the original of Ext. A (4) does not mention that Shri L. B. Thanga signed the notice on behalf of or for Shri H. S. Butalia is correct. But, the original notice in the note-file of the office shows that as a matter of fact the order of termination of service of the petitioner was passed and initialled by Shri H. S. Butalia. So, this is only a clerical mistake, which cannot invalidate the notice issued under Rule 5 (a).

6. The learned Counsel for the respondents drew my attention to the following decisions arising under Art. 311(1) of the Constitution of India. In AIR 1961 All 284 it was held that, if the services of a temporary employee are terminated not as punishment but under the contract, then his removal by an authority subordinate to the Appointing Authority cannot be questioned. In AIR 1962 All 471 a proposal for termination of service together with the draft order was put up for approval before the competent authority. That authority wrote the word "seen" on the proposal. It was held that the word "seen" indicated approval of the proposal of the competent authority for issuing the order of termination of service and that there was no violation of the provisions of Article 311 (1) of the Constitution of India. These two decisions arose under Article 311 (1) of the Constitution of India. They cannot directly apply to the facts of the present case, because Rule 5(a) lays down that the notice shall be given in writing by the Appointing Authority. But, the facts of this case show that the actual notice was signed and given by the Appointing Authority, while a copy of it was issued in the usual routine by the Additional District Magistrate. Though the decision in AIR 1963 Tri 38 of this Court has no direct bearing on this point, it throws some light on it. In that case a Government servant was appointed by the Chief Commissioner of Tripura temporarily. But, under Rule 5 his appointment was terminated not by the Chief Commissioner but by the Director of the Department, in which the Government servant was employed. It was held that the Director of the Department, if he was the Appointing Authority for Class III employees on the relevant date and if the Government servant was a Class III employee, could validly terminate the services of the employee, even though the employee was appointed by the Chief Commissioner. As Ext. B(2) shows that the actual order of termination of service of the petitioner under Rule 5 of

the Rules was passed by Shri H. S. Butalia, the Appointing Authority, the fact that the original of Ext. A(4) does not bear his signature, but that it bears the signature of the Additional District Magistrate and Collector does not, in my opinion, invalidate the notice issued to the petitioner under the circumstances of this case.

7. The learned Counsel for the petitioner stated that a copy of Ext. B(2) was filed very late in the Court on 25-9-1967 and that no reliance should be placed on it. Though he did not expressly state that Ext. B(2) was got up for the purpose of the present Writ Petition, he faintly suggested the same. But, that Ext. B(2) note file did exist before the Writ Petition was filed is clear from paragraphs 19 and 24 of the written statement filed by the respondents. In paragraph 19 the respondents stated that the order of applying Rule 5 of the Rules for terminating the service of the petitioner was passed by Shri H. S. Butalia, the then District Magistrate and Collector, Tripura and that his order was communicated under the signature of Shri L. B. Thanga as per the direction of Shri H. S. Butalia. In paragraph 24 the respondents clearly mentioned the existence of the note-sheet. In that paragraph the respondents alleged that the order of termination of service was passed by Shri H. S. Butalia and that his order was communicated under the signature of Shri L. B. Thanga, as per the direction in the note-sheet. Ext. B (2) contains several initials signatures and handwritings of a number of officers bearing several dates. There is absolutely no doubt about the genuineness of the note-sheet and it cannot be said that it was got up by the respondents to substantiate their defence in the Writ Petition.

8. It was finally contended by the learned Counsel for the petitioner that the affidavit, filed on behalf of the respondents, was not sworn to either by Shri H. S. Butalia or Shri L. B. Thanga and that much reliance cannot be placed upon it. He relied on *Moinuddin v. Divisional Mechanical Engineer, N. R. Rly.* AIR 1959 All 795, where it was held that the tendency among some Government Officials to depute their clerks or pairors to swear to affidavits in regard to the facts, which are within their own knowledge, is to be deprecated, that the practice is contrary to law and improper and that it smells of discourtesy to the High Court. But, in this case the affidavit was sworn to by Shri Naresh Chandra, Cultural Research Officer, in charge of Tribal Welfare Section. So he is a competent officer to swear to the affidavit in the present case.

9. In the result, the Writ Petition fails. It is accordingly dismissed, but under the circumstances without costs.

BDB/D.V.C.

Petition dismissed.

AIR 1969 TRIPURA 13 (V 56 C 4)

C. JAGANNADHACHARYULU, J. C.

Amaresh Chandra Nandi Majumdar, Petitioner v. N. K. Chanda and others, Respondents.

Criminal Revn. No. 15 of 1966, D/- 19-9-1967, against order of S. J., Tripura, D/- 1-9-1966.

Criminal P. C. (1898), Ss. 202 and 439 — Postponing issue of process — Reasons for not recorded — Order is erroneous and liable to be set aside.

Sec. 202 contemplates that the superior Courts must be in a position to find out whether the discretion in postponing issue of process has been properly exercised by the Magistrate or not. They should not be left to imagine what possibly could be his reasons. Where, therefore, there is nothing on record to show why the Magistrate postponed the issue of process and the reasons which compelled him to do so, the order is erroneous and liable to be set aside. AIR 1929 Cal 176 and AIR 1931 Sind 113, Disting. AIR 1940 Pat 97, Rel. on; AIR 1956 All 466 (FB), Ref. (Para 5)

Cases Referred: Chronological Paras

(1956) AIR 1956 All 466 (V 43) =	
1956 Cri LJ 959 (FB), Sri Ram	
Varma v. State	5
(1940) AIR 1940 Pat 97 (V 27)=41	
Cri LJ 349, Mukti Narayan Gir	
v. Emperor	4
(1931) AIR 1931 Sind 113 (V 18) =	
32 Cri LJ 926, Dharamdas Lilaram	
v. F. H. Pilcher	5
(1929) AIR 1929 Cal 176 (V 16) =	
30 Cri LJ 705, Ajoy Krishna Sarkar	
v. S. G. Bose	5

B. C. Dev Barma and M. K. Datta, for Petitioner; N. L. Choudhury, S. R. Barman and M. K. Bhowmik, for Respondents.

ORDER: This is a Criminal Revision Petition filed under Section 439 Cr. P. C. against the order of the Sessions Judge, Tripura in Criminal Motion 156 of 1966, dated 1-9-66, to set aside the same and also the order of the Sub-Divisional Magistrate, Sadar, dated 18-8-66, in Criminal Case No. 611 of 1966 filed under Sec. 395, I. P. C.

2. The petitioner filed criminal complaint against the respondents 1 to 5 in Criminal Case No. 611 of 1966, on 18-8-66, alleging that the respondents committed dacoity under Section 395 I. P. C. in the office of Tripura Apex Marketing Co-operative Society Ltd., Agartala. The learned S. D. M. examined the complainant on 18-8-

BL/EL/A731/68

66 and passed an order (under S. 202, Cr. P. C.) that the Circle Officer Shri N. Roy should enquire and report by 19-9-66. The petitioner-complainant attacked the correctness of this order under Sec. 202 Cr. P. C. by filing Criminal Motion 156 of 1966 before the Sessions Judge, Tripura, under Sections 435 and 438 Cr. P. C. The learned Sessions Judge held that the S. D. M. should have recorded his reasons under Section 202 Cr. P. C. for passing the order in question postponing the issue of process for compelling the attendance of the respondents, but that his failure to do so was only an irregularity, which is a curable defect under Section 537 Cr. P. C. He, therefore, rejected the revision petition. Hence the present Criminal Revision Petition by the complainant-petitioner to set aside the orders of the two Courts below.

3. The contention of the learned Counsel for the petitioner is that a perusal of Sections 200 and 202 Cr. P. C. shows that the learned S. D. M. violated the provisions of both the sections. Section 200 Cr. P. C. (as amended by the Cr. P. C. Amendment Act 26 of 1955) provides that the Magistrate shall, on taking cognizance of the offence on complaint, at once examine the complainant and the witnesses present, if any, upon oath. The present case does not fall under any one of the categories covered by the provisions of sub-sections (a), (aa), (b) and (c) of the proviso to Section 200, Cr. P. C. So, the learned S. D. M. should have not only examined the complainant but also his witnesses, who were present in the Court. But, the record does not show either whether the petitioner told the S. D. M. or that the S. D. M. ascertained from the petitioner about the presence of any other witnesses for him in the Court.

But, in the present case this objection was not taken by the petitioner's Counsel either before the S. D. M. or before the Sessions Judge or even in this Court. Only after the respondents' Counsel replied to the argument of the petitioner's Counsel, the latter urged this contention in his reply. The respondents' Counsel submitted that he was taken unawares by the new plea raised by the petitioner's Counsel in his reply arguments and that he was not prepared on that point. So, in the present case I do not propose to decide whether the question of law can be now raised or not and to rest my decision on this point.

4. The contention of the petitioner's learned Counsel that the S. D. M. violated the provisions of Section 202 Cr. P. C. by passing the order in question without recording his reasons in writing for postponing the issue of the processes to compel the attendance of the persons complained against is well founded. Sec. 202 Cr. P. C. lays down *inter alia* that on the receipt of a complaint of an offence by a Magistrate, of which he is authorised to take cognizance, he may, if he thinks fit, for reasons to be recorded in writing, postpone the

issue of process for compelling the attendance of the person complained against and may either inquire into the case himself or direct an inquiry or investigation by any Magistrate subordinate to him (if he is a Magistrate other than a Magistrate of the third class) or by a police-officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint.

But, under the proviso no such direction shall be made unless the complainant has been examined on oath under the provisions of Section 200 Cr. P. C. This naturally includes examination of the other witnesses present in the Court, which should also be done under Section 200 Cr. P. C. But, as already stated this question of non-examination of the other witnesses, if any, present in the Court is not being considered. The learned S. D. M. failed to record his reasons in writing for postponing the issue of processes to compel the attendance of the respondents. There is a decision of the Patna High Court reported in *Mukti Narayan Gir v. Emperor*, AIR 1940 Pat 97, which lays down that if a Magistrate has any doubt as to the truth of the allegations in the petition of complaint as supported by the solemn affirmation of the petitioner, he ought to record an order to that effect in the order sheet, so that the superior Courts may be satisfied that the Magistrate had any justification whatsoever in refusing to issue summons to the accused as required by law. So, the provision in Section 202, Cr. P. C. that the Magistrate should record his reasons in writing for postponing the issue of process is a mandatory one.

5. The learned Counsel for the respondents, however, contended that some of the respondents are respectable officers, that it is unthinkable that they would have committed dacoity in the office in the day-time, that the office is situate near a police station that, therefore, the learned S. D. M. wanted to ascertain the truth of the complaint and passed the order in question asking the Circle Officer to make an enquiry and to report, that his failure to record reasons did not prejudice the petitioner and that it was merely an irregularity. The merits of the case cannot now be gone into at this state as a Writ Petition is said to be now pending in this Court regarding the same. So, no observation can be made in this petition at all regarding the merits of the case of either party.

The learned Counsel for the respondents relied on the observations at page 1251 of *Sohni's Code of Criminal Procedure*, Vol. II, 16th Edition, where the learned Commentators state that the omission to record reasons amounts merely to an irregularity, if the procedure adopted by the Magistrate was legal and proper under the circumstances of the case and that unless it in fact occasions a failure of justice, it will be no ground for setting aside his order of

discharge under Section 203 Cr. P. C. In Note 23 at page 1397 of the Code of Criminal Procedure, AIR Commentaries, Vol. I, 6th Edition, it is stated that if any irregularity in procedure under Sec. 202 Cr. P. C. has not resulted in miscarriage of justice, the High Court will not make any order in revision, which can result only in harassment to the parties and the waste of time. It is further stated that omission of the Magistrate to record reasons for postponing the issue of process is one such irregularity with which the High Court will not interfere, unless there is failure of justice.

In *Ajoy Krishna Sarkar v. S. G. Bose*, AIR 1929 Cal 176, it was held that the failure of the Magistrate to record reasons for postponing the issue of process would at most be an irregularity and would not justify the setting aside of an order for issue of a search warrant.

In *Dharamdas Lilaram v. F. H. Pilcher*, AIR 1931 Sind 113, it was held that omission to record reasons for postponing the issue of process under Section 202 Cr. P. C. is merely an irregularity and not an illegality. It should be noted that the failure on the part of the Magistrate to record his reasons is said to be an irregularity which is curable under Section 537, Cr. P. C. But, the explanation to that Section lays down that in determining whether any error, omission or irregularity in any proceeding under the Cr. P. C. has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. In this case the petitioner took objection to the order in question immediately after it was passed. There is no meaning in stating that, though the learned S. D. M. committed irregularity in passing the order in question, the Court should wait and see whether ultimately the order which might be passed by the learned S. D. M. after the latter peruses the report of the Circle Officer, is vitiated by the irregularity in question and whether this irregularity has occasioned a failure of justice.

As rightly pointed out in *Sri Ram Varma v. State*, AIR 1956 All 466 (FB), Sec. 537 Cr. P. C. does not contemplate a case where the legality of a certain procedure about to be adopted, but not yet adopted, is brought into prominence in the trial Court and the Court is called upon to decide about its legality. It was held in that case that in such a case the Court cannot adopt a wrong procedure in the hope that ultimately it would be condoned under Section 537, Cr. P. C. Inasmuch as immediate objection was taken by the complainant to the procedure adopted by the learned S. D. M., the order passed by him cannot be sustained on the ground that the learned S. D. M. committed only an irregularity in passing the order, which may not vitiate his subsequent orders. Section 202 Cr. P. C. contemplates that the superior Courts must be

in a position to find out whether the discretion in postponing issue of process has been properly exercised by the Magistrate or not. Now, there is nothing to show why the Magistrate postponed the issue of processes and the reasons which compelled him to do so. The Courts should not be left to imagine what possibly could be his reasons. So, the order in question is clearly erroneous and is to be set aside.

6. In the result, the revision petition is allowed and the orders of both the Courts below are set aside. The District Magistrate should forward the case in question to some other S. D. M. for disposal according to law.

HGP/D.V.C.

Revision allowed.

AIR 1969 TRIPURA 15 (V 56 C 5)

C. JAGANNADHACHARYULU, J. C.

Rajendra Mohan Sinha and others, Appellants v. Nimai Chand Sinha and others, Respondents.

Second Appeal No. 26 of 1959, D/- 13-4-1967, against judgment and decree of Dist. J., Tripura in Civil Appeal No. 99 of 1956.

(A) Limitation Act (1908), Art. 182 (3) — 'Review of judgment' — Application to set aside ex parte decree under O. 9, R. 13 of Civil P. C., 1908, is not one for review within Art. 182 (3) and hence order thereon does not give fresh start of limitation. AIR 1950 Mad 552, Rel. on. — (Civil P. C. (1908), O. 9, R. 13 and O. 47, R. 1). (Para 13)

(B) Limitation Act (1908), Art. 182 (2) — 'Where there has been an appeal' — Suit for possession decreed ex parte against all defendants on 17-8-1353 T. E. — On application by defendant N to set aside ex parte decree against him, suit decreed against N on contest and ex parte against other defendants on 22-1-1359 T. E. — Appeal against decree D/- 22-1-1359 T. E. — Time taken in prosecuting appeal against decree D/- 22-1-1359 T. E. cannot be deducted in computing period of limitation for purpose of execution of ex parte decree D/- 17-8-1353 T. E. AIR 1932 PC 165 and AIR 1953 Tra-Co 220 (FB) and AIR 1961 Andh Pra 326, Ref. to. (Para 12)

(C) Limitation Act (1908), S. 3 — Scope — S. 3 casts a duty on Court to dismiss any matter which is barred by limitation, even though no plea is taken by defendants with regard to limitation. (Para 11)

(D) Tripura Public Demands Recovery Act (4 of 1326 T. E.), S. 20 — Scope — Auction-sale of land to realise arrears of land revenue — Even persons who were

66 and 67 to auction-proceedings are
P. C. file petition under S. 20 to get
show aside and they can file petition
pet S. 20 (2) even after expiry of 30
ne from date of sale if there are rea-
b/able grounds for condoning delay.

(Para 8)

Cases Referred: Chronological Paras

(1961) AIR 1961 Andh Pra 326

(V 48)=ILR (1961) 2 Andh Pra

300, Laxmi Narayanarao v. Kishan

Lal

(1953) AIR 1953 Tra-Co 220 (V 40)

=ILR (1953) Trav-Co 89 (FB),

Narayanan Thampī v. Lakshmi

Narayana

(1950) AIR 1950 Mad 552 (V 37)=

1950-1 Mad LJ 648, Ramakrishna

Naidu v. Srinivasulu Naidu

(1932) AIR 1932 PC 165 (V 19)=

ILR 60 Cal 1, Nagendra Nath Dey

v. Suresh Chandra Dey

M. R. Choudhury and R. L. Chakraborty, for Appellants; A. K. Shyam Choudhury, for Respondent 1.

JUDGMENT:— This is a second appeal filed by the defendants 8 to 10 in Title Suit No. 194 of 1955 on the file of the Munsiff, Kailasahar, against the judgment and decree of the District Judge in First Title Appeal No. 99 of 1956 on his file dismissing with costs the appeal filed by them against the judgment and decree of the Munsiff decreeing the Title Suit No. 194 of 1955 filed by the first respondent for delivery of possession of the plaint first schedule land.

2. The facts of the case involving a long drawn out litigation which led to the institution of this second appeal are as follows:—

(a) There is a Taluk No. 36, situate in mouja Kamrangabari under Pargana Bhitari Kailasahar, about 16 drones in extent, which stood in the names of Ramananda Singh, Sri Krishna Deb and Nabin Chandra Deb. 36/4 is a Kharija Taluk out of the same being 1 drone, 9 kanis, 13 gandas and 3 karas in extent.

(b) Kharija Taluk No. 36/4 belonged to Kuttasa Fakir. He possessed the same through his tenants namely, the defendants 1, 2, the father of the defendants 13 and 14 and the father of the third defendant. They executed Ext. 4, Kabuliyat dated 10th of Bhadra, 1353 T. E. in his favour. Under Ext. A dated 30th Bhadra, 1333 T. E. an extent of 3 drones, 7 kanis, 10 gandas and 3 karas of land in Taluk No. 36 was sold to the defendants 1, 2, the father of the defendants 9 and 10, father of the defendants 13 and 14 and others. Under Ext. B, Kabala dated 11-10-1333 T. E. an extent of 2 drones, 7 kanis, 13 gandas and 2 karas of land was purchased by the second defendant, the father of the defendants 9

and 10 and the father of the defendants 13 and 14 in the same Taluk No. 36.

(c) No. 36/4 carried an annual rent of Rs. 6/6/9 pies with cess of Rs. 2/6/9 pies. It was sold by the Government for the realisation of the arrears of land revenue due for the Ashad kisti of 1348 T. E. The first respondent-plaintiff purchased the same on 28-9-1348 T. E. and the sale was confirmed on 9-4-1349 T. E., as can be seen from Ext. 1 sale certificate. On the strength of the sale certificate the first respondent obtained symbolical delivery of the land on 10-12-1349 T. E. as per Ext. 2.

(d) But, the tenants in possession of Kharija Taluk No. 36/4 did not vacate the land. So, the first respondent-plaintiff filed Suits Nos. 19 of 1353 T. E. and 25 of 1353 T. E. on the file of the Munsiff's Court, Kailasahar, against the defendants 1, 2, father of the third defendant and father of the defendants 13 and 14 and others. The suits were decreed ex parte as per Ext. 5 against all of them on 17-8-1353 T. E.

(e) The fourth defendant in the above Suits 19 of 1353 T. E. and 25 of 1353 T. E. namely, Nabadwip Chandra Singh applied under Order 9 Rule 13 Civil Procedure Code in 1354 T. E. or 1355 T. E. to set aside the decree passed against him. The suits were re-numbered as Title Suits Nos. 19 of 1353 T. E., 25 of 1353 T. E., 20 of 1358 T. E. and 31 of 1358 T. E. There is dispute between the parties as to whether the ex parte decree was set aside not only as against Nabadwip Singh but also against the other defendants in those suits. According to the appellants, it was set aside only as against Nabadwip Singh. But, according to the first respondent-plaintiff it was set aside against all. This question will be subsequently considered. The Munsiff decreed the suit against Nabadwip Singh on contest and ex parte against the other defendants on 22-1-1359 T. E. as per Ext. 8.

(f) On the basis of the above decree dated 22-1-1359 T. E., the first respondent-plaintiff applied for delivery of possession of the suit land on 1-2-1359 T. E. and obtained delivery of it on 2-2-1359 T. E. as can be seen from Exts. 9 and 10.

(g) In the meanwhile, the defendants in the above suits carried the matter in appeal to the District Judge in Civil Appeal No. 24 of 1359 T. E. which was re-numbered as 3 of 1950 A. D. The first respondent-plaintiff filed a petition in the District Court stating that the then defendant No. 4 Nawadwip Singh was not a necessary party, as he had no interest in the suit and that the decree against him might be set aside. The other appellants filed a petition in the District Court that the ex parte decree passed

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